Public Servants
Disclosure Protection
Tribunal Canada

Tribunal de la protection
des fonctionnaires
divulgateurs du Canada

Citation: Agnaou v. Public Prosecution Service of Canada et al., 2019 PSDPT 3

File No.: T-2017-01

Issued at: Ottawa, Ontario

Date: November 13, 2019

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

BETWEEN:

YACINE AGNAOU
Complainant

-and-

THE PUBLIC SECTOR INTEGRITY COMMISSIONER OF CANADA

-and-

PUBLIC PROSECUTION SERVICE OF CANADA
Employer

-and-

ANDRÉ A. MORIN, BRIAN SAUNDERS, GEORGES DOLHAI AND DENIS DESHARNAIS
Individual Respondents

AMENDED DECISION ON THE MERITS

DECISION ON THE MERITS

I. Introduction

[1] On August 2, 2017, the Public Sector Integrity Commissioner of Canada (the Commissioner) submitted a notice of application to the Public Servants Disclosure Protection Tribunal (the Tribunal) pursuant to paragraph 20.4(1)(b) of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [the Act], and rule 5 of the *Public Servants Disclosure Protection Tribunal Rules of Procedure*, SOR/2011-170 [the Rules].

[2] This notice is in response to the Federal Court judgment in *Agnaou v Attorney General of Canada*, 2017 FC 338 [*Agnaou* 2017 FC 338], which, in particular, ordered the Commissioner to apply to the Tribunal to hear the complaint of Me Agnaou and decide whether reprisals were taken against him. Thus, in his notice, the Commissioner requested that the Tribunal decide whether reprisals, as defined in subsection 2(1) of the Act, were taken against Me Yacine Agnaou, the complainant. If so, the Commissioner asked the Tribunal to make an order granting a remedy to the complainant and taking disciplinary action.

[3] The Commissioner noted that he considered paragraph 20.4(3)(d) of the Act, and that it is in the public interest to file his notice to the Tribunal, given the particular circumstances of the complaint, including the judgment in *Agnaou* 2017 FC 338, cited above. Notwithstanding, given the circumstances set out below, and as will be later discussed, the Commissioner does not support all of Me Agnaou's arguments in this case.

[4] On April 20, 2018, at a pre-hearing conference, the Tribunal agreed, at the request of the parties, to divide the proceedings in two. The Tribunal must therefore first determine whether any reprisals were taken against Me Agnaou and then decide, if necessary, the issues relating to the remedy and disciplinary action. This decision deals with the first of these two components.

[5] In short, and for the reasons set out below, the Tribunal concludes that Me Agnaou has failed to prove, on a balance of probabilities, some of the elements provided for in the Act for the purpose of concluding that reprisals were taken against him. Me Agnaou did not prove that he made a protected disclosure under section 12 of the Act in April 2009, or that the measure was taken against him because he had made a protected disclosure. The Tribunal will therefore dismiss the complaint.

II. Background

[6] The facts of this case span several years, and it seems useful to briefly relate some of them to understand the arguments raised by the parties. I will set them out in segments, for ease of reading and comprehension.

A. Events from 2008 to 2009

[7] Me Agnaou is a lawyer and a member of the Barreau du Québec. Starting in 2003, he worked as a federal prosecutor on the Economic Crimes Team of the Federal Prosecution Service and, starting in 2006, in the Quebec Regional Office (QRO) of the newly created Public Prosecution Service of Canada (PPSC).

[8] In January 2006, the Canada Revenue Agency (CRA) submitted an investigation report to the Federal Prosecution Service recommending the prosecution of a company (Company A), which had failed to respond to CRA's requests for information. On January 24, 2006, the file (File A) was assigned to Me Agnaou, who had to determine whether it was necessary to institute criminal proceedings.

[9] Me Agnaou leaned swiftly in favour of instituting proceedings against Company A. However, around September 2007, the office of the Assistant Deputy Attorney General, Tax Law Services Portfolio of the Department of Justice, allegedly expressed some reservations about filing charges in File A and reported his reservations to the CRA's Appeals Branch. It appears that there was a difference of opinion within the CRA itself regarding the laying of charges (Exhibit P-5).

[10] On November 4, 2008, Carolyn Farr, one of three deputy chief federal prosecutors at the QRO and Me Agnaou's supervisor, as well as Bernard Mandeville, general counsel at the QRO, believed that it was premature to institute proceedings, particularly since the CRA's Appeals Branch was dealing with a notice of objection filed by Company A against its reassessments.

[11] At the same time, in the fall of 2008, relations between Me Agnaou and some PPSC managers began to deteriorate. Sources of friction included, for example, concerns about his workload; requests for monthly reports; his state of health, since he said he was tired; his development program, particularly in connection with his involvement in a case involving a jury trial; his attendance at a training meeting in September 2008; and his workplace behaviour.

[12] Thus, in early December, Me Agnaou brought before André A. Morin, Chief Federal Prosecutor at the QRO, the matter of the impasse he had reached with the deputy chief prosecutors following the decisions they had taken, collectively, since September 2008. Me Agnaou nevertheless asked Me Morin to report to Sylvie Boileau, one of the deputy chief federal prosecutors at the QRO, and Me Morin agreed. On January 7, 2009, in an email he sent to Chantal Proulx, acting Deputy Director of Public Prosecutions at PPSC headquarters, Me Agnaou stated that he was at a turning point in his career and that the prospects for managing this turning point no longer existed at the QRO (Exhibit P-162).

[13] In anticipation of their scheduled meeting of January 27, 2009, Me Boileau asked Me Agnaou to bring her File A, which she discussed with him during the meeting. Me Agnaou deduced that Me Boileau was already influenced by the other members of management and that the QRO was already determined to ensure that no proceedings were instituted, regardless of what he recommended. A disagreement therefore emerged between them as to the management of File A.

[14] On or about February 10, 2009, Me Agnaou confirmed his recommendation that proceedings should be filed against Company A. However, Me Boileau, Me Farr and Me Mandeville did not share his opinion. The General Counsel Committee, composed of a senior general counsel, Michel F. Denis, and five general counsels, received a request for a recommendation on File A. On March 9, 2009, the Committee met and recommended not to institute proceedings (Exhibit P-7). Me Agnaou was not informed that File A was on the agenda of the Committee's meeting, and he was not invited to the discussion.

[15] On March 23, 2009, Me Boileau met Me Agnaou, as confirmed in the document that Me Agnaou filed with the Commissioner in October 2011. In particular, Me Agnaou confirmed that the purpose was to discuss his participation in the case involving the jury trial and that Me Boileau then reproached him for failing to comply with her instructions and sending emails that poisoned their working relationship (Exhibit P-66 at p 14).

[16] At the hearing, Me Boileau recounted that she had been afraid of Me Agnaou and, at the end of that meeting, had raised questions with Me Morin relating to the safety and health of Me Agnaou. Me Boileau claimed that Me Agnaou would have been intimidating towards her, told her he was tired and made statements to the effect that they would not see each other again and that they were all against him. Given Me Boileau's concerns, Me Morin contacted security officials in Ottawa.

[17] On March 24, 2009, Me Agnaou met with Me Boileau, Me Farr and Me Denis. He then receives the memorandum from Me Morin recording the decision not to institute proceedings in File A and asking Me Agnaou to close the file (Exhibit P-7).

[18] The same day, Me Agnaou asked Me Morin to reconsider his decision, and on April 1, 2009, he sent him a 44-page memorandum supporting his recommendation for prosecution (Exhibit P-12), referring to the appendices that he neglected to attach, however, to that memo. On April 1, 2009, Me Morin confirmed to Me Agnaou that his decision in connection with File A remained unchanged (Exhibit P-11).

[19] Also on April 1, 2009, after receiving the aforementioned confirmation from Me Morin, Me Agnaou sent the email below to Me Boileau, his supervisor (Exhibit P-13):

> [TRANSLATION]
>
> Furthermore, as I told you, I must, in good conscience, submit this matter to the Director of Public Prosecutions. It is clear that management at the QRO has, since the fall of 2008 (if not since the Department of Justice intervened in September 2007), decided to find a way to close the file. The arguments put forward at the meetings of November 4, 2008, and February 24, 2009, and in the minutes of March 9, 2009, are almost identical.
>
> I contend that the consultation of the General Counsel Committee was intended to "give credibility" to a decision taken outside the regular process provided for in Chapter 15 of the FPS Deskbook. I also contend that today's meeting was never intended to allow the Chief Prosecutor to reconsider his decision, which was probably discussed by QRO management before the latest version of the prosecution report (January 2009) was received. These forums have not been set up to really debate the facts of this case. Moreover, the factual errors in the minutes of the General Counsel Committee and the lack of knowledge of the prosecution report that I noticed among the members of QRO management say it all about the reasons for his intervention in this case.
>
> So, could you please tell me how to bring this case to the attention of the Director of Public Prosecutions? If you gave me the name of a contact person, I could send them my attached statement of facts, the appendices (which André did not read before confirming his decision) and the full prosecution report.

[20] On April 2, 2009, informed that the CRA had been notified of Me Morin's decision, Me Agnaou sent another email to Me Boileau, with copies to Me Morin and Me Farr (Exhibit P-59):

> [TRANSLATION]
>
> Given that the external stakeholders have already been notified of the decision by our Chief Prosecutor, I can only reassess the timely nature of my efforts aimed at asserting to the Director of Public

> Prosecutions that this decision was made contrary to our organization's policies and that it is in the public interest.
>
> I will, in the coming weeks, focus on my active cases and think about what action to take in this serious matter. My decisions will be defined by my responsibilities as a Crown prosecutor, as set forth in our laws and policies. If necessary, our Chief Prosecutor will be informed by the competent authorities.

[21] It was these two emails that Me Agnaou identified, in January 2013, as protected disclosures under section 12 of the Act.

[22] On April 3, 2009, Me Morin directed Me Agnaou to take leave of absence and to consult his doctor to confirm his fitness for work (Exhibit P-18). On April 4, 2009, Me Agnaou sent another email to Me Morin, in which he alleged that QRO management had not followed the regular process set out in Chapter 15 of the Federal Prosecution Service Deskbook, indicated his intention to provide the 86 appendices that he had failed to attach to his previous email, so that Me Morin could reassess his decision again, and reiterated his request to submit File A for the consideration of the Director of Public Prosecutions, Brian Saunders (Exhibit P-18).

[23] On cross-examination before the Tribunal, Me Agnaou stated that on or about April 7, 2009, he read the Act and discussed it with Bernard Lanthier, as a possible option.

[24] On or about April 3, 2009, Me Agnaou requested the assistance of his union representative, Alain Gareau. In response to the decisions made by his managers, Me Agnaou, assisted by Me Gareau, filed three grievances, four complaints of psychological harassment and one complaint under section 127.1 of the *Canada Labour Code*, RSC 1985, c L-2 [Canada

Labour Code]. Me Gareau, in his testimony before the Tribunal, stated that he did not recall referring to the Act or to any unlawful act in connection with File A (transcript, volume 3, p. 882).

[25] On May 19, 2009, Me Agnaou obtained a document from his physician; on May 26, 2009, the doctor from Health Canada confirmed that Me Agnaou was fit for work; and on June 2, he therefore returned to work.

[26] Moreover, in May and June 2009, Me Agnaou contacted the Office of the Public Sector Integrity Commissioner (Office of the Commissioner) first on condition of anonymity and later revealing his identity (Exhibits P-186, P-197). In his first communication with the Office of the Commissioner, Me Agnaou inquired about what could constitute gross mismanagement and how the Office of the Commissioner works. In his second communication, Me Agnaou recounted the facts relating to File A and told the Office of the Commissioner that he was considering filing an official disclosure of wrongdoing.

[27] During the same period, Me Agnaou challenged the results of the competitions for an agent supervisor position, left vacant by Me Boileau, and for two LA-3A positions at the Department of Justice. More specifically, on February 9, 2009, he filed a complaint with the Public Service Staffing Tribunal in connection with the agent supervisor position, and the hearing for this dispute was scheduled for June 2009.

[28] In late 2008, Me Agnaou also participated in a competition to establish a pool of qualified candidates for LA-2B positions within the PPSC, and on July 3, 2009, he qualified for this pool (Exhibit P-198).

B. June 2009: Memorandum of Understanding

[29] In June 2009, the Public Service Staffing Tribunal was to hear Me Agnaou's challenge relating to the staffing of the agent supervisor position, but the hearing on the merits was preceded by a mediation session. Me Agnaou and Me Morin, having concluded that the bond of trust between Me Agnaou and the QRO had eroded, agreed to take advantage of the aforementioned mediation process to negotiate an agreement to put an end to the dispute. The negotiations resulted in an agreement, and on June 26, 2009, Me Agnaou and Me George Dolhai, Deputy Director of the PPSC, signed the Memorandum of Understanding (Exhibit D-223).

[30] The Memorandum of Understanding contained one section relating to the employer, another relating to the employee and a third relating to the parties. The employer granted Me Agnaou leaves of absence, some paid, some [TRANSLATION] "unpaid with compensation", until January 4, 2012, for a period of some 30 months, followed by one year of staffing priority. The employee agreed in particular to accept the benefits in full and final settlement of all his complaints, to not return to the "Service" during or at the end of the leave of absence, including during the period of his priority with the Public Service Commission, and to withdraw his complaint of February 9, 2009, and all complaints and grievances listed in Appendix 1 to the Memorandum of Understanding. I note that according to the text of the Memorandum of Understanding, the "Service" unambiguously refers to the PPSC.

C. October 2011: Disclosure to the Commissioner

[31] On October 13, 2011, Me Agnaou sent Me Mario Dion, then Commissioner, a 36-page letter (Exhibit P-66) to which he attached a disclosure of wrongdoing form and 86 appendices.

[32] In his disclosure form, Me Agnaou stated, among other things, that the wrongdoing that had been committed was a "gross mismanagement in the public sector", as provided for in paragraph 8(c) of the Act, and he referred the reader to the above-mentioned 36-page letter and to the 86 appendices. In response to the question to this effect in the form, Me Agnaou stated that he had reported the alleged wrongdoing to a supervisor or colleague, but he did not provide the requested information and instead referred again to the allegations in his 36-page letter and 86 appendices (Exhibit P-202 at p 6). Me Agnaou also stated in his form that he had reported the wrongdoing to the Office of the Commissioner on May 25, 2009.

[33] In his letter of allegations, Me Agnaou gave an overview of the gross mismanagement and identified three QRO managers, including Me Morin, as the alleged wrongdoers, while emphasizing that they were probably not the main sponsors.

[34] Me Agnaou did not reproduce the emails of April 1 and 2, 2009, in his letter of allegations, but he referred to the first in paragraph 54 and quoted passages from the second in paragraph 55. However, neither the disclosure form nor the 36-page allegation letter referred to these two emails as being disclosures of wrongdoing. According to the testimony of Me Agnaou and according to the decisions of the Federal Court of Appeal and the Federal Court, it was only

in January 2013, in response to questions from an analyst with the Office of the Commissioner, in the context of his reprisal complaint, that Me Agnaou reported that the emails of April 1 and 2, 2009, may constitute an internal disclosure (transcripts, volume 19 at p. 5316; *Agnaou v Canada (Attorney General)*, 2015 FCA 29 at para 14 [*Agnaou* 2015 FCA 29]; *Agnaou v Canada (Attorney General)*, 2014 FC 87 para 12 [*Agnaou* 2014 FC 87]).

[35] Me Dion quickly recused himself from Me Agnaou's disclosure file since he knew some of the respondents, notably Me Saunders, Director of the PPSC. On September 6, 2012, Deputy Commissioner Joe Friday rendered his decision not to investigate Me Agnaou's disclosure (Exhibit P-205). The Deputy Commissioner based his refusal to investigate on paragraphs 24(1)(e) and (f) of the Act, concluding that the facts of the disclosure resulted from the implementation of a balanced and informed decision-making process, which did not suggest that a wrongdoing may have been committed. The Deputy Commissioner rejected Me Agnaou's allegation that the actions and decisions taken by management constituted gross mismanagement because they violated the principle of equality before the law.

[36] It seems useful to emphasize here at the outset that section 24 of the Act provides that the Commissioner may refuse to deal with a disclosure or to commence an investigation — and he or she may cease an investigation — if he or she is of the opinion that, among other things, the subject-matter of the disclosure or the investigation relates to a matter that results from a balanced and informed decision-making process on a public policy issue, or there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation (paragraphs 24(1)(e) and (f) of the Act).

[37] Subsection 27(1) of the Act, meanwhile, provides that, when commencing an investigation, the Commissioner must notify the chief executive concerned and inform that chief executive of the substance of the disclosure to which the investigation relates. If there is no investigation, as in this case, the Commissioner does not inform the chief executive concerned of the existence of a disclosure.

[38] On October 1, 2012, Me Agnaou sought judicial review of the Deputy Commissioner's decision not to investigate his disclosure of wrongdoing, thereby making his October 2011 disclosure to the Commissioner public.

[39] On January 27, 2014, the Federal Court dismissed the application for judicial review. The Court noted in particular that what "the applicant's memorandum of fact and law clearly reveals is an honest difference of opinion between an employee and his supervisor" and that, "[u]ltimately, his superiors, who have more experience in criminal prosecutions, and who had also received input from the applicant's colleagues, decided not to prosecute: this was the result of a balanced, informed decision-making process. This type of decision falls directly within the expertise and authority of these people" (*Agnaou v Canada (Attorney General)*, 2014 FC 86 at para 35 [*Agnaou* 2014 FC 86]).

[40] On February 2, 2015, the Federal Court of Appeal dismissed Me Agnaou's appeal. It noted in passing that the wording of section 24 of the Act differs from that of section 41 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], since it gives greater discretion to the Commissioner to decide whether or not to investigate a disclosure. Ultimately, the Court of

Appeal found that the trial judge could conclude that the Commissioner's decision was reasonable given that the existence of an honest difference of opinion and the Commissioner's conclusion not to investigate under paragraph 24(1)(e) fell within a range of possible outcomes (*Agnaou v Canada (Attorney General)*, 2015 FCA 30 at para 75 [*Agnaou* 2015 FCA 30]).

[41] The Federal Court of Appeal therefore confirmed that the Deputy Commissioner's position on using paragraph 24(1)(e) of the Act to refuse to investigate was reasonable and that the Deputy Commissioner had reasonably concluded that the facts referred to in the disclosure, that is, the decision not to prosecute in File A, did not constitute a wrongdoing.

[42] None of these decisions mention an internal disclosure that preceded the disclosure to the Commissioner in October 2011.

D. The two LA-2B positions at the PPSC's headquarters

[43] We must take a break here from Me Agnaou's story to emphasize that two of the lawyers from the PPSC's headquarters were trying to have their duties recognized as belonging to level LA-2B rather than LA-2A, as they were classified. Those two lawyers are Laura Pitcairn and Sherri Davis-Barron, who in July 2009 both qualified in the aforementioned LA-2B pool, the one in which Me Agnaou also qualified (Exhibit P-84).

[44] The evidence shows that in 2002, Me Pitcairn joined the Federal Prosecution Office, that in 2006, she left for the Canadian Security Intelligence Service and that in September 2009, she returned to criminal prosecutions, now the PPSC. As soon as Me Pitcairn returned in 2009,

Me Dolhai told her that, having qualified for a level LA-2B pool, he could promote her to this level “down the road” (transcripts, volume 6, p. 1539). Me Davis-Barron, meanwhile, joined the Office of Federal Prosecutions in 2002.

[45] Documentary and testimonial evidence revealed that, since at least the spring of 2011, Me Pitcairn and Me Davis-Barron had urged Me Dolhai, their supervisor, to have the duties associated with their positions recognized at level LA-2B (Exhibits P-86 and P-90) rather than level LA-2A. In fact, before the Tribunal, Me Pitcairn confirmed that she had been questioning Me Dolhai about this issue since September 2009.

[46] In May 2011, the above-mentioned pool of LA-2B candidates was extended (Exhibit P-85). The pressure exerted by the two lawyers to have their position recognized at level LA-2B intensified at the start of 2012, when they both refused to sign the generic job description submitted to them on the grounds that this description did not reflect the duties they perform (Exhibit P-89 and P-99). In March 2012, Me Dolhai submitted a request to the organization’s finance committee to approve a budget essentially corresponding to the difference between two LA-2B positions and two LA-2A positions that would be eliminated (Exhibit R-232). The evidence reveals that Me Dolhai planned to grant the two lawyers’ requests by appointing them to the two newly created LA-2B positions from the pool created in 2009; in June 2012, the intentions to appoint were posted (Exhibits P-215 and P-216).

[47] In response to this appointment process, the Public Service Commission (PSC) referred a person with a priority, but this person opted not to pursue the process. In addition, on June 18,

2012, Me Agnaou self-referred (Exhibit P-123), which resulted in a change in the type of procedure used by management. The evidence reveals that Me Dolhai, Me Morin and Me Saunders were then surprised to learn that Me Agnaou had self-referred, in light of the terms of the Memorandum of Understanding, but that they nevertheless acknowledged that the right of priority, as part of an appointment process, was to be respected. The appointment process from the pool was then abandoned, and a reclassification process was initiated.

[48] On July 20, 2012, Me Agnaou indicated his opposition to this change from a competitive process to a reclassification process (Exhibit P-106) and called on the PSC to uphold his right of priority. In the meantime, in July 2012, the persons responsible for the reclassification process evaluated the positions of Me Pitcairn and Me Davis-Barron and, in September 2012, concluded that the duties of the two lawyers did correspond to level LA-2B (Exhibit R-94 at pp 3-5, 43-45). The process ended in December 2012 with confirmation that both positions were reclassified to level LA-2B (Exhibit P-93).

[49] During the period of June 2012 to September 2012, Me Morin held the position of acting Deputy Director of Public Prosecutions at headquarters in Ottawa. Denis Desharnais has been the Director of Human Resources at PPSC since March 2012; Me Saunders is still the Director of the PPSC, and Me Dolhai is still deputy director.

[50] On August 31, 2012, Me Agnaou wrote a letter to Me Saunders and asked for his comments on the reasons that prompted the PPSC to proceed with a reclassification rather than

by appointments (Exhibit P-123). By letter dated September 6, 2012, Me Saunders informed Me Agnaou that Mr. Desharnais would respond to his letter (Exhibit P-106 at p 21).

[51] By letter dated September 10, 2012, a few days after Me Friday's decision not to investigate Me Agnaou's disclosure, Mr. Desharnais responded to Me Agnaou. Mr. Desharnais informed him that the reclassification of positions had been considered more appropriate, and he recognized his right of priority. Mr. Desharnais clarified that it is not necessary to take priority rights into account in the event of a reclassification and that Me Agnaou's priority right was not affected (exhibit P-106 at p 22).

[52] This letter of September 10, 2012, is the measure alleged by Me Agnaou in the context of his reprisal complaint.

E. Certain events that followed the letter of September 10, 2012

[53] On September 17, 2012, Me Agnaou wrote to the President of the PSC to point out what he claimed to be the usurpation of his right to obtain a level LA-2B position, and to seek justice before initiating legal proceedings (Exhibit P-157). On October 19, 2012, the Vice-President of the Policy Branch at PSC responded to Me Agnaou and advised him that the decision to reclassify rather than make appointments was the responsibility of the PPSC, not the PSC, and that the PSC had nevertheless discussed this matter with the PPSC to ensure that the decision was not made to avoid appointing a priority person (Exhibit P-28).

[54] On the same day, Me Agnaou responded to the Vice-President and demanded an investigation (Exhibit P-159). On December 31, 2012, Guillaume Fontaine of the PSC's Investigations Branch confirmed to Me Agnaou that the PSC does not have jurisdiction to investigate an internal appointment process, unless it is fraudulent or politically influenced, and reiterated that the decision to reclassify belongs to the employer (Exhibit P-142).

[55] In the meantime, on December 8, 2012, Me Agnaou wrote to Mr. Desharnais and inquired as to whether the PPSC could protect his severance benefits pending the decision of the PSC and the outcome of the potential legal proceedings (Exhibits P-29 and P-135). On December 24, 2012, Mr. Desharnais replied that the PPSC did not have the power to accede to his request to extend his right of priority, and on January 4, 2013, Me Agnaou's right of priority expired (Exhibit P-30).

[56] It appears from the testimonies that Me Agnaou did not contest the PPSC's decision to proceed by reclassification, nor did he contest the PSC's decisions or that of Mr. Desharnais not to act on his request relating to severance benefits and the expiry of his right of priority.

III. Complaint of reprisals

[57] On January 7, 2013, Me Agnaou filed a reprisal complaint with the Office of the Commissioner.

[58] In the complaint form signed on January 5, 2013, Me Agnaou described the action constituting reprisals against him as the usurpation of the employment to which he had a clear

right (page 3 of the form, question (c)(1)) and confirmed that the reprisals were taken against him on September 10, 2012, the date of Mr. Desharnais' letter stating the PPSC's final decision to reclassify the two LA-2B positions rather than appoint from the pool (Exhibit P-210).

[59] Me Agnaou also stated, in particular, [TRANSLATION] "I, for my part, very quickly understood that the heads of the PPSC will seek by all means to prevent me from occupying a position in 'their' organization because of my disclosure of the File [A] case (cf. your file PSIC-2011-D-1422)" (Exhibit P-210 at p 3). On page 8 of the same form, Me Agnaou confirmed having made a protected disclosure, referring only to the file of the Office of the Commissioner PSIC-2011-D-1422, which corresponds to the disclosure to the Commissioner in October 2011 (see Exhibit P-205).

[60] Me Agnaou specified the four individual respondents as the persons responsible for the reprisals. The PPSC was a party to the proceedings before the Tribunal as Me Agnaou's employer at the time the alleged reprisals took place (paragraph 21.5(2)(c) of the Act).

[61] On February 12, 2013, the Deputy Commissioner refused to rule Me Agnaou's reprisal complaint, finding it inadmissible under paragraph 19.3(1)(c) of the Act on the grounds that it was beyond his jurisdiction (Exhibit P-211). The Deputy Commissioner essentially concluded that (1) it may be that the reclassifications constituted a measure within the meaning of the Act; (2) the wording of the email of April 2, 2009, did not constitute an internal disclosure within the meaning of the Act; and (3) the chief executive concerned was never informed in relation to the

disclosure to the Office of the Commissioner, given subsection 27(1) of the Act, and Me Agnaou did not demonstrate how his managers could have had knowledge of it.

[62] On March 11, 2013, Me Agnaou applied for judicial review of the Deputy Commissioner's decision (Exhibit D-226).

[63] On January 27, 2014, the Federal Court dismissed Me Agnaou's application for judicial review regarding the second decision of the Deputy Commissioner. The Court noted that the analyst responsible for the complaint file had asked Me Agnaou to indicate to him where the evidence of the (internal) disclosure could be found in his materials and that it was at this time, in January 2013, that, for the first time, Me Agnaou referred to the emails of April 1 and 2, 2009, as disclosures under section 12 of the Act. Ultimately, the Court found that it did not constitute a protected disclosure (*Agnaou* 2014 FC 87).

[64] On February 2, 2015, the Federal Court of Appeal allowed Me Agnaou's appeal and declared the reprisal complaint admissible (*Agnaou* 2015 FCA 29). In connection with the disclosure under section 12 of the Act, Justice Gauthier also pointed out that Me Agnaou had, on January 21, 2013, and in response to the letter from the Office of the Commissioner's analyst, clarified that he needed to read paragraphs 54 and 55 of his 36-page memorandum of allegations and appendices 42 and 43 in connection with the emails of April 1 and 2, 2009, which in his view could constitute a disclosure within the meaning of section 12 of the Act (*Agnaou* 2015 FCA 29 at para 14). In connection with the protected disclosure of October 13, 2011, to the Office of the Commissioner, Justice Gauthier noted in passing that it was confidential and, "since

the Commissioner had decided not to investigate, the Office [of the Commissioner] did not notify the PPSC of the disclosure" (*Agnaou* 2015 FCA 29 at para 11).

[65] Justice Gauthier distinguished the treatment of a wrongdoing disclosure, as discussed in *Agnaou* 2015 FCA 30, from that of a reprisal complaint, regarding which she concluded that "as is the case under section 41 of the CHRA, only plain and obvious cases must be rejected summarily because they cannot be dealt with" (*Agnaou* 2015 FCA 29 at para 57). The issue before the Court of Appeal was therefore whether the "[Deputy Commissioner] could reasonably conclude that it was plain and obvious that the emails mentioned by the appellant could not constitute an internal disclosure within the meaning of section 12", and Justice Gauthier concluded that this was not the case (*Agnaou* 2015 FCA 29 at paras 69, 89).

[66] Thus, this decision by the Court of Appeal tells us, in particular, that (1) protection under the Act must be granted to an employee in matters of reprisals against a public servant who has disclosed information on what he or she believed in good faith to be a wrongdoing, and the fact that the disclosed act is or is not ultimately found to be a wrongdoing is not relevant in dealing with a reprisal complaint (*Agnaou* 2015 FCA 29 at paras 73 and 74); (2) a person does not have to refer to the Act, nor does he or she have to mention the definition of "wrongdoing", section 12 of the Act, the Commissioner, or any other agency, to permit a finding that he or she made an internal disclosure (*Agnaou* 2015 FCA 29 at paras 75 and 76); and (3) the April 2 email "confirm[s] that, according to the appellant, what he described in his email dated April 1 was indeed a gross mismanagement" (*Agnaou* 2015 FCA 29 at paras 78, 83-88).

[67] The Federal Court of Appeal referred the file back to the Commissioner to be dealt with appropriately. On April 9, 2015, the Commissioner began an investigation into Me Agnaou's complaint of reprisals and notified Me Morin (Exhibit D-227). An investigator from the Office of the Commissioner then met Me Morin and Me Roussel.

[68] On November 9, 2015, following the investigation, the Commissioner determined that there were no reasonable grounds to believe that reprisals had been taken against Me Agnaou and dismissed the complaint under section 20.5 of the Act. The Commissioner essentially stated that the Memorandum of Understanding signed in June 2009 was a crucial element in determining whether there was a potential link between the alleged disclosure and the alleged reprisals and that, given the terms of said Memorandum of Understanding, he had no reasonable grounds to believe that the non-appointment of Me Agnaou to the coveted position was related to his alleged disclosure. On December 9, 2015, Me Agnaou filed an application for judicial review of this new decision by the Commissioner to dismiss his complaint of reprisals.

[69] On March 31, 2017, the Federal Court allowed Me Agnaou's application for judicial review and, among other things, ordered the Commissioner to apply, under subsection 20.4(1) of the Act, to the Tribunal to rule on Me Agnaou's reprisal complaint and decide whether reprisals had been taken against him (*Agnaou v Canada (Attorney General)*, 2017 FC 338 [*Agnaou* 2017 FC 338]). More specifically, the Court concluded that it was not for the Commissioner to determine whether there was a link between the alleged disclosure and the non-appointment of Me Agnaou to the LA-2B position, this determination belonging to the jurisdiction of the Tribunal.

[70] It is in this context that the Commissioner's notice of application for a determination was sent to the Tribunal. Nineteen days of hearings were devoted to the hearing of this case. The Tribunal heard the testimony of Me Agnaou and the 21 witnesses he called, and that of the seven (7) witnesses summoned by the respondents, including the four (4) individual respondents.

IV. Jurisdiction of the Tribunal

[71] Me Agnaou argued at the hearing that the Tribunal's scope of intervention should be extended beyond what is stated in the Commissioner's notice of application for a determination. I then confirmed to him that the Tribunal cannot consider elements which are not set out in this notice. My position is based on the principles enunciated by the Tribunal in *El-Helou v Courts Administration Service*, 2011 PSDPT 1 (El-Helou No. 1). The Tribunal panel, consisting of three members, then confirmed that the Commissioner's notice of application was the document instituting proceedings, that the Tribunal derives jurisdiction from the Commissioner's notice under subsection 20.4(1) of the Act and that the Tribunal cannot consider allegations that are not part of this notice.

[72] Thus, as I decided at the hearing, only the emails from April 1 and 2, 2009, may be considered as an internal disclosure under section 12 of the Act, and only the communication to the Commissioner dated October 13, 2011, may be considered as an external disclosure under section 13 of the Act. The alleged measure is the reclassification of the two LA-2B positions in order to avoid appointing Me Agnaou to one of these positions, despite the fact that he held a priority for appointment (notice of application for a determination at paras 14-18), and the subsequent decisions of the PSC or the PPSC are therefore not at stake in this regard.

V. Burden and standard of proof

[73] The Federal Court and the Tribunal have already established that, in a reprisals complaint, it is for the complainant to demonstrate, on a balance of probabilities, that (1) he or she made a protected disclosure within the meaning of the Act; (2) he or she was the subject of one of the measures listed in the definition of "reprisal" in section 2 of the Act; and (3) the measure was taken against him or her because he or she has made a disclosure, which constitutes reprisals (*Agnaou* 2017 FC 338 at para 7; *Dunn v Indigenous and Northern Affairs Canada and Lecompte*, 2017 PSDPT 3 at para 66 [*Dunn*]; *El-Helou 4* at para 34, 47-49). These elements flow directly from the definition of reprisals provided for in section 2 of the Act:

> ***reprisals*** 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:
>
> **(a)** any disciplinary measure;
> **(b)** demotion of the public servant;
> **(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;
> **(d)** any measure that adversely affects the employment or working conditions of the public servant; and
> **(e)** a threat to take any of the measures referred to in any of paragraphs (a) to (d). (*représailles*)

[74] Me Agnaou did not raise any arguments to the contrary in his statement of particulars or in his amended statement of particulars and even confirmed at the hearing that a complainant has the burden of proving, on a balance of probabilities, the three components mentioned above (transcripts, volume 2, p. 485; volume 5, p. 1314; volume 18, p. 4924). Almost at the end of his evidence, Me Agnaou signaled his intention to present rebuttal evidence, (transcripts, volume 13,

p. 3657), but did not act on it, choosing instead to ask the Tribunal for leave to add to his statement of particulars in order to argue that a particular legal framework should apply, different from that already established by case law. Thus, by email dated June 22, 2019, almost at the end of the respondents' evidence, after 15 days of hearings and at the end of almost 20 months dedicated to the management of the case and to the preparation of the hearing, Me Agnaou submitted that the legal framework hitherto followed by the parties and the Tribunal was incorrect. The respondents objected to Me Agnaou's request to add a position, deeming it late.

[75] Me Agnaou essentially argued that the burden imposed on the complainant is too onerous. Me Agnaou initially referred to the legal framework provided for in sections 14 and 15 of the *Canadian Human Rights Act* but then distanced himself from it and suggested a third option whereby it would be sufficient for a complainant to demonstrate, on a balance of probabilities, [TRANSLATION] "subtle whiffs of reprisal" in order to shift the burden onto the respondent, who would then become responsible for demonstrating, on a balance of probabilities, that the three elements constituting reprisals have not been met. According to Me Agnaou, this legal framework would allow the Tribunal to correct the significant imbalance relating to the information available to the complainant regarding reprisal complaints. In this regard, Me Agnaou argued that the Tribunal is not bound by the Federal Court's finding that the burden is on the complainant, on the balance of probabilities standard (*Dunn* at paras 58, 66), given the Federal Court of Appeal's findings in *Dunn v Canada (Attorney General)*, 2018 FCA 210, at paragraph 7. Moreover, in his reply, Me Agnaou added that if one adopts the position that a causal link between the measure and the disclosure must exist, the protection regime for public servant disclosures is doomed to failure.

[76] As I pointed out at the hearing, I do not subscribe to Me Agnaou's proposal and confirm that the complainant, and the Commissioner when the latter takes a position in favour of the complainant, has the burden of demonstrating, on a balance of probabilities, the three constituent elements of the aforementioned reprisals.

[77] The Supreme Court of Canada in *FH v McDougall*, (2008) 3 SCR 41, confirmed that there is only one standard of proof in civil proceedings, that of the balance of probabilities. The standard of proof required before the Tribunal is therefore also the balance of probabilities, as confirmed by the Federal Court in *Agnaou* 2017 FC 338.

[78] Justice Annis confirmed in *Dunn* that the Commissioner, when sharing the complainant's position, has the burden of proving the three elements of reprisal on a balance of probabilities. The legal framework established by the Tribunal was not challenged before the Federal Court of Appeal, which upheld the decision in *Dunn* (*Dunn* v *Canada (Prosecutor)*, 2018 FCA 210), and both the burden and the standard of proof have already been established.

[79] Me Agnaou has not submitted any authority or argument that would encourage or allow the Tribunal to depart from the established case law on the issue.

VI. Preliminary remarks related to the hearing

A. Subpoenas

[80] Me Agnaou sometimes forgot to adduce evidence through the appropriate witness. I believe I have shown flexibility, in line with section 2 of the *Rules*, and have allowed him to make up for his oversights when the situation permitted and so long as the principle of procedural fairness was respected.

[81] At the hearing, Me Agnaou introduced into evidence only two of the subpoenas which he transmitted or had had transmitted to his witnesses, having admitted that he forgot to file the others in evidence at the appropriate time. After the presentation of the evidence, he applied to the Tribunal for leave to file copies of these subpoenas. Counsel for Me Morin objected, arguing that he could not cross-examine the witnesses on this subject and stressing that Me Agnaou did not have proof of the date on which the subpoenas had been served to each witness. Thus, in view of the procedural fairness owed to each party, the Tribunal allowed the objection and did not authorize the late filing of these subpoenas.

B. Conduct of the Hearing

[82] Me Agnaou repeatedly condemned the fact that his witnesses did not remember his file or certain facts, and he insinuated that these omissions could allegedly have been calculated or arranged by, or for the benefit of, the respondents. In this regard, it is important to note that Me Agnaou was unaware of the content of the testimony that each of the witnesses he had subpoenaed would deliver, having never met them before their subpoena or the hearing. In this regard, Me Agnaou first indicated to the Tribunal that he did not have access to his witnesses (transcripts, volume 1, p. 59; volume 3, p. 612), but he subsequently indicated to the Tribunal that his practice was in fact to never meet with or prepare his witnesses beforehand, in order to

obtain their [TRANSLATION] “spontaneous” testimony and get to the truth (transcripts, volume 8, p. 2416). Me Agnaou made no request to declare his witnesses adverse or hostile, and no order was ever made to that effect. However, I granted Me Agnaou appreciable leeway in his examinations in chief, to allow him, to use his expression, to present his evidence.

[83] During the hearing, Me Agnaou confirmed that the allegations he made against the respondents at the various stages of the process preceding the hearing of his complaint were only based on circumstantial evidence which he sought to substantiate by the testimony during the hearing (transcripts, volume 5, pp. 1233, 1239). At the hearing, Me Agnaou admitted that he did not have all the evidence required to establish his allegations before the hearing, attributing this situation to the fact that the Office of the Commissioner did not conduct an investigation before the Tribunal proceedings (transcripts, volume 6, pp. 1768-1770). In particular, he asked the Tribunal, during the proceedings, to order the respondents to disclose additional documents and to recognize that the subpoena containing a so-called “duces tecum” request obliges the witnesses to seek documents which are no longer under their control, in their custody or in their possession. I rendered the decisions in connection with these requests, orally, on June 6 and June 19, 2019.

[84] In this regard, it is appropriate to note the remarks of Justice Stratas in *Lukács v Swoop Inc.*, 2019 FCA 145, repeating the principle that a claimant cannot appear at the hearing for the purpose of embarking on a fishing expedition.

[85] In addition, and despite the interlocutory decisions I rendered on the relevance of certain evidence, Me Agnaou insisted on devoting considerable time to the detailed examination of *a priori* irrelevant elements, such as the details of the management of File A, the events leading to his temporary exclusion from the workplace and events after the alleged measure of September 2012.

[86] It should also be noted that (1) the decision to reclassify the two positions, as well as the PSC's decisions, were not challenged and constitute, for the Tribunal, lawful decisions; and (2) the FCA, in *Agnaou* 2015 FCA 30, held that it was reasonable to conclude that the process followed in File A was the result of a balanced and informed decision-making process and that it was not an act of wrongdoing.

C. Pleadings

[87] Throughout the hearing, the respondents objected to certain lines of questioning from Me Agnaou and to certain passages from his testimony on the basis of irrelevance. I also pointed out the same concerns to Me Agnaou, but he assured me on several occasions that he would explain this relevance at the oral argument stage and that a link would be drawn between the various elements he presented (see, for example, pp. 1372, 1454, 1503 of the transcripts).

[88] However, this was not the case since, at the oral argument stage, Me Agnaou stated that he did not have the means to synthesize the evidence for the Tribunal, indicating that the evidence was quite detailed and that the work was extremely difficult and required precision. Me Agnaou therefore announced that he did not have the level of preparedness required to guide

the Tribunal towards the relevant evidence and that he would be relying instead on the Tribunal to identify all the elements necessary and relevant to his file through the transcripts (transcripts, volume 18, pp. 4906–4907). During his oral arguments, Me Agnaou therefore repeated his allegations against the respondents, and in fact asked the Tribunal to seek out and identify the relevant evidence capable of supporting his allegations. Even if the Tribunal takes cognizance of all the evidence, it is not for it to sift through the evidence and attempt to identify information that would support the allegations of Me Agnaou (*AC v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1452 at para 6; *OLE Real Estate Inc v Shanmugam et al.*, 2016 ONSC 6483 at para 2). This leaves the Tribunal with incomplete or non-existent representations.

VII. Evidence of constituent elements of reprisals

A. Protected disclosure

(1) Introduction

[89] As we have seen above, the Act protects public servants who have made a "protected disclosure", defined, for the purposes of this proceeding, in paragraph 2(a) of the Act as a disclosure that is made in good faith and that is made by a public servant in accordance with this Act. The disclosures at issue are those provided for in sections 12 and 13 of the Act.

[90] Section 12 provides for the possibility of making a disclosure to a supervisor or senior officer (internal disclosure) and states as follows:

> (12) A public servant may disclose to his or her supervisor or to the senior officer designated for the purpose by the chief executive of the portion of the public sector in which the public servant is

> employed any information that the public servant believes could show that a wrongdoing has been committed or is about to be committed, or that could show that the public servant has been asked to commit a wrongdoing.

[91] Section 13 provides for the possibility of making a disclosure to the Commissioner (external disclosure) and states as follows:

> 13 (1) A public servant may disclose information referred to in section 12 to the Commissioner.

[92] The Tribunal agrees with the parties that the communication from Me Agnaou to the Commissioner on October 13, 2011, does constitute a protected disclosure under section 13 of the Act.

[93] However, the respondents dispute the classification of the emails of April 1 and 2, 2009, as a protected disclosure under section 12, therefore the Tribunal must analyze the evidence in this regard.

(2) Positions of the parties

[94] Me Agnaou did not offer any arguments in his statement of particulars and in his amended statement of particulars regarding the internal disclosure. He confined himself to confirming that the only issue in dispute was whether there was a link between the impugned measure and either the 2009 internal disclosure or the disclosure made to the Office of the Commissioner in 2011. Me Agnaou therefore presented no arguments to support that his emails of April 1 and 2, 2009, did constitute a protected disclosure under section 12 of the Act.

He also admonished the respondents for not having admitted that the emails in question constituted a protected disclosure under the Act (transcripts, volume 5, p. 1370; volume 8, pp. 2416-2417).

[95] At the hearing, Me Agnaou nevertheless raised two points to submit that he had made a protected disclosure on April 1 and 2, 2009, namely, that (1) Me Boileau and Me Morin could not [TRANSLATION] "not know" that the emails from April 1 and 2 constituted a disclosure under the Act*;* and (2) the characterization of a message as a disclosure under section 12 of the Act should only be assessed from the perspective of the person relying on it, and he intended to disclose an act that he believed in good faith to be a wrongdoing.

[96] In connection with the first point, Me Agnaou insisted on filing in evidence the details of the management of File A, which were supposed to demonstrate that Me Morin and Me Boileau could not [TRANSLATION] "not know" that the two emails constituted a disclosure under the Act. Responding to the respondents' objections and to the Tribunal's doubts as to the relevance of reviewing all the details of File A, Me Agnaou announced that the necessary explanations would be offered during his oral arguments, which was not the case.

[97] In connection with the second element, Me Agnaou submitted that the emails should be viewed from his perspective alone (transcripts, volume 4, p. 982; volume 18, pp. 4944-4945), suggesting that his intention, at the time those two emails were sent, was to disclose an act which he believed in good faith to be a wrongdoing, and contending that what he communicated to his

immediate supervisors could demonstrate the existence of a wrongdoing (transcripts, volume 18, p. 4998).

[98] In his statement of particulars, the Commissioner argued that the emails of April 1 and 2, 2009, could constitute a disclosure of gross mismanagement (at para 42). At the hearing, the Commissioner added, in response to Me Agnaou, that it must be objectively reasonable to perceive the wrongdoing as defined by section 8 of the Act in the alleged disclosure so that it can meet the definition of disclosure. In his view, it is not only a matter of the whistle-blower having a subjective belief in the wrongdoing, but there must also be an objective element related to section 8 of the Act, so that the supervisors who receive the disclosure believe that it could indeed be a disclosure (transcripts, volume 18, pp. 5071-5076). In this regard, the Commissioner noted the words of the Federal Court, adopted by the Federal Court of Appeal, to the effect that it was really only a difference of opinion on the outcome of File A (*Agnaou* 2015 FCA 30 at paras 72, 73).

[99] Me Morin argued that the decision not to file proceedings in File A cannot be characterized as a wrongdoing within the meaning of the Act and that it does not constitute gross mismanagement (*Krieger v Law Society of Alberta*, [2002] 3 SCR 372 at paras 31, 42, 48). Moreover, at the hearing, he argued that there must be a contextualized legal test to the definition of wrongdoing and that the decision of whether to institute proceedings is not a management issue and does not meet the legal test. According to him, for it to be a disclosure, it must be obvious to the person receiving it that the communication makes reference, in the context, to some wrongdoing (transcripts, volume 19, pp. 5175-5176, 5196). According to Me Morin, the

purpose of the emails of April 1 and 2, 2009, was not to make a disclosure, but to announce a follow-up, namely the submission of File A to the Director of Public Prosecutions. Me Morin added that, if Me Agnaou had really wanted to make a disclosure, he would have written to the PPSC's disclosure protection coordinator. In his opinion, recalling the testimony of other witnesses, the email of April 2, 2009, instead foreshadowed a grievance against the decision not to institute proceedings in File A.

[100] In his statement of particulars, Me Morin argued first that the emails of April 1 and 2, 2009, did not constitute protected disclosures under the Act because they were not addressed to a supervisor or a senior officer, but he abandoned this argument at the hearing.

[101] The other respondents argued that the emails of April 1 and 2, 2009, did not constitute a protected disclosure within the meaning of the Act, since Me Agnaou had not yet decided to proceed by way of a disclosure at that time, a decision he made at the earliest in May or June 2009, when he contacted the Office of the Commissioner for the first time. At the hearing, they also argued that the content of the disclosure must, on its face, meet the definition of wrongdoing in section 8 of the Act, thereby agreeing with the position of the Office of the Commissioner in this regard. This is not the case with the emails. In addition, they argued that it is relevant for the Tribunal to consider the perception of the person receiving the emails. In any event, they emphasized that Me Agnaou himself did not intend to make a disclosure at that time, as indicated by the last paragraph of the email of April 2, 2009, according to which Me Agnaou was going to [TRANSLATION] "think about what action to take", and by the testimony of Me Gareau.

(3) Discussion

[102] In his decision in *El-Helou 1*, Justice Martineau recalled that the Act was established in response to the constantly evolving case law regarding wrongdoings, an employee's duty of loyalty and his or her freedom of expression. Thus, the Act was passed to provide a safe haven for public servants so that they can disclose behaviour that goes against the public interest, and to enhance public confidence in the integrity of public servants (see the preamble to the Act). Justice Gauthier also pointed this out in *Agnaou* 2015 FCA 29 (para 60). Furthermore, I am aware, as Justice Martineau mentioned in *El-Helou 1*, that the Act must be given a fair, large and liberal interpretation in order to fulfill these objectives.

[103] However, it appears impossible for the Tribunal to analyze the evidence in an informed manner and to offer a definition of disclosure according to section 12 of the Act that would find a general application beneficial to the disclosure regime, considering the circumstances of the present case and the absence of representations in this regard from Me Agnaou. Consequently, the conclusions I have reached in this case are tied to the specific facts of this case and to the evidence and representations which were presented to the Tribunal.

[104] The word "disclosure" is not defined in the Act. However, Le Petit Robert defines it as the act of disclosure which is to [TRANSLATION] "bring to the attention of the public (that which was known to a few). – to unveil, to disclose, to proclaim, to publish, to spread, to reveal (cf. to bring to light; to shout from the rooftops)". As for the Larousse Dictionary, it defines this term as the [TRANSLATION] "act of disclosing, of making information public: Disclosure of a secret

code". And it defines *divulguer* (to disclose) as [TRANSLATION] "to disseminate to the public information that was originally considered secret, confidential; to spread a rumour; to unveil, to uncover: Disclose the name of a suspect". What is more, in accordance with the context in which the Act was passed and the purpose stated in its preamble, it seems fair to point out that the objective of a disclosure is, for the public servant, to denounce an act that undermines the integrity of the public service, to reveal, to sound the alarm. A person who makes a disclosure is known in popular parlance as a "whistle-blower".

[105] The very text of section 12 of the Act provides for certain elements. Thus, a disclosure must be made to a supervisor or the designated senior officer. In this case, it is common ground that Me Boileau and Me Morin were indeed supervisors of Me Agnaou on April 1 and 2, 2009.

[106] Second, in my view, a disclosure should communicate any information that could objectively demonstrate that a wrongdoing has been or is about to be committed. To this end, section 8 sets out the categories of wrongdoings covered, including (c) a gross mismanagement in the public sector. Me Agnaou indicated in these emails that the PPSC's position not to prosecute is contrary to its own policies and to the public interest, and the Federal Court of Appeal determined in *Agnaou* 2015 FCA 29 at paras 78, 83–88, that Me Agnaou's references may refer to a case of gross mismanagement. I therefore accept that the objective criterion to which the respondents have referred has been met.

[107] The parties did not explain why it was necessary for the recipient and/or the complainant to know that a disclosure was transmitted, other than to establish the link provided by

Parliament. In any event, even if we set aside the question of whether these criteria are correct and assume that they apply, the evidence filed at the hearing rather shows that (1) Me Boileau and Me Morin were unaware that the emails constituted a disclosure under the Act, and that they instead believed that Me Agnaou was signaling his intent to carry on the debate internally and prove his point; and (2) Me Agnaou himself did not at the time intend to disclose a wrongdoing under the Act.

[108] In fact, despite his promises in this regard, Me Agnaou did not explain how or why the emails could have been considered to be a disclosure to his supervisors. He suggested that it could not be otherwise since File A was the only issue between him and his management, but he did not specify what evidence supported this argument and how, even if that were the case, this fact would demonstrate, among other things, that Me Boileau and Me Morin could not [TRANSLATION] "not know" that it was a disclosure. Rather, credible evidence reveals the following:

- Me Boileau and Me Morin did not consider his emails as a disclosure, but as an expression of deep disagreement and a desire by Me Agnaou to bring his position on File A to the attention of the Director of Public Prosecutions.

- When Me Agnaou indicated that he would think about what action to take in this serious matter, Me Boileau and Me Morin stated that they expected to receive a grievance instead (transcripts, volume 1, pp. 66-67; volume 14, pp. 4237-4238).

- Moreover, for Me Morin, the reference to a serious matter meant that there were two different points of view on File A (transcripts, volume 14, p. 4238) since File A did not constitute, for him, a serious matter, but simply a summary offence case.

- Relations between Me Agnaou and his managers had been strained for several months, and the disagreement over File A was not the only source of tension. Besides, according to Me Agnaou himself, other points of contention were discussed at the meeting of March 23, 2009, between Me Agnaou and Me Boileau, just over a week before April 1 and 2, (Exhibit 66, paragraph 36).

- Me Agnaou often contested the decisions related to himself, and it was legitimate for Me Boileau and Me Morin to assume that this was, yet again, Me Agnaou expressing his deep disagreement with Me Morin's decision;

- Me Agnaou had not raise any of the irrelevant elements of the Federal Prosecution Service Deskbook; if he had raised such elements, it could have [TRANSLATION] "set off alarm bells" (Exhibit P164; transcripts, volume 17, pp. 4600-4603);

- The intervention of the civil section of the CRA and the Department of Justice was normal, and there was nothing to indicate that their position was not legitimate, nor was it setting off any alarm bells (Exhibit P-5, transcripts, volume 14, p.4137);

- Me Saunders, Me Dolhai, Me Boileau, Me Proulx, Me Denis and Me Morin all stated that disagreements between prosecutors and management regarding the laying of charges in their area were not unusual, and that the final discretionary decision rests with management (transcripts, volume 4, pp. 990-991; volume 11, p. 3136; volume 13, pp. 3873, 3880-3881; volume 14, p. 4100).

[109] Even if I accepted Me Agnaou's argument that only his view counts in deciding whether he had made a disclosure under the Act by sending his emails on April 1 and 2, he unfortunately did not prove that it was more likely than not that he himself wanted to make a disclosure under the Act.

[110] According to the evidence, the element of denunciation, of revelation or of sounding the alarm to which I referred above is absent. In this regard, I agree with Me Morin when he concludes that if Me Agnaou had wanted to sound the alarm, he would have sent his message to the disclosure protection coordinator at the PPSC, a third party, and not exclusively to the same persons that he alleged having wanted to denounce. It is difficult to conclude that Me Agnaou wanted to disclose, to sound the alarm, to reveal information or to denounce acts, by sending two messages to the exact same people he was accusing.

[111] It seems more likely, according to the evidence, that through these emails, Me Agnaou wanted to once again apply pressure to express his disagreement, to signal that he was thinking it over, to have the file submitted to the Director of Public Prosecutions, and to convince his supervisors to rally to his point of view. The evidence filed reveals the following:

- The actual text of the email of April 1 contains a request to have the case be submitted to the Director of Public Prosecutions.

- Me Agnaou himself, in paragraph 54 of his 36-page memorandum of allegations, referring to the email of April 1, 2009, confirms that he asked for directions to submit the case to the Director of Public Prosecutions.

- Neither Me Agnaou nor his union representative, Me Gareau, mentioned disclosure in their discussions even though they were preparing to initiate several separate remedies during this period. Me Agnaou also testified that he wanted to continue the discussion internally and that his email of April 1, 2009, was for the sole purpose of submitting File A for evaluation by the Director of Public Prosecutions and the [TRANSLATION] "decision will be what it will be" (transcripts, volume 5, p. 1482). Me Agnaou had also discussed with Me Gareau, his union representative, the possibility of proceeding by "moot court" to make his case (transcripts, volume 12, p. 3399). Moreover, in an email to Me Morin dated April 4, 2009, Me Agnaou confirmed that he was asking for information on the procedure to follow to submit File A to the Director of Public Prosecutions for evaluation (Exhibit P-18).

- Me Agnaou stated that he had mentioned the recourse to the Office of the Commissioner for the first time only after April 2, 2009, and that he then noted to Me Lanthier that [TRANSLATION] "it would be an option" (transcripts, volume 12, pp. 3391 -3392). He also confirmed that, when he received the informational email on the Office of the Commissioner, sent to employees of the PPSC in February 2009, he had not then studied the Act, and that he had only made the connection between the Act and his own situation for the first time during his discussions with Me Lanthier, after April 2 (transcripts, volume 13, pp. 3730-3732).

- Me Agnaou informed no one, before January 2013, four years later, that the emails of April 1 and 2, 2009, constituted a disclosure under the Act. There is no evidence that he referred to those emails as a disclosure during his communications with the Office of the Commissioner in May and June 2009, during the Memorandum of Understanding negotiations, in the 36-page memorandum of allegations he sent to the Commissioner in October 2011, or in his reprisal complaint in January 2013. In fact, in his complaint, he only referred to a disclosure, that is, the one made to the Commissioner in October 2011;

- His email indicated that he would think about what action to take.

[112] Thus, Me Agnaou has not proved, on a balance of probabilities, that he made a disclosure under section 12 of the Act and therefore benefits from the protection the Act grants in this regard to a public servant who makes an internal protected disclosure.

[113] That said, and since I may be wrong on this point, I will nevertheless examine Me Agnaou's arguments as to the evidence of the existence of a link between the measure of September 2012 and the emails of April 1 and 2, 2009, as if these emails constituted a protected disclosure under the Act.

B. Measure

(1) Positions of the parties

[114] The measure is described in the complaint form that Me Agnaou filed with the Office of the Commissioner on January 7, 2013. At the hearing, Me Agnaou stressed that the measure was the fact that his staffing priority had not been respected and was therefore robbed of a job (transcripts, volume 18, pp. 5022-5024). He affirmed that the four individual respondents each carried out the measure, but to varying degrees. Finally, he confirmed that the gravity or illegality of the measure had no impact on its qualification under the Act.

[115] The Commissioner was also of the opinion that the respondents' alleged conduct, that is, the decision to reclassify the two positions to avoid appointing Me Agnaou to one of the positions, may constitute a measure adversely affecting his employment or working conditions (Commissioner's statements of particulars, p. 10). On this point, he noted that in

September 2012, Me Agnaou was still a public servant under section 42 of the *Public Service Employment Act*, SC 2003, c 22 (Employment Act). However, at the hearing, the Commissioner pointed out that the Memorandum of Understanding meant that there was no measure, since Me Agnaou behaved for several years as if the memorandum was valid.

[116] In his statement and at the hearing, Me Morin argued that he had taken no action against Me Agnaou and that there was no evidence that could connect him to the taking of a measure against Me Agnaou. Me Morin pointed out that his involvement could not be characterized as participation in the taking of a measure and that his participation was limited to (1) having advised Me Dolhai to ensure that Me Agnaou's rights were respected; (2) having been copied in the emails in connection with the reclassification in September 2012, whereas he was never a party to these exchanges in July and August 2012; and (3) having confirmed that the letters prepared by Me Saunders and Mr. Desharnais in September 2012 were excellent. Me Morin added, at the hearing and in the alternative, that there was no measure because Me Agnaou suffered no loss; his staffing priority enabled him to apply for positions in other departments of the public service.

[117] The other respondents argued, in their statements of particulars, that Me Agnaou was not the victim of a measure under the Act, since he was no longer an employee of the PPSC. At the hearing, they clarified that Me Agnaou's employment was not adversely affected, since the spirit and the purpose of the Memorandum of Understanding was to terminate his employment with the PPSC and not have him return there. They added that there had been no violation of his staffing priority, since priorities need not be considered in the context of a reclassification.

(2) Discussion

[118] The measures are listed in the definition of the word "reprisal" in section 2 of the Act, which refers to measures taken against a public servant. Paragraph (d) states that any measure that adversely affects the employment or working conditions of the public servant may constitute a reprisal. Therefore, one must determine whether Me Agnaou was still a public servant at the appropriate time and whether the abandonment of the appointment process for the reclassification of the two positions constituted a measure that adversely affected Me Agnaou's employment or working conditions.

[119] According to the Memorandum of Understanding signed by Me Agnaou and the PPSC on June 26, 2009, Me Agnaou still held a staffing priority in September 2012.

[120] However, subsection 41(1) of the Employment Act confirms the priority given to employees who are replaced during their leave of absence, while section 42 of the same act confirms that this employee does not cease to be an employee until the end of that allotted period, that is, at the end of the further period of one year following the end of the leave of absence, when the priority ends.

[121] The evidence reveals that Me Agnaou's priority ended on January 4, 2013 (Exhibit P-115, p. 1), the date on which he therefore lost his status as a public servant under section 42 of the Employment Act. Me Agnaou therefore still had public servant status in September 2012.

[122] Me Agnaou stated that the measure taken against him consisted of ignoring his staffing priority and reclassifying the positions instead of appointing him. More specifically, he alleged that the respondents usurped a job that was rightfully his. The Tribunal must determine whether this was a measure affecting his employment or his working conditions under paragraph (d) of the definition of reprisals.

[123] This term is not defined in the Act, but by applying the broad and liberal interpretation that should be given to it, "any measure that adversely affects the employment or working conditions of the public servant" may include the reclassification of two positions after Me Agnaou had asserted his priority, which had an impact on his employment and constituted a measure adversely affecting his employment according to paragraph (d) of the definition in section 2 of the Act.

[124] That said, the evidence reveals that Me Morin did not participate in the taking of the measure. His involvement was extremely limited, and I agree with his position that he did not participate in taking the measure.

C. Link between the disclosure and the measure

(1) Introduction

[125] It should first be noted that I do not agree with the proposition that Me Agnaou raised at the hearing, according to which it would suffice for the complainant to prove that the disclosure

was only one of the reasons for taking the measure, and not the only reason, in order to conclude that there were reprisals (transcripts, volume 18, p. 5054).

[126] I also disagree with the other proposition that Me Agnaou set out in his reply, namely, that if we take the position that there must be a causal link between the disclosure and the measure, the protection regime against reprisals will not work (transcripts, volume 19, p. 5325). Me Agnaou did not file any authorities or arguments to support his propositions, while the text of the Act clearly requires that, in order to find reprisals, the measure had to have been taken against the public servant "because the public servant has made a protected disclosure".

(2) Lack of evidence of a link between the measure and the internal disclosure

[127] As mentioned above, I will assume that the emails of April 1 and 2, 2009, constitute protected internal disclosures for the purposes of this review. Furthermore, I conclude that Me Agnaou has not proven that it is more likely than not that the measure was taken because he disclosed an act which he believed was a wrongdoing. It seems more likely, based on the evidence, that the measure was taken to ensure that the two lawyers accessed the LA-2B positions, to ensure that the appropriate process for recognizing their duties was followed, to avoid having one or more other priority public servants appointed to one of the positions set aside for them and to prevent Me Agnaou from returning to the PPSC.

[128] Me Agnaou maintained that the reclassification of the two positions was only an excuse to ignore his staffing priority since the PPSC no longer wanted him because of his disclosure. He maintained, despite the clear language of the Memorandum of Understanding, that his

commitment was limited to not returning to the QRO, and not to the PPSC in general. He added that the Memorandum of Understanding was contrary to public order since it could not disregard his staffing priority (transcripts, volume 18, p. 5036). Consequently, since no other reason can be justified, the measure can only have been taken because he made a disclosure in April 2009 (transcripts, volume 19, pp 5369-5370).

[129] Nonetheless, in connection with the reclassification, the evidence presented at the hearing showed that the concern regarding the recognition of the tasks of Me Pitcairn and Me Davis-Barron was genuine and that a process had been initiated for them to access an LA-2B position, all this being unrelated to Me Agnaou. Me Pitcairn and Me Davis-Barron testified, in a very credible manner, to having received promises of recognition and to having exerted pressure on Me Dolhai since at least 2011, causing as well the extension of the pool of candidates. Since at least May 31, 2011, Me Pitcairn and Me Davis-Barron had been sending emails to Me Dolhai in order to fill LA-2B positions (Exhibit P-86). In fact, Me Pitcairn testified that she conversed regularly with Me Dolhai on this subject, since her office was located near that of Me Dolhai.

[130] In January and February 2012, they refused to sign the job description for the LA-2A positions, since their daily tasks were rather at the LA-2B level (Exhibit P-89, R-229). The testimonial and documentary evidence also reveals that the decision to recognize the work of these two lawyers at the LA-2B level was taken around February 2012, after they refused to sign their generic LA-2A job description.

[131] Thus, to address the concerns of his two employees, Me Dolhai attempted to appoint them to LA-2B positions from the pool of which they and Me Agnaou were part. On March 31, 2012, Me Dolhai presented a business case to the PPSC finance committee, in order to obtain the funds necessary to create an LA-2B position and fill a vacant LA-2B position (Exhibit R-232; transcripts, volume 15, pp. 4414-4416; volume 17, p. 4627), and the committee approved the business case (transcripts, volume 17, p. 4636). On June 20, 2012, Mr. Buccino informed Me Dolhai that Me Agnaou had self-referred as a priority (Exhibit R-233). Me Saunders then informed Me Dolhai that a reclassification would have been the appropriate procedure to address the concerns of Me Pitcairn and Me Davis-Barron (transcripts, volume 15, pp. 4414–4417).

[132] It is unfortunate that Me Dolhai first chose to appoint the two lawyers from the pool already created, through the appointment process (transcripts, volume 17, pp. 4628-4629). It seems fair to conclude that Me Dolhai changed his strategy after Me Agnaou self-referred. It also seems fair to conclude that Me Dolhai was surprised to learn that Me Agnaou wanted the job, considering the terms of the Memorandum of Understanding and considering that he did not want him to return. However, everything also indicates that Me Dolhai would have changed the procedure regardless of the identity of the person who self-referred or who was referred.

[133] The evidence indeed reveals that Me Dolhai's objective was to ensure that the two lawyers were recognized at the LA-2B level.

[134] Me Saunders testified that Me Dolhai's section did not have the funds to appoint the two lawyers at the LA-2B level and hire a person with priority, regardless of who held it. The

evidence also reveals that only one of the two lawyers could have accessed an LA-2B position if Me Dolhai had persisted in going through the appointment process. Had it not been for the fact that Me Agnaou exercised his staffing priority, the appointment process would probably have gone through. However, there is nothing to indicate that the recognition of the work of these two lawyers at the appropriate level by way of a reclassification in 2012 was a pretext or had been motivated in any way by the fact that Me Agnaou allegedly made a disclosure in April 2009.

[135] According to Mr. Giguère's testimony, an appointment process is used when the position to be filled is vacant or will soon become vacant (transcripts, volume 11, p. 2982). The reclassification process is used when the position already has an incumbent but the functions of this position have evolved. At this point, classification experts review the duties of the position and determine whether the level of the position should be raised or lowered.

[136] Furthermore, even assuming that the Memorandum of Understanding could not have been opposed, or even that the reclassification was not valid, nothing in the evidence shows that it is more likely than not that the measure was taken, in September 2012, because Me Agnaou made a disclosure, in April 2009.

[137] Me Dolhai, Me Saunders and Me Morin were surprised to learn that Me Agnaou was exercising his priority, given the provisions of the Memorandum of Understanding and the history of relations between Me Agnaou and the PPSC. It is also likely that the PPSC managers did not want Me Agnaou's return precisely because of this history. The Memorandum of Understanding also recorded the intent of the parties when it was signed and Me Agnaou's

commitment not to return to the Service, defined as the PPSC. Even if the Memorandum of Agreement could not, in fact, restrict the exercise of Me Agnaou's right of priority, and even if the respondents had been aware of this reality at the time of signing the Memorandum of Understanding, the fact remains that this Protocol was signed precisely because of the history of tense relations between Me Agnaou and the managers and because the bond of trust had eroded. The list of disputes that were settled with the Memorandum of Understanding illustrates the difficult relationship between the parties.

[138] I therefore do not have to consider the validity or the scope of the Memorandum of Understanding.

[139] Furthermore, proof of the link between the measure and the disclosure also requires, first of all, proof of knowledge, by those who took the measure, of the existence of the disclosure. However, this proof has not been made.

[140] Me Morin, even if he had participated in the taking of the measure, did not know, in September 2012, that the emails of April 1 and 2, 2009, were a disclosure under the Act, and he had not been informed of this possibility.

[141] Me Boileau only learned about it around March 2013 and therefore could not have informed either of the respondents of the existence of this disclosure before September 2012.

[142] Me Saunders did not remember having received emails on April 1 and 2, 2009, or having been informed of the existence of an internal disclosure in 2009 (transcripts, Volume 15, pp. 4426-4427). He did not learn about the disclosure until May or June 2014, when he learned of the decisions of the Federal Courts. He did not learn of the reprisal complaint until 2015 when he received a letter from the Commissioner (transcripts, volume 15, pp. 4428-4429).

[143] Me Dolhai never interacted directly with Me Agnaou between 2009 and 2012 (transcripts, volume 17, pp. 4591-4592). He was informed in 2009 of the disagreement between Me Agnaou and management and the content of the email of April 1 and 2 (transcripts, volume 17, pp. 4596, 4599) and found that it was the expression of a major disagreement between Me Agnaou and his colleagues, but that nothing extraordinary justified his intervention. Me Dolhai testified that he learned that Me Agnaou had made a disclosure when the Federal Court returned the file to the Commissioner following the judicial review.

[144] Mr. Desharnais was not an employee of the PPSC in April 2009; he did not arrive until March 2012, and there is no evidence that he was informed of the existence of these emails or that they constituted a disclosure before the measure was taken in September 2012. Mr. Desharnais did not recognize the emails of April 1 and 2, 2009, and in 2012 he had neither received nor been informed of documents dating from 2009 regarding Me Agnaou (transcripts, volume 16, pp. 4687-4688).

[145] Me Agnaou offered no evidence that the respondents knew, in September 2012, that the emails of April 1 and 2, 2009, were or could constitute a disclosure under section 12 of the Act.

Me Agnaou himself did not disclose the possibility that these emails constituted an internal disclosure until January 2013, several months after the measure was taken.

(3) Lack of evidence of a link between the measure and the external disclosure

[146] Me Agnaou admitted that he was unable to provide direct evidence that the respondents had been informed of his disclosure of October 2011, or that they knew of its existence in September 2012. He still insists that the decision to reclassify the positions was made only one working day after the Deputy Commissioner's decision not to investigate, and that it is unlikely, in his view, that there was no information leaked from the Office of the Commissioner to the PPSC. Me Agnaou also acknowledged, however, that he had not shown direct evidence of a leak from the Office of the Commissioner (transcripts, volume 18, pp. 5055, 5057).

[147] Me Agnaou added that his evidence of a leak is circumstantial (transcripts, volume 18, p. 5058) and that it is essentially based on (1) the fact that Me Dion knew Me Saunders, which is why he recused himself from Me Agnaou's file; (2) the fact that Me Dion knew Justice d'Auray while she was a lawyer at the Department of Justice and spouse or ex-spouse of Me Saunders; (3) the fact that the Deputy Commissioner's September 6, 2012, decision not to investigate was contemporaneous with the date of the letter confirming the measure of September 10, 2012; and (4) an excerpt from the Office of the Commissioner's electronic record keeping system which indicates that the file was handed to Me Dion on September 5, 2012 (Exhibit P-67) (transcripts, volume 18, p. 5056).

[148] However, during his testimony, Me Dion confirmed that he (1) never followed Me Agnaou's file after recusing himself; (2) never informed the respondents and Justice d'Auray of the existence of the October 2011 disclosure; (3) never used the file management program and therefore never entered anything in it; (4) had not seen Me Agnaou's file, having recused himself as soon as he saw the names of Me Morin and Me Dolhai in bold letters on the disclosure form (transcripts, volume 5, pp. 1247-1248) ; and (5) never discussed Me Agnaou's file, either outside or inside the Office of the Commissioner (transcripts, volume 5, pp. 1333-1334). Me Dion testified very directly and very credibly.

[149] For his part, the Commissioner confirmed that the employer was not informed of the disclosure since no investigation had been initiated, in accordance with subsection 27(1) of the Act (statement of particulars of the Commissioner, para 46), which provides that it is only at the start of an investigation that the organization concerned is informed of a disclosure.

[150] According to the testimonial evidence, the respondents learned of the disclosure of wrongdoing from the Commissioner after September 2012, when Me Agnaou requested judicial review of the Commissioner's decision not to investigate his complaint of reprisals. In fact, Me Morin was informed of the existence of the disclosure in March 2013, when Me Boileau sent him the notice of application for judicial review (Exhibit D226). He became aware of the October 2011 disclosure form several years later, in 2017 or 2018 (transcripts, volume 14, p. 4245). Me Dolhai, on the other hand, was not aware of the existence of the 2011 disclosure form prior to the Federal Court decision (transcripts, volume 17, p. 4656). Me Saunders stated that he learned of the existence of the disclosure to the Commissioner when he learned of the

decisions of the various Federal Courts in May or June 2014 (transcripts, volume 15, p. 4429). And finally, as previously mentioned, Mr. Desharnais learned of the existence of Me Agnaou's disclosure from the Office of the Commissioner in April 2015 (transcripts, volume 16, p. 4687).

[151] In order to conclude that the respondents were aware, in September 2012, of the existence of Me Agnaou's disclosure to the Commissioner, I would have to exclude or ignore the testimonial evidence given during the hearing, except for that of Me Agnaou, which I have no intention of doing. Furthermore, it seems I would have to conclude that the Office of the Commissioner apparently did not comply with its enabling legislation and that it apparently informed the PPSC that a disclosure of wrongdoing had been presented to it. However, nothing in the evidence presented allows me to doubt these testimonies and to come to such a conclusion.

[152] Me Agnaou did not demonstrate, on a balance of probabilities, the existence of a link between his disclosure to the Office of the Commissioner and the reclassification of the two positions, a finding that he himself recognized. He thus did not prove that a measure was taken against him because he made a disclosure.

VIII. Conclusions

[153] For these reasons, I conclude that Me Agnaou did not demonstrate, on a balance of probabilities, that the respondents took reprisals against him.

DECISION

THE TRIBUNAL concludes that Me Agnaou did not show that reprisals were taken against him and dismisses his application.

DATED at Ottawa on this 13th day of November 2019.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Martine St-Louis

SOLICITORS OF RECORD

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