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 2

File No.: T-2011-01

Issued at: Ottawa, Ontario
October 19, 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

AMENDED INTERLOCUTORY DECISION ON MOTION FOR SUMMARY JUDGMENT

[1] On May 16, 2011, an Application was filed with the Public Servants Disclosure Protection Tribunal (the Tribunal), in accordance with subsection 20.4(1) of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 (the Act). This interlocutory decision disposes of a motion requesting an order for summary judgment, seeking the dismissal of the Application, as it relates to the two individual respondents, Mr. Éric Delage and Mr. David Power.

[2] The motion was filed with the Tribunal on July 15, 2011, in accordance with Rule 13 of the *Public Servants Disclosure Protection Rules of Procedure*, SOR/2011-170 (the Tribunal Rules). In correspondence dated August 12, 2011, the employer stated that it supported the position and arguments of the individual respondents in this matter. The complainant and the Public Sector Integrity Commissioner (the Commissioner) oppose the motion. The motion has been decided on the basis of the written submissions of the parties.

I. BACKGROUND

[3] The complainant, a public service employee, brought a complaint alleging reprisal against the Courts Administration Service (CAS). He filed his complaint with the Office of the Public Sector Integrity Commissioner (OPIC) in July 2009. The Commissioner determined that he would deal with the complaint and investigate the matter. Although the Senior Investigator concluded that there were no reasonable grounds for sustaining the first two allegations made by the complainant, she found that there were reasonable grounds for believing that reprisal had been taken against the complainant with respect to withholding his Top Secret security clearance.

[4] The Commissioner accepted these findings and recommendations. By letters dated April 18, 2011, parties to the complaint were advised that the Commissioner would apply to the Tribunal, pursuant to subsection 20.4(1) of the Act, for a determination as to whether the withholding of the complainant's Top Secret security clearance constituted a reprisal, and if so, whether disciplinary action should be taken against two named persons, Mr. David Power and Mr. Éric Delage. The Commissioner then filed the Application to the Tribunal.

[5] In that Application, the Commissioner stated that he had determined that there were sufficient grounds to proceed with only one of the allegations initially brought by the complainant, with regard to the withholding of his Top Secret security clearance. In accordance with subparagraph 20.4(1)(b) of the Act, the Application also stated that, should the Tribunal

find that a reprisal was taken against the complainant, the Commissioner intends to seek an order respecting a remedy in favour of the complainant, and an order respecting disciplinary action against the persons alleged to have taken reprisal, Mr. Power and Mr. Delage.

[6] On June 10, 2011, the Tribunal directed the parties to suspend the filing of their statements of particulars until further notice, pending determination of a jurisdictional motion and the other preliminary motions. On October 6, 2011, the Tribunal issued its decision on the jurisdictional motion, which is cited as *El Helou v Courts Administration Service,* 2011 PT 01 (*El Helou #1*). The Tribunal also outlined actual and contingent next steps in that decision. Some of these steps related to the issue of particulars, and the fact that the particulars of all the parties have not yet been filed.

[7] For the reasons given below, the Tribunal has determined that this motion must be denied.

II. THE POSITION OF THE PARTIES

[8] In a nutshell, the individual respondents argue that the particulars and evidence disclosed with the Commissioner's Application do not provide any factual basis upon which to conclude that they took the alleged reprisal, or had the authority to direct that such reprisal be taken. They submit that they provided recommendations regarding the withholding of the security clearance, pending further investigation, but that they did not make the decision to withhold the complainant's security clearance. They state that Mr. Raymond Guenette, the former Chief Administrator of the CAS, was the only person who had the authority to make the decision that the complainant's Top Secret security clearance be withheld.

[9] Included with the motion for summary judgment is an affidavit, sworn by Mr. Guenette, in which he states that neither Mr. Delage, nor Mr. Power, had the authority to revoke or suspend Mr. El-Helou's security clearance. In addition, the sworn affidavit of Mr. Guenette states that any decision to continue to withhold the complainant's security clearance from December 2009 until January 2010 could not have been based on the recommendations of Mr. Power or Mr. Delage, given changes in their responsibilities. The sworn affidavit also refers to advice that Mr. Guenette received from Ms. Francine Côté (an interested party in relation to the jurisdictional

motion decided by the Tribunal in *El Helou #1*), and states that she did not have any authority to revoke or suspend the complainant's security clearance.

[10] The complainant opposes the motion and highlights those sections in the Act pertaining to the Tribunal. He argues that these provisions make it clear that it is the Tribunal that determines whether or not the complainant has been subject to reprisal. He maintains that this determination cannot be conducted in a preliminary fashion, without the conduct of a hearing, and he also asserts that coming to such a determination involves more than a review of the materials that were before the Commissioner during the course of his investigation.

[11] The complainant reviews the screening and investigation functions of the OPIC in the Act and places them in sharp contrast to the adjudicative functions of the Tribunal. He argues that the Tribunal performs adjudicative functions with respect to the Application that is referred to it by the Commissioner, and that the Act clearly requires the Tribunal to make a final determination on the merits of any Application before it.

[12] The complainant compares the hearing functions of this Tribunal and the Canadian Human Rights Tribunal. He states that, similar to the Canadian Human Rights Tribunal, this Tribunal does not perform a second screening function and that, in fact, the scope of this Tribunal's powers at a hearing is broader. The Canadian Human Rights Tribunal is bound by legislation which contemplates both an inquiry and a hearing under section 50 of the *Canadian Human Rights Act*, RSC 1985, c H-6. Citing jurisprudence on section 50 of the *Canadian Human Rights Act*, and on the notion of a second screening function at the preliminary stages of a tribunal hearing, he argues that this provision has been interpreted to mean that, in some instances, the Canadian Human Rights Tribunal may engage in both an inquiry and a hearing, and this means that a complaint may be dismissed at the hearing stage in certain circumstances, such as abuse of process: *Canada (Human Rights Commission) v Canada Post Corp*, 2004 FC 81, affirmed 2004 FCA 363 at paragraphs 17-20; *Powell v United Parcel Service Canada Ltd*, 2008 CHRT 43 at paragraph 12; and *Harkin v Canada*, 2009 CHRT 6 at paragraphs 18-24; *Fahmy v Greater Toronto Airports Authority*, 2008 CHRT 12 at paragraph 13; *Khalifa v Indian Oil and Gas Canada*, 2009 CHRT 27 at paragraph 8. Noting that there is no similar wording in the present Act, which contemplates a hearing but does not refer to an 'inquiry', the complainant

submits that an even broader interpretation of the Act is consistent with what it is tasked to do in relation to protecting public servants from reprisal when they have disclosed wrongdoing.

[13] The complainant also submits that it is premature to summarily dismiss the Application, in the absence of a full hearing of all the evidence and submissions by the parties. He argues that to do so at this stage, without the benefit of a hearing, would result in making a decision in a factual vacuum. He disputes the argument advanced by the respondents that there is no genuine issue of material fact requiring a hearing. He questions the argument that responsibility for reprisal lies with the person who gives final approval or has final decision-making authority. The complainant notes the significance of matters addressed by the Tribunal under the Act, and states that there is a need for "a full and public airing of these very serious concerns." He submits that a decision to summarily dismiss the Application would deprive the complainant of important rights, and that the issues in question are also important to the employer and the public.

[14] The Commissioner argues that the individual respondents have not met the test to establish that a summary dismissal should be granted. He submits that he met the requisite burden of proof of "reasonable grounds for believing that a reprisal was taken" when determining that an Application to the Tribunal was warranted. He reviews the investigation that was carried out and discusses several factual issues in dispute that require a hearing, where the Tribunal can weigh the evidence before it. These issues include: the manner in which the clearance was denied; whether or not the deputy head for the CAS invoked the Government Security Policy and the Policy on Government Security; the involvement of the individual respondents in the decision to withhold the security clearance; the multiple roles of Mr. Power; whether a security investigation was completed or commenced; and differing evidence regarding the matter of the security clearance and the allegations against the complainant regarding harassment.

[15] The Commissioner refers to his function as a "gatekeeper" and states that it is not his role to establish that particular facts have been proven. He argues that section 20.4 of the Act is clear in attributing this determination to the Tribunal. He refers to the high threshold for satisfying the requirement for a summary judgment and the principle that underlies this threshold: that it is essential to justice that claims disclosing real issues, that may be successful, proceed to trial

(*Canada (Attorney General) v Lameman*, [2008] 1 SCR 372, 2008 SCC 14 at paragraph 11 (*Lameman*)).

III. LEGAL FRAMEWORK AND POLICY CONSIDERATIONS

[16] A consideration of the framework of the Act is helpful in providing context as to why this motion must fail. The underlying purposes of the Act require that the Tribunal be prudent and measured in the approach it takes to procedural devices that are designed to summarily dispose of an action and that may eliminate or significantly reduce the scope of a hearing. The reasons for such caution include the requirements for the Tribunal's proceedings; the Commissioner's role as the "gatekeeper" of complaints; the importance of the Tribunal hearing once an Application has been referred; and the Tribunal's discretionary power to add parties in the course of a proceeding before it.

A. The requirements for the Tribunal's proceedings

[17] In the general realm of civil actions, a motion for summary dismissal is one of three key legal devices that serve to ensure that a matter before a court can be quickly disposed of when there are no genuine issues to be tried. The other two devices are motions to strike and motions for a summary trial. It is important to note that these devices can serve a constructive purpose in civil proceedings. Generally, they are used toward the goal of an early resolution or a shortened proceeding, on the basis that there is no need for a trial. These types of procedural devices may also be relevant to the adjudicative processes of some administrative tribunals.

[18] This Act, which creates this Tribunal and enables its mandate, does not expressly state that these procedural devices are at its disposal. It is clear from section 21 of the Act, however, that proceedings before the Tribunal are to be conducted "as informally and expeditiously as the requirements of natural justice and the rules of procedure allow." Section 21 provides flexibility to the Tribunal in the way in which it proceeds with an Application before it. In addition, subsection 21(2) of the Act provides the Tribunal with broad rule-making power and does not limit its power in relation to motions that might summarily dispose of a matter before it. In accordance with subsection 21(2), Rule 13(1) of the Tribunal Rules allows a party to submit any procedural or evidentiary question to the Tribunal by motion.

[19] Nevertheless, the above Rule, and especially subsection 21(1) of the Act, which highlights the conduct of proceedings that are expeditious and the principles of natural justice, must be read in conjunction with subsection 21.6(1). This latter provision outlines the rights of parties and requires the Tribunal to allow the parties to be heard. It reads as follows:

21.6 (1) Every party must be given a full and ample opportunity to participate at any proceedings before the Tribunal — including, but not limited to, by appearing at any hearing, by presenting evidence and by making representations — and to be assisted or represented by counsel, or by any person, for that purpose.	**21.6** (1) Dans le cadre de toute procédure, il est donné aux parties la possibilité pleine et entière d'y prendre part et de se faire représenter à cette fin par un conseiller juridique ou par toute autre personne, et notamment de comparaître et de présenter des éléments de preuve ainsi que leurs observations.

[20] This provision reinforces the principles of natural justice, requiring that the Tribunal ensure that the parties are given a "full and ample opportunity" to be heard. While subsection 21.6(1) addresses the right to be heard, subsection 21.6(2) is also important in its expression of the duty of the Commissioner in relation to the public interest. Subsection (2) requires that the Commissioner adopt the position that is in the public interest, having regard to the nature of the complaint.

[21] When section 21, subsection 21.6(1) and subsection 21.6(2) are read together, the significance of this Tribunal's requirements becomes clear. Once an Application has been referred to it, the Tribunal 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); that the parties are given a full and ample opportunity to be heard and be assisted or represented by counsel or by any person (subsection 21.6(1)); and that the proceedings before the Tribunal also allow the Commissioner to fulfill his or her duty to adopt the position that is in the public interest, having regard to the nature of the complaint (subsection 21.6(2)).

[22] The requirements for the proceedings to hear an Application confirm why this Tribunal must, due to its mandate and responsibilities, exercise caution when entertaining a motion to summarily dismiss an Application before it. In advancing principles such as the public interest, natural justice and the importance of having a full and ample opportunity to be heard, these provisions also support the values expressed in the preamble of the Act: maintaining and enhancing public confidence in the integrity of public servants; establishing effective procedures for the disclosure of wrongdoing and the protection of public servants who disclose wrongdoing; recognizing that the federal public administration is an important national institution and is part of the essential framework of Canadian parliamentary democracy; and balancing the two important principles of the duty of loyalty to the employer and the right to freedom of expression.

B. The Commissioner's role as "gatekeeper"

[23] In a typical civil action, a motion for summary judgment proceeds without any prior inquiry into the action in question. The proceeding before this Tribunal, however, is not a traditional legal action. It must be viewed in the context of the statute which created it. The Commissioner plays a key role in the Act as "gatekeeper" of complaints that are filed with the OPIC. As the Tribunal discussed in *El Helou #1*, this role is not insignificant.

[24] In its decision in *El Helou #1,* the Tribunal contrasted the role of the Commissioner with that of the Tribunal. The Tribunal canvassed the two-stage complaint process, and the four step screening role that the Commissioner then plays when a complaint is filed. There is a substantial prior examination of a complaint, well before the Commissioner determines whether an Application should be referred to the Tribunal. When the Tribunal seizes its jurisdiction from the Application, the Commissioner will already have engaged in an inquiry of the initial complaint. With regard to the content of the Application, he or she will have determined whether individual respondents should be named and whether the Tribunal will be requested to order a remedy or disciplinary order. This is different from the situation that occurs when a civil action is launched and a court is asked to entertain a motion for summary dismissal.

[25] In the Commissioner's systematic examination of the complaint, before an Application is referred to the Tribunal, many factors are taken into account that are akin to those that are applied to dispose of a civil action summarily, for example, through a motion to strike out a

pleading. The OPIC may do so, for example, when determining whether or not a complaint is admissible. Section 19.3(1) states that a Commissioner may refuse to deal with a complaint if he or she is of the opinion

a) that the subject matter of the complaint has been adequately dealt with, or could be more appropriately dealt with according to a procedure provided for under an Act of Parliament, or a collective agreement (subparagraph 19.3(1)(a));

b) if another body acting under another Act of Parliament or collective agreement is dealing with the subject matter of the complaint (subsection 19(2));

c) where the complaint relates to a member of the RCMP, if the subject matter of the complaint has been adequately addressed through certain procedures under the RCMP Act, RSC 1985, c R-10 which are specifically noted in subsection 19.1(5) of the Act (subparagraph 19.3(1)(b));

d) if the complaint is beyond the jurisdiction of the Commissioner (subparagraph 19.3(1)(c)); or

e) the complaint was not made in good faith (subparagraph 19.3(1)(d)).

[26] If the Commissioner determines that the complaint is admissible, there is still another opportunity where these factors may again be considered. This occurs after the Commissioner has determined that he or she will deal with the complaint (i.e. the complaint is accepted) and when the Commissioner is determining whether or not an Application to the Tribunal is warranted under subparagraph 20.4(3)(c). At this juncture, the Commissioner may assess a complaint in the screening process, in accordance with subsection 19.3(1).

[27] The Commissioner may consider other factors in accordance with subsection 20.4(3): such as whether or not there are “reasonable grounds for believing that a reprisal was taken against the complainant” (subparagraph (20.4(3)(a)); 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 (subparagraph 20.4(3)(b)); 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 (subparagraph 20.4(3)(d)).

[28] This probing examination of the complaint by the Commissioner also results in decisions as to the scope of the Application, if the Commissioner is of the opinion that a referral to the Tribunal is warranted. In this situation, he or she must determine:

a) whether the Application will be comprised of all the allegations from the complaint, or only some of these allegations (section 20.4, *El Helou #1*);

b) whether or not an individual respondent or respondents should be named in the Application, or simply the employer (section 20.4);

c) whether or not the Tribunal should be requested to consider an order respecting a remedy in favour of the complainant, in the event that it has found that reprisal was taken (subparagraph 20.4(1)(a)); or

d) whether or not the Tribunal should be requested to consider an order respecting a remedy in favour of the complainant, and an order respecting disciplinary action against any person or persons identified by the Commissioner in the Application, in the event that it has found that reprisal was taken (subparagraph 20.4(1)(b)).

[29] Therefore, when considering motions such as the present one, it is important to appreciate that the Application referred to the Tribunal has already undergone a prior examination by the Commissioner. The human rights jurisprudence referred to by the complainant supports the Tribunal's view, that it is generally not the role of the adjudicator (the tribunal) to screen, yet again, the matter before it. The Tribunal addressed the distinct functions of this Tribunal and the Commission in this Act in detail in *El Helou #1*. For these reasons, it is not necessary to embark on the complainant's arguments with regard to the scope of this Tribunal's hearings, and the distinctions between the wording in this Act and the wording in relation to hearings before the Canadian Human Rights Tribunal under section 50 of the *Canadian Human Rights Act*, RSC 1985, c H-6.

C. The importance of the Tribunal hearing once an Application has been referred

[30] The Act is designed to ensure protection from reprisal for disclosure of wrongdoing in many ways. The Commissioner's referral of an Application to the Tribunal may occur, perhaps often, in situations where the issues raised in the complaint could not be addressed through the

other avenues under the Act. For example, these avenues might include the possibility of a successful resolution through the senior officer designated in a department to receive and deal with disclosures, or the possibility of conciliation at the OPIC. The first approach may be reported upon generally (for example, under section 38.1 of the Act). But given their functions in the overall structure of the Act, these non-adjudicative approaches to individual complaints are not otherwise designed to be transparent in nature.

[31] The Tribunal, however, plays an adjudicative function. As a quasi-judicial tribunal, its role and functions are much more transparent in nature. This is confirmed in several provisions of the Act which emphasize the central importance afforded to the parties being heard, and of the right of this Tribunal to conduct a hearing with the full powers of inquiry of federally appointed judges. For example, these provisions address the powers of the Tribunal as the same as those of a superior court of record (section 21.2), the discretion to hold hearings *in camera* (section 21.3), the determination as to whether the complainant has been subject to a reprisal (section 20.4), the definition of the parties under subsection 21.4(2), the right to add parties under subsection 21.4(3); the right of the parties to be heard (subsection 21.6(1)); the duty of the Commissioner in proceedings before the Tribunal to adopt a position that is in the public interest, having regard to the nature of the complaint (subsection 21.6(2)); the determination of remedy (sections 21.5, 21.7) and the determination of disciplinary action (section 21.8). It is also noteworthy that when the Tribunal has made an order relating to reprisal, an employer or any person may request that this order be filed in Federal Court to ensure its enforceability (section 21.9).

[32] In light of the structure and framework of the Act, and how an Application is referred to the Tribunal, it would be far too soon in the process, a process that Parliament clearly intended, to predetermine the outcome of this matter based only on the paper record of the screening function of the Commissioner, and without a proceeding where the issues in the Application can be fully heard. The Tribunal's view on this matter is also supported by the manner in which a hearing proceeds before it.

[33] Specifically, the provisions of the Act related to the proceeding before the Tribunal spell out an adjudicative process of at least three steps in all Applications. There are also two other steps possible, when the Application includes a request that the Tribunal address the issue of remedy for the complainant (step 4 below), includes named respondents (step 5), or includes a

request that the Tribunal address the issue of remedy for the complainant and disciplinary orders for the named respondents (step 5 below).

[34] ***Step 1. Reception of the Application*****:** The first step in the hearing relates to the reception of the Application by the Tribunal, which is referred to it by the Commissioner in accordance with section 20.4 of the Act. Once the Application has been referred to the Tribunal, the Chairperson of the Tribunal must assign a member, or panel of three members, to deal with the Application (section 21.1). As noted earlier in this decision and as discussed in *El Helou #1*, the member or panel has all the powers of a superior court of record in the proceeding as a whole (section 21.2).

[35] The Tribunal's jurisdiction is determined by the scope of the Application. For example, the Application may include a request by the Commissioner relating to remedy (subparagraph 20.4(1)(a)) or both a request for a remedy and a request for an order relating to discipline (subparagraph 20.4(1)(b)). An Application may include all the allegations of a complaint or only some (section 20.4, see also *El Helou #1*). If the Commissioner has identified individual respondents, these individuals are also parties within the meaning of the Act. The exchange of particulars between the parties takes place at this step. It is at this stage as well that preliminary proceedings, such as discovery and the prehearing, take place.

[36] ***Step 2. Presentation of evidence forming the basis of Application*****:** The second step in the hearing process is the hearing itself. The Act is silent as to the order in which the parties are to proceed. The Application is the originating document and is referred to the Tribunal by the Commissioner. Therefore, it is the Commissioner who initiates the proceedings (after opening argument by the parties).

[37] It is then up to each party to present his or her case (sections 20.4, 21.6). The logical sequence could generally follow the manner in which the parties are identified when the Commissioner gives notice of the Application in section 20.6 of the Act. Therefore, the next party to present would be the complainant (section 20.6(a)); followed by the employer, or if the complainant is a former public servant, the complainant's employer at the time of the alleged reprisal (section 20.6(b) or (c)); and then the individual respondents (section 20.6(d)). If the Tribunal, as authorized under subsection 21.4(3), has added a party, this party will also be heard as an interested party, after the individual respondents.

[38] However, as discussed below, not all of these individuals or entities are parties at each stage of the hearing. This depends upon the scope of the Commissioner's Application.

[39] ***Step 3. Tribunal determination as to whether or not reprisal has occurred***: The Tribunal must then make a determination as to whether reprisal has occurred (section 20.4)). During this step, the Tribunal must determine whether or not reprisal was taken against the complainant. There are important considerations here, relating to the parties and to what the Tribunal must determine, which relate back to whether the Commissioner has made a request for the Tribunal to grant a remedy only (subparagraph 20.4(1)(a)), or whether the Commissioner has made a request for the Tribunal to grant a remedy and to order disciplinary measures against persons named in the Application (subparagraph 20.4(1)(b)), should it determine that reprisal has occurred.

[40] Should the Tribunal determine that reprisal was taken against the complainant and the Application was made under subparagraph 20.4(1)(a), then the Tribunal may only determine whether or not to grant a remedy to the complainant, should it find that reprisal has occurred. In that case, the only parties to the proceedings are the complainant; and the complainant's employer, or if the complainant is a former public servant, his or her employer at the time of the alleged reprisal (section 21.4(2)). In this scenario, the Tribunal may identify somebody as having taken reprisal against the complainant, even if that person is not named in the proceeding. Section 21.4(3) gives the Tribunal the right to add a party, where that person has been identified as someone who may have taken the alleged reprisal and may be directly affected by the Tribunal's determination.

[41] The parties differ in situations where the Application includes a person or persons who may have committed the alleged reprisal, in addition to a request that a remedy be granted to the complainant. Section 21.5 outlines the parties in respect of the Application when the Commissioner has made these requests under subparagraph 20.4(1)(b). In this situation, the parties are the complainant; the complainant's employer, or if the complainant is a former public servant, the employer at the time the alleged reprisal was taken; and the person or persons identified in the Application as being the person or persons who may have taken the alleged reprisal.

[42] Should the Tribunal determine that reprisal was taken against the complainant and the Application was made under section 20.4(1)(b), the Tribunal must determine whether reprisal occurred and whether the person or persons identified by the Commissioner in the Application committed the reprisal against the complainant. In situations where the Tribunal finds that reprisal has occurred, it is significant that, in accordance with section 21.5, the Tribunal can grant a remedy to the complainant, whether or not the person or persons named in an Application committed the reprisal. The Act clearly foresees the possibility that, in the course of a hearing, it may be determined that the person or persons identified in an Application may not be the person or persons who actually committed the reprisal.

[43] These three steps will always occur in the hearing context, with some variations that are contingent on the nature of the Commissioner's Application. Tribunal proceedings may also include one or both of the following steps.

[44] ***Step 4: Tribunal determination as to remedy*** (if applicable): If the Application states that the Tribunal should consider whether the complainant should be awarded a remedy, then it is at this stage that the Tribunal will do so (subparagraph 20.4(1)(a) and section 21.7). The Act makes it clear that the inquiry as to remedy may not include all the parties, notwithstanding the parties' right to be heard. It is noteworthy that subsection 21.6(3) allows the Tribunal to limit the parties to a proceeding with respect to those portions of a proceeding relating to remedy. In these situations, the Tribunal can limit the participation of any person or persons identified as being the person or persons who may have taken the alleged reprisal.

[45] ***Step 5. Tribunal's determination as to disciplinary measures*** (if applicable): The fifth step occurs when the Application from the Commissioner requests that the Tribunal order both a remedy for the complainant and a disciplinary measure for the respondent or respondents named in the Application. It is important to emphasize that it is only those respondents named in the Application who can be subject to a disciplinary measure ordered by this Tribunal. In this situation, the parties to the proceeding are the Commissioner, the person against whom the disciplinary action would be taken, and the entity that would implement a disciplinary order.

[46] The above steps make it very clear that the parties have the right to be heard in the process, and that the Tribunal must determine, through the hearing process, whether or not the parties named in the Application have committed reprisal. The steps also demonstrate that there

is flexibility in the process, for example, in the Tribunal's discretion to add parties, to award a remedy to the complainant whether or not the individual respondent or respondents committed the reprisal, and to limit proceedings pertaining to remedy.

D. The Tribunal's discretionary power to add parties in the course of a proceeding

[47] Where an Application proceeds, but only with a request to award a remedy to the complainant should reprisal be found to have occurred, the Act specifies that a party can be added in accordance with subsection 21.4(3). This discretionary power is not explicitly subject to temporal restrictions during the proceedings, but it is obvious that this power should be exercised at the earliest possibility. Section 21.4(3) addresses the addition of parties and reads as follows:

If the Tribunal is of the opinion that a person who has been identified as being a person who may have taken the alleged reprisal may be directly affected by a determination of the Tribunal, the Tribunal may add that person as a party.	S'il est d'avis qu'une personne identifiée comme étant une personne qui aurait exercé des représailles peut être directement touchée par sa décision, le Tribunal peut la mettre en cause.

[48] This provision has been positioned within section 21.4, which addresses Applications before the Tribunal where the Commissioner has asked that the Tribunal grant a remedy to the complainant, should it determine that reprisal occurred. Therefore, it addresses those situations where the employer is a party and no individual respondents (that is, person or persons who may have taken the alleged reprisal) were named in the Application before the Tribunal. Section 21.4 allows the Tribunal to add an individual or individuals who are found to have committed the reprisal, but it does not allow the Tribunal to order discipline against them.

[49] The question might be asked as to whether or not a party can be added by the Tribunal, on its own motion, when an Application by the Commissioner is brought under subsection 20.4(1)(b) and includes requests that the Tribunal consider both remedy and disciplinary measures against a named person or persons in the Application. Section 21.5, which covers the nature of the Tribunal's determination in this area, is silent as to whether the Tribunal has the power to add other parties on its own motion in these situations.

[50] It could be argued that the power of the Tribunal to add parties under section 21.4(3) can also be applied to determinations under section 21.5. The purpose of section 21.4(3) is to advance the public interest, and the interests of the employer in deterring reprisal due to disclosure of wrongdoing in the workplace. Both the public and the employer have an interest in knowing the individual person or persons who may have committed the alleged reprisal. When information comes to light in the course of a proceeding that might identify a person or persons who may have committed the alleged reprisal, it is consistent with the purposes of this legislation to add those persons so that they have the right to be heard. It is equally in the public interest, and in the employer's interest, to be able to add parties to the proceedings, in situations where the Application has proceeded under subsection 21.4(1)(b), and where the Application identifies a person who is not the person who may have committed the alleged reprisal.

[51] Even if subsection 21.4(3) does not explicitly apply to situations covered under subsection 21.5, Rule 12 (1) of the Tribunal Rules allows a person, who wishes to be added to the proceedings as an interested person, to make a motion for that purpose. Rule 12(2) states that the Tribunal will consider whether the person to be added has a substantial interest in the proceedings; whether their position is already represented in the proceedings; whether the public interest or the interests of justice would be served; and whether their participation would assist the Tribunal in its determination of the issues.

[52] In addition, the Tribunal is master of its own proceedings and in that capacity, on its own motion, may have such rule-making power in accordance with subsection 21(1), which dictates expeditious and informal hearings in accordance with natural justice. It is also consistent with the broad rule-making powers of the Tribunal under subsection 21(2) of the Act.

[53] Therefore, either on its own motion, or by the filing of a motion, the Tribunal could order the addition of a person who it has identified as being a person who may have taken the alleged reprisal, whether or not an Application has been brought forward under subsection 20.4(1)(a) and 21.4(1), or whether the Application has been advanced in accordance with subsection 20.4(1)(b) and 21.5 of the Act. Adding this person as a party ensures that any individual who may be affected is able to address issues that might affect him or her during this proceeding.

[54] The Tribunal's powers in this area support its reasons for not summarily dismissing the Application as it relates to the respondents in this case. First, the Act envisions a full proceeding,

with the benefit of a hearing of the issues in accordance with the principles of natural justice. It anticipates that in certain cases, the persons identified in an Application might not be the persons who may have committed the alleged reprisal. In the hearing process, additional information that was not before the Commissioner and could not be tested by the OPIC through its limited powers of inquiry, may be revealed.

[55] Secondly, the naming of additional parties is essential to the overall mandate of the Act and to principles of fairness. The Tribunal may make findings in the absence of an individual who was not named in the Application. It may draw negative inferences and offer observations about the impact of certain acts upon a complainant. By adding a party to the proceedings, the Tribunal assures that this individual has a right to be heard in the course of a hearing.

[56] Thirdly, the Act and the Tribunal's rule-making powers afford sufficient flexibility to address diverse outcomes that could occur as a result of a hearing. It may be that a person who the Commissioner has identified in an Application is found by the Tribunal not to be the person who took the reprisal. On the other hand, it may be that the person identified in an Application is found to be the person who took the reprisal. It may also be that there were additional persons who acted in reprisal. In this manner, the Tribunal can assure that hearings related to protection from reprisal are not subject to unnecessary procedural detours or delays. This serves the complainant, the employer, the named respondents, those who may be potential respondents and the public at large.

E. Conclusions relating to the framework of the Act

[57] The screening function of the Commissioner allows for a vetting of complaints that are vexatious, abusive, redundant or otherwise do not meet the requisite threshold to warrant an Application to the Tribunal. This gatekeeping function generally fulfills the underlying role of motions for summary dismissal. Considering the structure of the Act and its objectives, an over-adherence to preliminary actions, such as motions for summary judgment, could leave the parties without the opportunity to present evidence and make their submissions about the issues relating to alleged reprisal because of the disclosure of wrongdoing. This could result in weakening the entire purpose of the Act or in reducing confidence in the legislation.

[58] This does not mean that the Tribunal, as master of its own proceedings, would never rule on preliminary matters. The Tribunal has the power to entertain these motions under section 21(2) of the Act. It is also entirely appropriate for a tribunal to entertain preliminary matters at the outset and to "clear the procedural underbrush", as was noted in one of the decisions referred to by the complainant (see *Canada (Human Rights Commission) v Canada Post Corp*, 2004, FC 81, at paragraph 14 (affirmed in FCA)). Nevertheless, the Tribunal is mindful of the mandate of the Act, and of its specific functions. It will exercise a level of caution when addressing these preliminary motions, particularly in situations such as the present one, where the motion relates directly to the screening function that has already been carried out by OPIC and the Commissioner's opinion that a complaint warrants referral to the Tribunal with named respondents.

IV. REASONS FOR DISMISSAL OF THE PRESENT MOTION

[59] With this legal framework providing the context, the Tribunal finds that this motion cannot succeed. It is premature. In addition, it does not meet the requisite threshold to be granted.

A. The motion is premature

[60] The individual respondents ask for a summary judgment of the Application, as it relates to them. The wording of the motion, in relation to the individual respondents is such that it is not entirely clear whether the respondent is seeking a motion for summary dismissal, a motion to strike pleadings, or a motion for a summary trial. It is evident, however, that for the purposes of this Application, any one of these motions would either be premature or not applicable. The Tribunal Rules do not specifically address motions to summarily dispose of a proceeding. The *Federal Court Rules* (SOR 98/106) specifically address these types of procedural devices and although they do not bind the Tribunal, these rules can provide general guidance in this discussion.

[61] Rule 221 of the *Federal Court Rules* concerns a motion to strike a pleading at any time. The Court may consider a number of factors for striking a pleading or anything in a pleading, such as the fact that it is redundant or immaterial, that it is vexatious, or that it discloses no reasonable cause of action. Rule 221 states:

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221.** (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	*a*) qu'il ne révèle aucune cause d'action ou de défense valable;
(b) is immaterial or redundant,	*b*) qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	*c*) qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	*d*) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	*e*) qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the process of the Court,	*f*) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
Evidence	Preuve
(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).	(2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)*a*).

[62] The wording of this provision implies that this motion can be brought whether or not the pleadings of the parties have been filed. In this Tribunal's proceedings, the exchange of particulars is similar to the exchange of pleadings. Theoretically, a motion to strike a particular or particulars could occur at any stage, but it is important to consider the practical realities of this Act, already discussed in the Tribunal's reasons above. The factors that are taken into account to

determine whether or not to grant a motion to strike are similar to the factors that, in this Act, the Commissioner takes into account in screening complaints, prior to arriving at his or her opinion as to whether or not an Application to the Tribunal is warranted.

[63] For example, under subsection 19.3(1)(a), the Commissioner may refuse to deal with the complaint if its subject matter has been adequately dealt with, or could be more appropriately dealt with, according to a procedure provided for under an Act of Parliament, other than this Act, or a collective agreement. Under section 19.3(1)(d), the Commissioner may refuse to deal with a complaint if he or she is of the opinion that the complaint was not made in good faith. Under section 19.3(2), the Commissioner may not deal with a complaint if a person or body acting under another Act of Parliament or a collective agreement is dealing with the subject matter of the complaint (other than as a law enforcement authority).

[64] The Commissioner's prior examination of a complaint, as part of its pre-screening function, occurs at different points before an Application is referred to the Tribunal. In view of the importance of the Commissioner's role as the "gatekeeper" of complaints, it is unlikely that the Tribunal will entertain a motion to strike in an Application before the Tribunal, especially when the particulars of all the parties are not before it.

[65] Rule 216 of the *Federal Court Rules* outlines the process for bringing a motion for summary trial. In this context, the motion for a summary trial includes all the evidence upon which a party relies. This implies that the pleadings are before the Court at the point that it is making this determination. Rule 216(1) of the *Federal Court Rules* states:

216. (1) The motion record for a summary trial shall contain all of the evidence on which a party seeks to rely, including	**216.** (1) Le dossier de requête en procès sommaire contient la totalité des éléments de preuve sur lesquels une partie compte se fonder, notamment :
(a) affidavits;	a) les affidavits;
(b) admissions under rule 256;	b) les aveux visés à la règle 256;
(c) affidavits or statements of an expert witness prepared in accordance with subsection	c) les affidavits et les déclarations des témoins experts établis conformément

258(5); and	au paragraphe 258(5);
(d) any part of the evidence that would be admissible under rules 288 and 289.	d) les éléments de preuve admissibles en vertu des règles 288 et 289.

[66] Subsection (2) of Rule 216 prohibits the filing of further affidavits or statements unless their content is limited to evidence that would be admissible at trial as rebuttal evidence or with leave of the Court. Subsection (5) of Rule 216 allows the dismissal of the motion if the issues raised are not suitable for summary trial or a summary trial would not assist in the efficient resolution of the action. Subsection (6) allows the Court to proceed with adjudication on some or all of the issues if there is sufficient evidence before it to do so. Subsection 216(6) reads:

(6) If the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment either generally or on an issue, unless the Court is of the opinion that it would be unjust to decide the issues on the motion.	(6) Si la Cour est convaincue de la suffisance de la preuve pour trancher l'affaire, indépendamment des sommes en cause, de la complexité des questions en litige et de l'existence d'une preuve contradictoire, elle peut rendre un jugement sur l'ensemble des questions ou sur une question en particulier à moins qu'elle ne soit d'avis qu'il serait injuste de trancher les questions en litige dans le cadre de la requête.

[67] In accordance with section 21 of the Act, the Tribunal must conduct its proceedings as expeditiously as possible and therefore, it is theoretically possible that the Tribunal could proceed by way of summary trial. An inquiry by the Tribunal as to how to proceed with a hearing would not be possible until after the particulars are filed with the Tribunal and the Tribunal has all the evidence before it. In the present case, even if this were a motion for summary trial, this motion would be premature. Rule 19 of the Tribunal Rules requires each party to file a statement of particulars for the Application made by the Commissioner. The particulars of all of the parties have not been filed with the Tribunal as yet.

[68] Once again, a consideration of the practical realities of this Act and the functions of the Tribunal and the Commissioner is merited. In this instance, the Commissioner has performed an important screening role before exercising his discretion to bring this Application under subsection 20.4(1)(b) of the Act, that is, in a manner that includes a consideration of the role of identified respondents and the possibility of discipline being imposed on them, should reprisal be found to have occurred. As already discussed earlier in these reasons, the Tribunal must consider the requirements of its proceedings in accordance with sections 21 with 21.6 and ensure that the parties are heard, and that the manner in which the hearing proceeds adheres to the principles of natural justice.

[69] Rules 214 and 215 of the *Federal Court Rules* state that the Court shall grant a summary judgment if, on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence. These two rules require that the pleadings be filed prior to a consideration of them.

214. A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.	**214.** La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l'instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l'existence d'une véritable question litigieuse.
215. (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.	**215.** (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

[70] In addition to the observations already made in its discussion as to the legal framework of the Act, the Tribunal also finds that in this case, the motion would be premature. The wording of these two provisions and their reference to the claim or defence of an action presumes that the

disposition of summary dismissal would only occur once the pleadings were filed. The Tribunal finds that this motion is premature because the exchange of particulars has not been completed. The only particulars currently before the Tribunal are the particulars of the Commissioner.

B. The Threshold for summary dismissal has not been met

[71] The party seeking summary dismissal bears the evidentiary burden of showing that there is no genuine issue of material fact requiring a hearing (see *Guarantee Co of North America v Gordon Capital Corp,* [1999] 3 SCR 423 at paragraph 27 (*Guarantee Co of North America*). The Tribunal finds that the respondents have failed to meet this burden.

[72] As noted in *Lameman,* at paragraph 11, that threshold is high. The balance must be struck between the cost of trying unmeritorious claims and the need to ensure that justice is served and that claims disclosing real issues that may be successful proceed to trial. At paragraph 10, the Supreme Court of Canada stated:

> The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[73] In *Lameman,* the Supreme Court also stated that a motion for summary judgment must be judged on the basis of the pleadings and materials before the decision-maker, and not on suppositions of what might be proved in the future. The Court stated, at paragraph 19:

> A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future.

[74] The Tribunal finds that a hearing is required. There are outstanding issues that require a hearing and many outcomes are possible. For example, in the particulars in support of this Application, the Commissioner refers to the role of both individual respondents at paragraph 59 and a key issue to be addressed:

> While Mr. Delage indicated to this office that he felt there had been a security breach, the CAS never followed the required procedure to investigate the alleged breach. It was on his, and Mr. Power's recommendation, that the clearance remained in abeyance. However, no security investigation was ever commenced and as such, their security concerns remained unresolved and unaddressed.

[75] In her affidavit in support of the Commissioner's response to this motion, Ms. Gail M. Gauvreau, the Senior Investigator in this matter, states that in the course of the investigation, she examined several Treasury Board security policies and the two that were specifically pertinent to the complainant's security clearance being suspended. The sworn affidavit also states that neither of these policies provided a right of a deputy head to hold a security clearance in abeyance (paragraph 9). In the affidavit, she also states that in the process of investigation, a recommendation was made by Mr. Delage, and supported by Mr. Power, that the security clearance be "held" (paragraphs 7 and 8 of the affidavit). In addition, the affidavit states that Mr. Delage informed the OPIC that he believed that the security breach by the complainant was "serious", but despite the comments of both Mr. Delage and Mr. Power, no security investigation was ever conducted (paragraph 11).

[76] These examples make it clear that there are factual issues upon which this Application turns that are best suited for the hearing, where the evidence will have the benefit of being tested through legal principles such as admissibility, reliability, examination and cross-examination, and weight. As all the parties are aware, it is possible to call Mr. Guenette as a witness in order to have his evidence before the Tribunal as part of the proceeding.

[77] The Supreme Court of Canada decision in *Guarantee Co of North America*, at paragraph 27, refers to *Irving Ungerman Ltd v Galanis*, (1991), 4 OR (3d) 545 (CA), which is often cited in relation to motions for summary judgment. In this latter decision, the Ontario Court of Appeal reversed a decision to allow a motion for summary judgment, emphasizing that it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists that requires a hearing.

[78] Whether or not reprisal occurred is a genuine issue of fact that must be addressed at the hearing. The definition of reprisal under section 2 of the Act does not expressly state that the Tribunal is bound to consider reprisal only where final decisions are made. Under the Act, "reprisal", or « représailles » in the French version of the Act, is defined as follows:

any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33:	L'une ou l'autre des mesures ci-après prises à l'encontre d'un fonctionnaire pour le motif qu'il a fait une divulgation protégée ou pour le motif qu'il a collaboré de bonne foi à une enquête menée sur une divulgation ou commencée au titre de l'article 33 :
(a) A disciplinary measure;	*a*) toute sanction disciplinaire;
(b) The demotion of the public servant;	*b*) la rétrogradation du fonctionnaire;
(c) The termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;	*c*) son licenciement et, s'agissant d'un membre de la Gendarmerie royale du Canada, son renvoi ou congédiement;
(d) Any measure that adversely affects the employment or working conditions of the public servant; and	*d*) toute mesure portant atteinte à son emploi ou à ses conditions de travail;
(e) A threat to take any of the measures referred to in any of paragraphs (a) to (d).	*e*) toute menace à cet égard.

[79] The definition of reprisal is worded in such a way that a multitude of subtle and incremental issues can be examined. The definition refers to terms that are action oriented, such as the word "measures." It refers to "any of the following measures taken" in the initial words of the definition; "threats to take any of the measures" referred to in subparagraph (a) to (d) (in subparagraph (e); and to "any measure that adversely affects the employment or working conditions of the public servants" in subparagraph (d). Without having the benefit of a hearing, and the possibility of testing the evidence before it, it is not possible for the Tribunal to make a finding, solely on the basis of Mr. Guenette's affidavit. The issue relating to the finality or authoritativeness of the decision, and its relation to the definition of reprisal, must be determined through the evidence and legal argument.

V. DECISION AND NEXT STEPS

[80] For all of these reasons, the motion for summary judgment brought by the individual respondents is denied.

[81] In its decision in *El Helou #1*, the Tribunal referred to the fact that the complainant had filed an application for judicial review of the Commissioner's decision to dismiss certain allegations in the complainant's original complaint (Docket T-862-11). The decision also directed the complainant to advise the Tribunal by October 18, 2011, as to whether he will continue with his application for judicial review. The Tribunal specified that, should the complainant determine that he will continue with his challenge of the Commissioner's decision in Federal Court, it will suspend its proceedings, pending the decision from the Federal Court on that matter. In *El Helou #1*, the Tribunal also stated that, should the complainant determine that he will discontinue the Federal Court application above, the Registrar will issue a letter outlining the timelines for the exchange of particulars from the parties.

[82] At the time of the issuance of the decision on the present motion for summary judgment, the Tribunal has not been advised by the complainant as to whether or not he will continue with his application for judicial review.

DATED this 19th day of October, 2011.

"Luc Martineau"

Chairperson

PUBLIC SERVANTS DISCLOSURE PROTECTION TRIBUNAL

PARTIES OF RECORD

DECISION NUMBER:	2011 PSDPT 2
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:	October 19, 2011

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

APPEARANCES:

Mr. Andrew Raven Raven, Cameron, Ballantyne and Yazbeck LLP/s.r.l.	For the Complainant
M. Brian Radford	For the Office of the Public Sector Integrity Commissioner
No submissions made	For the Employer
Mr. Stephen Bird Bird Richard	For the Individual Respondents and the Interested Parties