Public Servants
Disclosure Protection
Tribunal Canada

Tribunal de la protection
des fonctionnaires
divulgateurs du Canada

Citation: Joy, Gardiner, Korosec v. Blue Water Bridge Canada, 2014 PSDPT 5

Tribunal File No. : T-2014-01

T-2014-02

T-2014-03

Date: 20141002

Ottawa, Ontario, October 2 2014

The Honorable Sean Harrington, Member of the Tribunal
Public Servants Disclosure Protection Tribunal

BETWEEN:

DAVID JOY
and

CATHY GARDINER
and

STAN KOROSEC
Complainants

-and-

PONT BLUE WATER BRIDGE
Respondent

INTERLOCUTORY DECISION ON MOTION FOR RECUSAL
(Delivered orally from the Bench on Tuesday, 30 September 2014, reserving the right to complete quotations and citationsand to correct clerical and grammatical errors)

[1] Blue Water Bridge Canada has moved that I recuse myself from hearing the complaints of David Joy, Cathy Gardiner and Stan Koresec that it fired them because they disclosed alleged wrongdoing on its part. The basis of the motion is that in preparing for the three week hearing

scheduled to begin this October 6th, I read some of the documents our rules of practice require the parties to file beforehand. It is also alleged that the Commissioner filed documents he should not have filed. It is submitted in the circumstances that an informed person having thought the matter through could not be confident that I would be impartial. The motion is contested by the complainants and by the Public Sector Integrity Commissioner.

[2] These are the reasons why I am dismissing the motion, including those portions thereof which seek ancillary relief.

[3] One of the hallmarks of our society is that disputes must be resolved peacefully. If parties are unable to settle their matters themselves, they may seek the advice of a third party and might even ask that person to decide for them.

[4] The state puts various dispute resolution tribunals at the disposal of the public; from high courts to rental boards. Parliament established this Tribunal, the Public Servants Disclosure Protection Tribunal, to provide recourse to those against whom reprisals have been taken because they disclosed wrongdoing within the Federal workplace. The Tribunal is charged with the responsibility of determining whether there was a protected disclosure, whether the employer reacted by taking a reprisal and, if so, what remedy should be accorded the whistleblowers.

[5] This Tribunal functions as an adjudicator. It is a quasi-judicial body which must observe the rules of natural justice which dictate that a party be given a fair opportunity to make its case or defence before an impartial decision maker. Impartiality is crucial as justice must not only be done but must be seen to have been done. As Lord Denning put it in *Metropolitan Properties Co. (FGC) Ltd. v. Lannon*, [1969] 1 Q.B. 577:

> The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right minded people go away thinking: "The Judge was biased".

[6] In Canada, the *dicta* of Mr. Justice de Grandpré has been universally followed since he said in 1978:

> …"what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude" … the grounds for this apprehension must… be substantial.
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> [*Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369]

[7] As Mr. Justice Pigeon said in *Hamel v Brunelle and Labonté*, [1977] 1 SCR 147, "...procedure be the servant of justice not its mistress." Various tribunals have enacted different rules of practice. In *Syndicat des employés de production du Québec v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879, Mr. Justice Sopinka adopted the following statement of Lord Denning in *Selvarajan v Race Relations Board*, [1976] 1 All ER 12, where he said at page 19:

> In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion. … In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.

[8] Our Tribunal does not investigate. That role, under the *Public Servants Disclosure Protection Act*, is left to the Public Sector Integrity Commissioner. Furthermore, the matter is decided following an open hearing in which witnesses are examined, cross-examined and

documents exhibited. This fair degree of formality is hardly surprising as tribunal members must be either Federal Court or Superior Court judges, and Parliament left the drawing up of the rules of practice to the Tribunal's Chair.

[9] Blue Water's concern is not that I am actually biased, but that the public would think there is an air of partiality, an appearance of bias. This arises from the rules themselves, from my reading of documents the parties disclosed in their Statements of Particulars as ones they intended to produce at the hearing, and from the conduct of the Public Sector Integrity Commissioner in filing documents he had no intention of producing at the hearing, or which he knew full well or should have known could not possibly be accepted as exhibits.

The Investigation Process

[10] A person who believes a wrongdoing has taken place in the Federal workforce may file a complaint with the Public Sector Integrity Commissioner. The original complaint was that Blue Water, a Crown corporation, gave unduly generous severance packages to two employees. That complaint was investigated both by the Commissioner and by the Auditor General. For my purposes, the Commissioner's finding of wrongdoing on the part of Blue Water's then president is irrelevant. The fact is the complainants' jobs were eliminated. They say this was because they had disclosed alleged wrongdoing. They assert that they were fired as a result and asked the Commissioner to investigate.

[11] One of the Commissioner's investigators in this case, or more correctly in these three cases, interviewed various individuals and collected various documents. He circulated a preliminary report to Blue Water as the employer, to various employees whom the complainants had identified as handing out the reprisals, and to the complainants. Blue Water and some others responded. The investigator then issued a final report which contained the recommendation that there was reason to believe that the elimination of the complainants' jobs was an act of reprisal prohibited under the Act. The Commissioner accepted the report and, in turn, referred the matter to this Tribunal.

[12] Blue Water's defence is succinctly stated in the first two paragraphs of its Further Amended Common Statement of Particulars. They read:

> 1. Blue Water Bridge Canada ("BWBC") strongly denies the allegation that it engaged in a reprisal against the three Complainants and further denies that its decision to eliminate the positions in question was retaliation against the individuals who have complained. The elimination of those positions was the culmination of a planning process which had been in the works as early as May of 2010 and was intended to streamline BWBC's organizational structure in order to achieve better performance results. This streamlining was in response to both the Federal Government's general direction to all Crown corporations to undertake steps to assist in cutting the deficit, and pressure from BWBC's bond holders to eliminate losses and achieve a balanced budget.
>
> 2. The Statements of Particulars filed by the Commissioner and the Complainants unreasonably fail to give credence to the extended history of this restructuring or the consultations that took place between BWBC and Transport Canada to ensure that BWBC was moving in the right direction to fulfil the Government's directives and to sustain its operations.

[13] This is not a judicial review of the Commissioner's decision. If Blue Water is of the view that the decision was unreasonable or otherwise improper, one recourse available to it was to apply to the Federal Court for judicial review. I do not care about the reasonableness of the investigator's opinion or his concerns about the credibility of some of those he interviewed. Indeed, in law, I cannot care. The point for decision is not whether the Commissioner had reason to believe a reprisal had taken place, but rather whether based on the evidence at the upcoming hearing there was a protected disclosure which led to a reprisal and, if so, what the appropriate remedy should be.

The Rules of Procedure

[14] The Act provides that proceedings are to be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow. Those rules are made by the Chairperson of the Tribunal, provided always that each party must be given a full and ample opportunity to participate, to appear at any hearing, to present evidence, and to make representations either personally or as assisted or represented by counsel or any other person.

The Commissioner participates in the proceedings but is required to adopt the position which, in his or her opinion, is in the public interest having regard to the nature of the complaint.

[15] The Act goes on to provide that the Tribunal may accept evidence and information whether or not under oath and whether or not that evidence and information would be admissible in a court of law.

[16] The *Public Servants Disclosure Protection Tribunal Rules of Procedure*, SOR/2011 170 were issued by the Tribunal's Chair, Mr. Justice Martineau, in August 2011. Rules 2 and 3 provide that the rules must be liberally interpreted with the aim of ensuring that the proceedings are conducted informally and expeditiously, and that the rights of the parties are respected. The Tribunal may vary or dispense with a rule if so doing advances these aims.

[17] Another rule worth mentioning is Rule 13 which provides that a party may submit a procedural or evidentiary question to the Tribunal "as soon as feasible after it determines that there is a need to submit a question.

[18] Blue Water focuses on Rule 20(1). It provides that the parties are to file a Statement of Particulars which must contain certain information and documents. Rule 20(1)(c) reads:

20. (1) A statement of particulars must contain the following information and documents:	20. (1) L’exposé des précisions contient les renseignements et documents suivants :
…	[…]
(*c*) regarding documents that are relevant to a matter at issue in the proceedings and that are in the party’s power, possession or control,	*c*) à l’égard des documents qui sont pertinents aux questions en litige dans l’affaire et qui sont en sa possession, sous son autorité ou sous sa garde :
(i) those documents that the party intends to produce in the proceedings,	(i) les documents qu’elle a l’intention de produire durant l’instruction de l’affaire,

(ii) a list and description of the documents for which the party claims privilege, and	(ii) une liste et une description des documents à l'égard desquels elle revendique un privilège de non-divulgation,
(iii) a list and description of the documents that are not otherwise referred to in subparagraphs (i) and (ii);	(iii) une liste et une description de tout autre document non visé aux sous-alinéas (i) et (ii);

[19] The Statement of Particulars also requires that each party identify its witnesses.

[20] In essence, Blue Water's motion is an attack on our rules of procedure as there is no mechanism within them or, as I have confirmed within the Registry itself, to prevent the trier of fact from reading the documents the parties were required to file before they are formally accepted as exhibits at the hearing. Indeed, some might not be produced either because the party no longer intends to or because objections thereto are successful. The submission goes on that, as a result, the trier of fact's mind is poisoned with extraneous documentation which a reasonable person might believe would affect his judgment.

[21] One might wonder why the rules of procedure call for the filing of documents before hearing, if not to allow the tribunal member assigned to hear the case on the merits to prepare. The Registry is open to the public. Presumably the whole world is entitled to review the documents, except those adjudged confidential, while the trier of fact, if Blue Water is correct, may read none of them.

[22] Blue Water's second major concern is that in accordance with the rules of procedure, the Commissioner was required to list and to file the documents upon which he intended to rely. That is not what the rule says. The rule says that a party must file the documents it intends to produce. The Commissioner, in the public interest, may well intend to file documents upon which he does not intend to rely. The Commissioner was also to list, but not to file, documents which might be relevant which he did not intend to produce, documents which might be relevant which were no longer in his possession, and documents over which privilege was asserted.

[23] The Commissioner only filed a single list and filed all the documents enumerated therein. Blue Water does not accept that the Commissioner intends to produce all these documents as

exhibits, that he knows full well that some of the documents are inadmissible, and that the individuals he lists as witnesses are not in a position to produce some of them. For instance, the Commissioner lists the investigator's preliminary and final investigation reports but does not list the investigator as a witness. Without restricting the generality of Blue Water's position that no document produced by any party should be read before the hearing, of particular concern are the preliminary and final reports of the investigator which are said to be very prejudicial to Blue Water's defence. The Commissioner's reply is that he may produce these documents, perhaps in examination in chief, perhaps in cross-examination. When filing the list, he did not know what position the other parties would take, what documents they would list and file, and which witnesses they might call.

[24] Initially, Blue Water itself also filed a single list of enumerated documents and filed all of them. Some of these documents tend to give credence to its defence that it was under pressure from the Treasury Board and bondholders to balance its budget, that it was management top heavy, and that there had been discussions with outside counsel with respect to eliminating positions the year before they were actually eliminated. These documents are not exhibits either. If they are not introduced in evidence at the hearing, would a well-informed person looking at the matter objectively form the view that having read those documents, I would be partial to Blue Water? I think not.

[25] Since Blue Water should not be kept guessing as to what I have read, and while I can say I have not yet read every single document, I have read the investigator's preliminary and final reports, and some of the witness statements. I have also read comments on the preliminary report which those interested were invited to make.

[26] I see nothing prejudicial in a requirement that documents be filed before their formal production at a hearing. When I began practice in Montreal, the *Quebec Code of Procedure* required a plaintiff to serve and file the documents to which it referred in its declaration. Although the rules have changed somewhat, there is still provision for pre-trial filing. Indeed, the judge assigned to hear the case on the merits may require that documents be filed in advance.

[27] Counsel for Blue Water relies upon the decision of this Tribunal *in El Helou v Courts Administration Service*, 2011-PT 01, in which it was held that the filing of documents did not constitute evidence. They had to be produced at the hearing. That point was decided by the entire

Tribunal, including myself. Mr. El Helou had alleged three reprisals on the part of his employer. The Commissioner only referred one to us. The issue was whether the referral of one kept alive the other two. As one can see from paragraphs 18 and 27 of that decision, the Tribunal had, in fact, read some of the documents filed, but, of course, not yet produced at the hearing which even to this date has not taken place. Paragraph 18:

> [18] The events outlined below are drawn from a number of documents already filed, on the understanding that the Tribunal accepts that these are facts or allegations to be proven at the hearing of this Application.
>
> [27] In particular, the Senior Investigator concluded that there is evidence that CAS wanted the complainant to leave and that the threat of a security clearance investigation was used as leverage

[28] The *Federal Courts Rules* also deal with pre hearing production of documents. Leaving aside judicial review, in which this Court is assessing the decision of another, Federal Court judges are first instance deciders not only in matters which may proceed to trial, but also in applications. In applications, the evidence is by way of affidavits and exhibits attached thereto, all of which are filed in Court before the hearing. Parties are entitled to move either before or at the hearing itself that certain statements in the affidavits and certain exhibits be struck on any number of grounds. One need only mention applications under the *Patented Medicine (Notice of Compliance) Regulations*.

[29] In order to reach a decision on a motion to strike, it seems to me the judge may have to read the impugned evidence. Counsel for Blue Water refers to an interlocutory decision of an arbitrator in *British Columbia in British Columbia Institute of Technology v British Columbia Government Service Employees' Union*, [1995] B.C.C.A.A.A. No. 52. In that case, an investigation report was held not to be admissible in evidence; without the arbitrator having read it. A basis, of course, is that it is hearsay and that the evidence at the hearing may be quite different. However, he did say at paragraph 26 in reference to the *B.C. Labour Relations Code* which allows an arbitrator to accept evidence not otherwise admissible in court, it does not direct that. He said, and I quote:

> I do not agree with the Employer that I am obliged to read the investigation report before deciding on its admissibility. That is discretionary and not mandatory.

[30] If it is a matter of discretion, I have, in my discretion, read it.

[31] Blue Water also refers to, *El Helou v Courts Administration Service*, 2011-PT 04. The issue there was whether an investigation report could be produced at a hearing yet to take place. It's also noteworthy that the investigators who had prepared the report had been listed as witnesses. Mr. Justice Martineau held that it was premature to make any such ruling.

[32] In both proceedings leading to trial and in applications, a judge might be called upon to rule at a preliminary stage whether certain documents are protected from disclosure on the grounds of privilege. The documents are delivered under seal. The Court might rule that some are not privileged and are to be disclosed and that others are privileged and not to be disclosed. The documents so ordered to be disclosed may or may not be produced at trial. If that judge then hears the case on the merits, is he or she tainted with partiality because documents not produced at trial were reviewed beforehand? Although there might be some fact specific circumstances which might lead an objective observer to that conclusion, as a general proposition I think not.

[33] Under section 87 of the *Immigration and Refugee Protection Act*, designated Federal judges may be called upon by the Crown to review and not to disclose documents to a person against whom a certificate of removal has been issued.

[34] In criminal matters, a judge may receive certain information by way of voir dire which is kept from the jury and which he or she must cast from his or her mind.

[35] I had reason to review some of the authorities in *Gordon v Canada (Minister of National Defence*, 2005 FC 223. I referred to the decision of Mr. Justice Noël in *Charkaoui*, Re, 2004 FC 624, where he said at paragraphs 7 and 8:

> [7] …Trial judges routinely exclude evidence that they have heard on a voir dire, or hear confessions or guilty pleas by co- accused, and go on to preside over the trial of an accused.
>
> [8] The presumption of integrity and judicial impartiality is such that it allows the judge to act and make rulings in circumstances where he or she has already acquired

> knowledge in earlier proceedings and decisions involving the same parties. As stated in *Arthur v. Canada (Minister of Employment and Immigration)* (C.A.), [1993] 1 F.C., at paragraph 8, this presumption may be challenged and rebutted provided the evidence underlying the disqualification is serious and unambiguous:

[36] I also relied upon Arthur and cases cited therein, more particularly the decision of *President Jackett in Nord-Deutsche Versicherungs Gesellschaft et al. v. The Queen et al*., [1968] 1 Ex CR 443. President Jackett, in turn, relied upon the decision of Mr. Justice Hyde of the Quebec Court of Appeal in *Barthe v The Queen* (1964), 41 CR 47.

[37] The issue in Barthe was that the judge charged with a hearing of fraud had disposed of a related charge against a co-accused arising out of the same facts. The judge is said to have indicated that he had formed the view that the applicant was guilty. Mr. Justice Choquette held that Barthe had waived the objection by participating in the proceedings. Mr. Justice Rivard would have granted a writ of prohibition on the basis of a real likelihood of bias. However, in Nord-Deutsche, President Jackett relied upon the opinion of the third judge, Mr. Justice Hyde, whom he quoted as follows at paragraph 25:

> Bias in a judge is a pre-disposition in favour of one of the parties. It may be inferred from financial or other interest where it offends… the principle that a person cannot be both judge and prosecutor at the same time. This bias may be sometimes inferred from extra-judicial opinions expressed by the judge, which, I presume, is the basis on which appellant attacks Judge Gaboury's jurisdiction in the present instance.
>
> It is wrong, however, in my opinion, to make any such deduction from the statements made by the learned judge in the O'Connell judgment. He clearly recognizes, in the extract cited, that the appellant testified under the protection of the Court. That being the case, the judge is in no different position from that of any judge who hears evidence on a voir dire and after excluding the evidence objected to, proceeds with the hearing and adjudication of the case. In the course of the voir dire the judge may hear extensive evidence against the accused which he must ignore in disposing of the merits of the case.
>
> The ability to judge a case only on the legal evidence adduced is an essential part of the judicial process. Appellate Courts are frequently called upon to hear appeals from

> new trials which they have ordered on appeal from a previous trial. The evidence in one may be substantially different from evidence considered in the other.

[38] More recent authorities were reviewed by Mr. Justice Mosley in *Douglas v Canada (Attorney General)*, 2014 FC 299, including the decision of the Supreme Court in *2747-3174 Québec Inc v Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919. The Régie's decision under review was quashed because of an appearance of bias. The very persons who investigated a matter might participate in the decision. Under our Act, the investigation stage and the adjudication stage are completely separate with no interchange of personnel.

[39] For these reasons, I shall dismiss the motion. In my opinion, there is no appearance of bias. The presumption of impartiality has not been rebutted.

[40] Even if I were wrong on that point, the motion should also be dismissed because Blue Water has, in essence, waived any irregularity. It only raised the issue in an e mail to the Registry on 26 August 2014, more than six months after the Commissioner filed his Statements of Particulars and documents, and a month after the matter had been set down for proof and hearing. Without having received an answer, it filed an Amended Statement of Particulars on 29 August 2014 with documents it says I am not supposed to read.

[41] Under rule 13, it should have raised any evidentiary concern at the first opportunity.

[42] In addition to seeking an order that I recuse myself, Blue Water also seeks an order: (a) that the Commissioner identify the documents listed in his Statements of Particulars which he intends to produce at the hearing; (b) that all documents filed by the Commissioner that are not identified as being ones that he intends to produce in the proceedings be removed; and (c) that all documents that any party intends to produce in the proceedings be removed from any formal Tribunal record.

[43] The Commissioner's position is that he may indeed produce all the documents he has listed. He was required to produce his Statement of Particulars first, without knowing what the other parties might do in terms of producing documents and calling witnesses. Indeed, certain witnesses listed may not be called. It is certainly premature at this stage to rule that any document is inadmissible.

[44] I do think, however, that the Commissioner did misread rule 20(1)(c). It requires production of documents the party intends to produce. The Commissioner went first and could not be certain as to what evidence other parties might state they intended to adduce. The rule does not say to file documents which a party may produce. It may well be that some documents might only be produced in cross-examination of witnesses. The Commissioner does not yet know with any certainty who will be called. So I think it is correct to say that (i) requires the filing of documents which, at that time, the Commissioner intended to produce at the hearing. Circumstances may change as time goes on. Documents which may be relevant, which the Commissioner at that time did not intend to produce, ought to have been listed under (iii). One example of why the investigation reports might be produced is the decision of the House of Lords in *Browne v Dunn* (1893) 6 R. 67 (H.L.). There may be circumstances in which a witness at the hearing appears to say something which is not in accord with what he or she said on a previous occasion. In that circumstance, it is only right and proper that the previous statement be put to that witness. That statement, if it is only in the report of the investigator, may well be hearsay and may require an investigator to be called.

[45] That leaves me, however, with the conclusion that this irregularity is not substantial, is not fatal, and it is too late in the day to seek some kind of a segregation of documents in strict accordance with the rule, which rule in the circumstances I am entitled to and do vary.

[46] Finally, this leaves us with the motion that all documents be removed from any formal Tribunal record. The answer is that the only "formal" Tribunal record to date consists of the Notice of Application, Statements of Particulars, amendments thereto, answers thereto, and various interlocutory directions and orders. There is not a single document in a formal tribunal record. Documents must be introduced at the hearing, which hearing has yet to take place.

[47] Consequently, Blue Water's subsidiary submissions are also dismissed.

FOR REASONS GIVEN;

THE TRIBUNAL ORDERS that Blue Water Bridge Canada's motion for recusal and other relief is dismissed in its entirety.

"Sean Harrington"

Tribunal Member