

Federal Court



Cour fédérale

Date: 20140403

Docket: T-1137-13

Citation: 2014 FC 329

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 3, 2014

Present: The Honourable Mr. Justice Annis

BETWEEN:

SYLVAIN MARCHAND

Applicant

and

**THE PUBLIC SECTOR INTEGRITY
COMMISSIONER AND THE ATTORNEY
GENERAL OF CANADA**

Respondent

REASONS FOR ORDER AND ORDER

Introduction

[1] This is an appeal from an order of November 21, 2013, by Prothonotary Mireille Tabib, under section 51 of the *Federal Courts Rules*, SOR/98-106 (the Rules). Prothonotary Tabib (the Prothonotary) allowed the motion made by the appellant (the applicant) to obtain an order requiring the Public Sector Integrity Commissioner (the Commissioner) to transmit documents in accordance with sections 317 and 318 of the Rules. The motion was filed as part of an application for judicial review of a decision of the Commissioner dated May 28, 2013, that the applicant committed two serious breaches of the *Values and Ethics Code for the Public Sector*, potentially misused public funds and was responsible for serious breaches with respect to management.

[2] The appeal is dismissed for the following reasons, but with some changes to the Prothonotary's order.

Factual background

[3] The applicant, Sylvain Marchand, who is the subject of the above-noted decision, is a former Chief Information Officer at the Canada School of Public Service (the School).

[4] The decision is the result of an investigation led by the Commissioner under the *Public Servants Disclosure Protection Act*, SC 2005, c 46 (the Act or PSDPA) following disclosures of wrongdoings that the applicant allegedly committed.

[5] On August 31, 2012, the applicant received a Notice of Inquiry from the Commissioner relating to six allegations of wrongdoing.

[6] The applicant alleges that between March 2012 and November 2012, the Commissioner did not give the applicant the opportunity to know from where or whom the allegations against him came or to know of what he was accused.

[7] In November 2012, the applicant's counsel required that the Commissioner reveal the information justifying that he be investigated. Counsel for the applicant also expressed his apprehension that the investigator, Christian Santarossa, is biased because of the [TRANSLATION] "reprehensible conduct" that he showed during a meeting in September 2012 and, therefore, he refused any future meetings between the applicant and Mr. Santarossa. Following an exchange of letters, the Deputy Commissioner replaced Mr. Santarossa with Stéphanie Dumas.

[8] On May 28, 2013, the Commissioner accepted the recommendations of the final report of the investigation and noted that the applicant had committed wrongdoings: either by misusing public funds through favouritism in awarding contracts; by creating an unhealthy work environment because of his abusive and disrespectful behaviour and by improperly using the workforce reduction exercise as an opportunity to dismiss employees for personal and not objective reasons.

[9] The applicant alleges that he is a victim of a political war waged by a group of individuals who were unhappy with their employer's decision to declare their positions surplus because of budget cuts that their department had to make. He stated that the people who provided evidence to the Commissioner's investigations made misrepresentations and provided inaccurate and slanderous facts about him, of which he was not aware.

[10] In June 2013, the applicant initiated a judicial review under sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, alleging that, among other things, the Commissioner did not respect procedural fairness and the principles of natural justice, contrary to paragraph 22(d) of the Act: i.e. "ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including ... persons alleged to be responsible for wrongdoings" (the relevant statutory provision is in the appendix).

[11] In his notice of application for judicial review, Mr. Marchand requested, under section 317 of the Rules, that the Commissioner transmit a certified true copy of a list of documents that were not in his possession, including the list of witnesses in the investigation, the transcripts of the interviews and notes of discussions relating to the applicant between the Commissioner or members of his office and certain witnesses.

[12] The respondents opposed the transmission of the documents under subsection 318(2) of the Rules, raising paragraph 22(f) of the Act, which imposes on the Commissioner the duty to "establish procedures for processing disclosures and ensure the confidentiality of information collected in relation to disclosures and investigations".

[13] Therefore, the applicant filed a motion for a disclosure order of certain documents indicated in his notice of application under section 318 of the Rules.

The impugned decision

[14] In her order, the Prothonotary noted that the arguments presented by the applicant in his motion record do not justify the relevance of the requested documents.

[15] However, the Prothonotary commented that the applicant's argument evolved during the hearing to show that the notes and recordings of witness interviews could establish that the alleged bias on the part of Investigator Santarossa permeated and compromised the integrity of the investigation and the investigation report. In reading the notice of application in a broad and liberal manner, she found that the argument that the applicant made during the motion hearing flowed logically from the facts and grounds for review stated in the notice.

[16] For these reasons, the Prothonotary awarded the motion and made an order including the following directives:

[TRANSLATION]

2. The Commissioner will transmit to the other parties' counsel the documents sought in the notice of motion, at the latest by December 19, 2013.

3. The parties' counsel will process the documents transmitted confidentially and will not divulge them to anyone, including their respective clients, until further order of the Court.

4. The parties will exchange and file with the Court as documents to be processed as documents relating to the dispute resolution conferences and will do so confidentially at the latest by February 3, 2014, their respective positions as to questions that are or remain at issue in this file, as well as the documents, recordings or any part of these that they consider relevant.

...

6. The costs of the motion are awarded against the applicant and in favour of the Attorney General of Canada and the Integrity Commissioner.

[17] The respondents seek to have the Prothonotary's order set aside on the ground that it is clearly wrong in that it orders the communication of information collected during the investigation so as to allow the applicant's counsel to find evidence in it to validate his argument of the investigator's bias. According to the respondents, this argument is not supported by specific facts or by the evidence and is not written in his motion. The respondents state that this exercise is tantamount to authorizing a "fishing expedition" in the investigation record on the basis of general allegations of bias in a context where the information collected during the investigation also benefits from a measure of confidentiality under paragraph 22(f) of the Act.

[18] The respondents rely on *Esgenoôpetitj (Burnt Church) First Nation v Canada (Human Resources and Skills Development)*, 2010 FC 1195 at paragraph 53 to point out that applicants are only authorized to receive documents transmitted under Rule 317 when they show that the information sought would help the Court in its determination of the merits of facts argued in support of the application for judicial review.

[19] The applicant argues that it is wrong to believe that the notice of application does not describe an apprehension of bias, as noted by the Prothonotary Tabib. Further, he argued that only the transmission of the documentation required will enable a just and equitable judicial review and will help show that the bias is founded. As for the confidentiality of the information collected during the investigation, the applicant points out that the court record already includes numerous personal documents and preliminary inquiry reports including the names of a great majority of witnesses and substantial portions of their testimony. Finally, he observed that there is no privative clause in the Act to entitle reducing the documentation that must be transmitted under section 317 of the Rules.

Issues

[20] The issues are as follows:

1. Is the applicant entitled to an additional disclosure on the basis of allegations of the investigator's bias?
2. Is the applicant entitled to an additional disclosure given the serious consequences that resulted from the investigation that was used as a basis for the Commissioner's decision?
3. Does the confidentiality of the PSDPA limit the disclosure of documents in the certified record?

Standard of review

[21] In *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27, the Supreme Court noted:

18 Discretionary orders of prothonotaries ought to be disturbed by a motions judge only where (a) they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts, or (b) in making them, the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case: *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), per MacGuigan J.A., p. 462-463.

Analysis

Introduction

[22] The attorney general argued that the Prothonotary applied a test of speculative relevance (i.e. a fishing expedition) based on the hypothesis that if the documents were disclosed, they could establish the appearance of the investigator's bias. The attorney general argued that in accordance with the appropriate test, the applicant must show an arguable case as to the fact that the investigator lacked impartiality on the basis of the information that he presented to the Court, not on the basis of what may or may not be in the investigator's file.

[23] In addition to adopting and expanding somewhat on the attorney general's arguments, the Commissioner argued that the Prothonotary erred in ordering the transmission of the documents requested of the applicant's counsel without taking into account the content of the duty of fairness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*Baker*)) with respect to statutory provisions on confidentiality limiting the disclosure of documents obtained during an investigation conducted within the context of the PSDPA.

[24] The Commissioner argued that decisions on issues of this nature must not be made in the interlocutory context of a pre-hearing conference, but should instead be made at the level of the

application. Therefore, he requests that the Court suspend the execution of the Prothonotary's order, if it is not set aside. I reproduce below paragraphs 4 and 5 of the Commissioner's memorandum:

[TRANSLATION]

4. The danger in applying too broadly or in a speculative manner the test under section 317 consists in the fact that the Court may, without being aware of it, predetermine the outcome of the proceedings without having the opportunity or the evidence to analyze the application on merit. In this case, the analysis of the degree of appropriate procedural fairness will include the consideration of the statutory regime provided in the *Public Servants Disclosure Protection Act* (the Act). In this regard, the protection offered to disclosers and witnesses, with respect to the information obtained during an investigation relating to the alleged wrongdoings, was not considered by the Prothonotary at all before making the order under appeal.

5. Although, in clear situations, a reviewing court determining an application for judicial review may decide that the specific circumstances of a proceeding would require a higher level of procedural fairness than was given by the Court during the proceeding, the Commissioner respectfully submits that the appropriate forum to do so is at the level of merit, not at the interlocutory step of section 317. The order under appeal, if affirmed, would stall the willingness of current and potential whistleblowers to freely state their concerns because of further exposure to possible reprisals.

[25] In light of these observations and for other reasons, I decided to rule on the issue of possible restrictions of disclosure because of the provisions of confidentiality in the PSDPA such as initially raised by the parties in the motion. I agree that it is not an issue that should be determined during a pre-hearing conference by examining each document; rather, it would be appropriate to create some general principles regarding the balance between disclosure requirements that normally apply and the limits that could be imposed under the Act.

[26] Further, I find that it is difficult to not rule on all the issues of disclosure at the same time, especially insofar as there is no need to only address one issue with two parts that must be weighed and considered with respect to each other. I am also aware of the delay and additional costs that may result from future decisions on the effect of the provisions on the confidentiality of disclosures that would be submitted to another appeal.

[27] I do not see anything that would prevent the Court from making decisions on the confidentiality of documents at this stage of proceedings, as had been raised by the parties and, indeed, I do not see any other practical method to address the issue of the disclosure of the investigator's file. Further, to allay fears of a premature disclosure of the Commissioner's files, my order will be suspended awaiting the possible exercise of the respondents' right of appeal. If the matter is appealed, the Court of Appeal will have all the issues before it at the same time, in addition of any benefit that could result from this Court's findings on the definition of issues to be decided.

[28] For the reasons that follow, I reject the respondents' arguments, finding that the Commissioner's record must be completely disclosed, despite the confidentiality provisions of the PSDPA. I made this finding in part by affirming the Prothonotary's order. Even more importantly, I find that the disclosure of the investigator's file is necessary based on arguments first raised by the applicant in his motion, before redirecting his submissions to the issue of the apprehension of the investigator's bias.

[29] I find that the applicant first argued that the disclosure of the documents was necessary given the fact that the Commissioner relied on a non-transparent investigation process that significantly prejudice him by finding that he had committed serious wrongdoings. In my view, these factors require a high level of fairness toward the applicant, which requires a broad interpretation of exceptions to the PSDPA confidentiality clauses. The complete disclosure of the requested information is necessary to allow the applicant to be fully informed of all details regarding the manner in which the investigation was conducted to make its findings, in addition to the need for this information to be put before the Court for the proper settlement of this matter. More reasons on these issues follow below.

Is the applicant entitled to an additional disclosure on the basis of allegations of the investigator's bias?

[30] It is well established that, as a starting point, the record before the Court should be limited to the documents that were before the Commissioner when the decision was made. Generally, they are the investigator's report and the documents that were before the Commissioner (see *Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455, at para 11-12 (*Pathak*)). However, the Court would require the disclosure of documents beyond those before the decision-maker where a breach to procedural fairness is alleged or the investigator's report is allegedly inaccurate or incomplete (*Pathak* at paras 19-22; *Clark v Canada (Attorney general)*, 2007 FC 9 at paras 32-40; *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720 at paras 50-52, aff'd by 2007 FCA 131 (*Gagliano*); *Deer Lake Regional Authority Inc v Canada (Attorney General)*, 2008 FC 1281 at paras 29-35).

[31] In his documents attached to the motion, the applicant argued that there was a breach of procedural fairness. However, none of the allegations made concerned an apprehension of the investigator's bias. The Prothonotary allowed the applicant to change his argument along the way to base his request for disclosure on the allegations of the investigator's bias. She considered the notice of the application for judicial review, by pointing out the presence of numerous elements that raised concerns of the investigator's bias during the investigation. I find that the Prothonotary did not err in allowing the applicant to vary his argument, except to the extent that it would prejudice the respondents by taking them by surprise. When I raised this issue, there was no indication of prejudice or that a request for an adjournment was considered necessary.

[32] I agree with the Prothonotary's characterization of the notice of application as sufficient evidence that the issue of the investigator's bias was raised. Using the notice of application, to define the parameters of relevance, is generally accepted before this Court (see, for example, *Ecology Action Centre Society v Canada (Attorney general)*, 2001 FCT 1164 at para 6; *Gagliano*, above, at para 49).

[33] The exhaustive, almost verbose, notice of application refers to extensive documentary evidence and, in my view, provides a sufficient basis to establish that the investigator's initial bias was a serious issue in this matter.

[34] First, the evidence on the record contained documents referring to the applicant's allegations against the investigator during the investigation. These allegations, although rejected

by the Commissioner, have resulted in the appointment of another investigator to lead the investigation. This shows that the investigator's impartiality was a current issue during the investigation and not an issue invented after the fact.

[35] Second, some doubt remains as to the extent to which the report relied on the first investigator's findings, given the fact that he co-signed the reports. Therefore, assigning a second investigator to the record does not seem to have allayed concerns as to the first investigator's contributions to the report.

[36] Third, the documents provided as evidence show the existence of submissions filed by the applicant's staff, which are very critical toward the investigator, including suggestions that he intimidated Mr. Marchand and his staff in a somewhat contradictory manner. This evidence was in the certified record before the Prothonotary at the time that she made her decision.

[37] I am of the view that the test to apply in the context of an allegation of impartiality of an investigator is that expressed by Justice Mactavish, when she dealt with the same issue regarding the Canadian Human Rights Commission in *Hughes v Canada (Attorney general)*, 2010 FC 837 at paragraphs 23 and 24:

[23] That said, because of the non-adjudicative nature of the Commission's responsibilities, it has been held that the standard of impartiality required of a Commission investigator is something less than that required of the Courts. That is, the question is not whether there exists a reasonable apprehension of bias on the part of the investigator, but rather, whether the investigator approached the case with a "closed mind": see *Zündel v. Canada (Attorney General)* (1999), 175 D.L.R. (4th) 512, at paras. 17-22.

[24] As the Court stated in *Broadcasting Corp. v. Canada (Canadian Human Rights Commission)*, (1993), 71 F.T.R. 214 (F.C.T.D.), the test in cases such as this:

[I]s not whether bias can reasonably be apprehended, but whether, as a matter of fact, the standard of open-mindedness has been lost to a point where it can reasonably be said that the issue before the investigative body has been predetermined.

[Emphasis added.]

[38] In the case of an order to disclose additional documents in an application for judicial review, I think that, on the basis of the attorney general's submissions, the test would be to know whether there is a reasonably defensible argument that the investigator seems to have adopted a closed attitude against the applicant. Based on this standard, I am persuaded that the Prothonotary had sufficient evidence before her to conclude that an appearance of bias was a significant issue in this proceeding so that a fairly arguable case was established to order the additional disclosure of the Commissioner's file.

Is the applicant entitled to an additional disclosure given the serious consequences that resulted from the investigation that was used as a basis for the Commissioner's decision?

[39] In the documents in support of his request, the applicant argued that because of the importance of the investigation's role in determining the final outcome, unless the documents are disclosed, it would be impossible to understand the logic of the report. Further, he argued that the PSDPA provisions limiting the confidentiality of information gathered relating to disclosures should not apply once the Commissioner has found that the applicant has committed serious wrongdoings. He linked these arguments to the highly prejudicial nature of the recommendations

and the lack of transparency in the investigation, which prevented him from understanding how the investigator had made the findings of fact. Without knowing how the investigator reached his findings, he could not defend himself. Moreover, without knowing how the investigation was conducted, the Court could not decide whether he was treated fairly during the investigation.

[40] I reproduce below paragraphs 21 to 31 of the applicant's affidavit in support for his request for additional disclosure:

[TRANSLATION]

21. These documents are part of the Commissioner's investigation file;

22. Further, everything suggests that these documents have had a significant impact on the Commissioner's decision to investigate the applicant and on the findings of the disputed investigation report, as the decision describes;

23. Therefore, as the information contained in this documentation is directly related to the grounds for dispute, they are required for the purposes of this case and for disputing the Commissioner's investigation report because without this information, it is impossible to understand the rationale of the report;

24. Further, access to these documents is required to avoid violating the *audi alteram partem* rule, a right recognized by procedural fairness and the principles of natural justice;

25. Indeed, it is impossible for me to attack the probative value and the truth of the complaints filed against me without knowing the complainants, the full contents and the context of the questions asked;

26. It is impossible for me to defend myself against the complaints and accusations filed against me without knowing their full content;

27. This documentation is relevant to the application for judicial review in that it had a crucial role to play, not only as concerns the Commissioner's decision to launch an investigation, but also as concerns the findings of his investigation report;

28. It is also vital that I have the chance to file these documents and materials in the Court's record so that it may consider the entire record that was before the Commissioner during the investigation;

29. The Commissioner's refusal to transmit the required documents is not justified;

30. Indeed, although the *Public Servants Disclosure Protection Act* provides for the confidentiality of the information in question, this confidentiality cannot survive in an adversarial context, the scope of which is the reputation of an individual who is suspended from his duties because of an investigation and who is exposing himself to serious future consequences related to whether this report has merit, given the nature of the recommendations that the Commissioner has the power to give in the circumstances, as provided in section 22 of the enabling statute;

31. Finally, since one of the grounds for disputing the Commissioner's investigation is the breach of procedural fairness, the concept of documents relevant to the application must be interpreted broadly and the documents surely cannot be deemed irrelevant without first allowing the Court to read them;

[41] In my view, the applicant was essentially on the right track when he argued that the nature of the decision-making process and the serious consequences imposed on him were potentially a breach of the principles of natural justice and of procedural fairness that he was owed by refusing to give him access to the specific information on how the investigator gathered the information that was used as a basis for his findings of fact.

[42] The applicant faced a recent and fairly innovative legislative act containing a number of provisions that emphasized the need to ensure the confidentiality of the entire disclosure process. Instead of tackling the legislation head-on by arguing that it is appropriate to interpret the procedural fairness provisions with more generosity of spirit, it is perhaps understandable that he

would argue that these provisions would be somewhat mitigated following a finding of his wrongdoing. I do not find that there is a marked difference between the requirement to disclose during the decision-making process and after the negative decision has been taken.

[43] Nevertheless, I think that he is correct to say that the seriousness of the impact of the Commissioner's decision combined with the lack of transparency in the investigation and the disclosure processes raises fundamental issues of fairness that the reviewing court must consider. Moreover, he may not have far long enough when he argued that breaches to fairness take place only once the final decision is made and not during the investigation.

[44] However, after defining the most important two factual elements of the breaches to fairness that he wants to dispute—serious prejudice experienced and lack of transparency in the investigation process—I have no difficulty in extending his submissions to include the allegation of not being treated fairly in accordance with the provisions of the PSDPA; in other words, contrary to paragraph 22(d) and subsection 27(3) of the Act. These provisions are reproduced below with my emphasis, as follows:

22. The duties of the Commissioner under this Act are to

...

(d) ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;

27. (3) It is not necessary for the Commissioner to hold any hearing and no person is entitled as of right to be heard by the Commissioner, but if at any time during the course of an investigation it appears to the Commissioner that there may be sufficient grounds to make a report or recommendation that may adversely affect any individual or any portion of the public sector,

the Commissioner must, before completing the investigation, take every reasonable measure to give to that individual or the chief executive responsible for that portion of the public sector a full and ample opportunity to answer any allegation, and to be assisted or represented by counsel, or by any person, for that purpose.

[45] I would not like to strictly limit the arguments of the applicant to problems of transparency. The lack of transparency in the investigation is a major issue in this matter, but I believe that it is only one aspect of the most fundamental issue, which is the appropriateness of a non-transparent investigation to make findings of credibility that were the basis of the Commissioner's decision. On this basis, I summarize the applicant's original arguments as follows:

[1] The applicant experienced serious consequences following the Commissioner's decision because of its impact on his employment situation, i.e. being suspended from his position and damage to his reputation, which are consequences resulting from the investigation ;

[2] Neither the investigator or the Commissioner have taken all reasonable measures to be entitled to procedural fairness or any possibility of responding to the allegations against him because of the lack of transparency and the appropriateness of the investigation process to determine a matter relying in large part on findings of credibility; and

[3] For the applicant to respond to the attacks against him from various witnesses and to defend himself, as well as for the Court to review these issues and consider the appropriateness of the investigation process as it was conducted given the consequences he experienced, the Court must have the details on how

the investigation was conducted, which requires the disclosure of the investigator's file.

[46] Considering the central role played by the investigation process of the decision, I agree that the investigator's file must be disclosed and be part of the certified record to allow the Court to decide the issue on the basis of the evidence regarding how the investigation was conducted, not only its findings.

[47] The obligation to disclose the investigator's file is, however, subject to my other comments below relating to the limits to the disclosure resulting from the confidentiality provisions of the PSDPA. However, before that, I will comment on the issue of prejudice to the applicant resulting in the Commissioner's decision and I will describe some known weaknesses of investigations so as to draw factual conclusions on credibility, as well as other issues that require the full disclosure of the investigation process.

Final decision resulting in serious consequences for the applicant

[48] The Commissioner stated that the applicant had committed several wrongdoings by misappropriating public funds and serious breaches in management, to the detriment of his work colleagues. There is no doubt that the decision clearly had a negative impact on the applicant's career resulting in his suspension from work, while damaging his reputation. Moreover, I am certain that it is a decision that caused him a great deal of emotional stress and personal embarrassment that will continue in the future.

[49] The Commissioner's finding that the applicant committed serious wrongdoings is a final and binding decision under the PSDPA. Therefore, the appointed head of the school must take measures to remedy the situation. Therefore, it is not as though the Commissioner exercised an intermediary duty or acted as a step in another process, such as when he refers a complaint of reprisals to the Public Servants Disclosure Protection Tribunal for a hearing.

[50] Although it is not the Commissioner's duty to ensure that the applicant is disciplined, the Act provides that disciplinary measures, including the termination of employment, may result in wrongdoing. The Commissioner may require that the appointed head takes measures to implement the recommendations contained in the report, or that he provided reasons for which no measure was taken. If a disciplinary measure was taken and the applicant succeeded in defending himself against it, it seems that there is no provision in the Act for a withdrawal of the statement relating to committing the wrongdoing. In other words, the judicial review proceeding is the only opportunity for the applicant to cancel the decision that he committed a wrongdoing, as determined under the PSDPA.

[51] There are measures in the legislation that require the protection of the confidentiality of the decision and the identity of individuals involved in the disclosure process. Nevertheless, a copy of the decision must be provided to employees who made the disclosure. Further, on receiving the Commissioner's decision, the federal agency is required under paragraph 11(1)(c) of the Act to "promptly provide public access to information that ... describes the wrongdoing, including information that could identify the person found to have committed it if it is necessary to identify the person to adequately describe the wrongdoing". The Commissioner is required to

point out the case to Parliament and include an abridged reference to the case in the Commissioner's annual report.

[52] I am persuaded that, following an investigation on the circumstances and the scope of this question, the school staff allegedly learned the details of the decision and the identity of Mr. Marchand as the wrongdoer who misused public funds and committed acts constituting serious breaches in management. A journalist with weak deduction skills could discover and publish the applicant's identity. The applicant did not request an order of confidentiality for his identification, which, in my view, shows that the damage to his reputation because of the report has already taken place.

The role and nature of an investigation under the PSDPA

[53] The Commissioner adopted the findings and recommendations of the investigator's report in this matter. It is well recognized that when it is produced, the report is part of the decision under review in the application for judicial review (see *Sketchley v Canada (Attorney General)*, [2005] FCJ No 2056 at paras 36-39).

[54] However, this seems to be one of the rare cases where an investigation largely determines the final decision on the finding of a serious wrongdoing by an individual. Thus, the investigation carries clearly more harmful consequences and even plays a very different role from an investigation conducted on alleged reprisals under the Act, or from an investigation conducted by other federal agencies for similar purposes of controlling access, such as the Canadian Human Rights Commission.

[55] For the complaints under human rights legislation, such as a reprisal complaint under the PSDPA, an investigation is used to help the Commissioner in his duty as custodian to decide whether a complaint must be rejected or referred back to the court for a final decision. In both cases, when the matter is referred back the court, a hearing takes place, which largely eliminates concerns of the fairness of the investigation process and the reliability of the investigator's findings of fact. The Commissioner is required to prove the merits of his case by introducing the oral testimony of witnesses who will be submitted to a cross-examination before a neutral and independent decision-maker. The applicant is given every opportunity to know the evidence accumulated against him and to rebut it. This ensures at the same time the fairness and reliability of results to the extent possible, after being subjected to tests by both parties.

[56] The courts have determined that in exercising his custodial duty, when a commission decides to refer the matter back to a court, it is "more administrative than judicial in nature": *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364 at para 26, quoting *Losenno v Ontario Human Rights Commission* (2005), 78 OR (3d) 161 (CA) at para 15. Therefore, the principal condition is that the investigation is more in-depth and that the investigator does not raise any apprehension of bias.

[57] Logically, this raises the issue of whether what seems to be the same investigation process can change its "nature", so to speak, by simply providing the alleged wrongdoer with a copy of the investigator's report when the key issues centre on credibility and intentional wrongdoing. It is clear to make the distinction between the administrative or judicial nature of a

decision-making process based on the content of the level of the duty of fairness that is required and that is due to the individual affected by the decision. Therefore, it is not the investigation process that determines the content of the duty of fairness, but the nature of the decision resulting from it.

[58] In examining the content of the duty of fairness, it must be taken into account that the investigation into this matter has provided the applicant with a minimum of transparency on how the decision was made. The investigation allowed the collection of evidence and, to the extent possible, making findings of fact and findings of fact and law on the wrongfulness of the applicant's conduct under his mandate, which consists in determining whether a wrongdoing occurred. The fact that the main purpose of the Act is to determine whether a wrongdoing occurred cannot, however, subsume and conceal the clearly negative impact of the decision on the applicant. Moreover, if the person is not found responsible for the conduct, how could the corrective measures required by the legislation be undertaken?

[59] In accordance with the Act, the investigation was conducted confidentially, apparently one witness at a time and without the applicant. In this context, an investigator exercises considerable discretion over the process, for example, in the choice of the questions to be asked, which ones merit following up and, depending on the case, to what extent and with whom. There may be problems that occur in noting the evidence, summarizing the evidence and even presenting it in a report.

[60] Since the investigations relating to disclosures are “conducted as informally and expeditiously as possible” (subsection 26(2)), I cannot imagine that there would be objections to an investigator asking suggestive questions or relying on hearsay, opinion evidence or character evidence, which could have an impact on the final report, without referring to it.

[61] Moreover, the investigators invariably face issues of credibility both in terms of contradictory evidence, inconsistency in a witness’s evidence, answers that are very speculative, which lack realism or raise concerns with respect to the witness’s memorandum, or other aspects of the involvement of witnesses in the matter that could affect their answers. It is a process of assessing evidence and considering personal interest and the credibility of witnesses with respect to making value judgments about the probability and accuracy of the situations considered on the basis of reasonable standards and experience in arriving at findings of reasonable fact that will be reflected in the investigator’s report. In other words, the investigator’s duty is to make findings of fact and law, but without the benefit of all the attributes of a hearing that make the process fair by its transparency and the most reliable findings by the objection process by cross-examination.

[62] The investigator’s report in this matter is filled with issues of credibility because of inconsistencies noted in the evidence of witnesses questioned by the investigator and the applicant’s answers regarding his statements. There seems to be a rift among staff where the applicant worked, to the extent that two of his administrative officers provided evidence criticizing the investigator’s conduct. As the applicant pointed out, the situation is complicated by the fact that workforce reduction was conducted because of budgetary restrictions. Following these complaints, it seems that 14 members of the staff who had been fired were asked to return

to work. The interest of witnesses in proving that the applicant committed a wrongdoing has an important place in the investigation.

[63] Further, a key witness who reported directly to Mr. Marchand recanted his original testimony that Mr. Marchand was a mentor and an exemplary manager. The investigator states that in light of the inconsistencies in this statement with respect to those of other witnesses, [TRANSLATION] “he decided to go meet [the individual] informally, so as to establish a relationship of trust that would allow [the individual] to confide, if he indeed had things to share”.

[64] The lack of transparency extends to the investigator’s qualifications, including his training and experience; whether he was subject to protocols and followed them; whether, for example, the witnesses were required to verify the accuracy and completeness of their draft statements by signing them. The only background information provided to the applicant with respect to the investigation itself is contained in the preliminary and final reports and in the documents obtained by the investigator from other sources.

[65] It is precisely because the investigators exercise such control and discretion outside of the parties’ view in conducting their investigations that there are few opportunities provided to oppose the evidence at the time when it is presented that the applicant requires access to the investigator’s file to defend himself. It was another reason for which the Court must also know what occurred during the investigation.

Do the confidentiality provisions of the PSDPA limit the disclosure of documents in the certified record?

[66] Paragraph 22(d) and subsection 27(3) of the Act already referred to imposed duties of procedural fairness and natural justice to the investigator and the Commissioner when negative consequences are provided for individuals because of their decisions.

[67] Other provisions provide the confidentiality of information obtained in the disclosure process. The initial short description at the start of the Act emphasizes the purpose of providing protection to individuals who disclose wrongdoings. Similarly, the preamble reflects the purpose of the Act to protect public servants who disclose wrongdoings. Therefore, I find that the protection of public servants who disclose wrongdoings constitutes one of the main purposes of the legislation provided by Parliament.

[68] As regards the Commissioner's responsibilities, paragraph 22(e) of the Act provides the protection of all individuals involved in the disclosure process, subject, however, to exceptions provided by another Act of Parliament or made necessary by the principles of procedural fairness and natural justice. Similar obligations are imposed on chief executives under paragraph 11(1)(a), with the exception of the cases indicated above where the identity of the individual found guilty of wrongdoing may be disclosed if by giving public access to the information concerning wrongdoing, the identification of the wrongdoer cannot be avoided.

[69] Paragraphs 22(f) and 11(1)(b) impose identical duties to the Commissioner and the chief executive as to the implementation of procedures ensuring the confidentiality of information

gathered relating to disclosures of wrongdoings. As previously indicated, paragraph 22(f) is raised by the respondents to the extent that it does not seem to impose qualitative limits to the duty of maintaining the confidentiality of information. However, I do not believe that this provision offers greater protection of confidentiality against revealing information gathered during the disclosure process. Overall, the provision speaks of the duty to implement procedures to ensure the confidentiality of information. The question of whether this information must be communicated to the applicant remains no less subject to the rules of procedural fairness and natural justice and the requirements of the legislation adopted by Parliament.

[70] Finally, section 44 of the Act repeats the general duty of preserving confidentiality of any information obtained by the Commissioner, except if the communication is done by executing a legal obligation or is authorized by this Act.

[71] Therefore, while numerous provisions exist providing the confidentiality of information gathered by the Commissioner in the performance of his duties, these provisions also recognize the exceptions where information should be divulged if necessary under other Acts of Parliament or requirements of natural justice and procedural fairness.

[72] The framers of the Act clearly predicted the tension that would arise between maintaining the confidentiality of information gathered in exercising these duties and the necessity of disclosing information when required by the Act or to satisfy the principles of procedural fairness. It was supposed that the framers recognized the contextual nature of making decisions when these opposing purposes are present and thereby leave the courts the task of determining in

which circumstances the confidentiality of information must be maintained, as opposed to the need to disclose for the purposes of fairness or that required by other laws. The limits of confidentiality clauses by the [TRANSLATION] “other acts” include a reference to the *Federal Courts Act* and its Regulations, under which the relevant documents must be disclosed when it is considered necessary for the conduct of its proceedings.

[73] Therefore, in short, besides the considerable emphasis in the legislation on the protection of public servants who disclose wrongdoings, the provisions of the Act are not of great use in resolving problems such as those arising in this case, which must be largely determined on the basis of the normal rules of the content of the duty of fairness.

Weighing the duty of confidentiality of the Commissioner and his obligation of fairness

[74] Generally, for questions concerning the content of the duty of fairness, the Court is inspired by the Supreme Court decision in *Baker* that lists the general contextual tests governing the question. Although the legislative context of other factors plays a role, I am convinced that the importance of the decision for the concerned individual places the bar quite high with respect to the content of the duty to the applicant. I quote paragraph 25 of *Baker* to emphasize this point with respect to its application to the decisions affecting the employment of an individual, as is the case in this matter:

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J.

(as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:

A high standard of justice is required when the right to continue in one's profession or employment is at stake. . . . A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

[75] Moreover, the issue in this matter is not so much the content of the duty of fairness as meeting one of the two recognized fundamental requirements of procedural fairness, i.e. to provide sufficient information to allow the individual concerned to defend him- or herself adequately.

[76] Given that a non-transparent investigation process was used in this case, it seems to me that it is even more important for the purposes of fairness that the applicant receives as much information as possible to allow him to dispute the findings of credibility on a procedural basis if required. In light of the principles of natural justice and procedural fairness, I am not of the view

that the provisions of confidentiality are a very limiting factor in the circumstances, except for the protection of the identity of the discloser of wrongdoings, in recognition of the importance that Parliament gives to this goal.

Confidentiality of information from witnesses

[77] In the circumstances of this matter, it would seem that the two key areas of concern relate to the production of information allowing for the identification of public servants disclosing wrongdoing and the information obtained from them and other witnesses during the investigation. This includes corollary issues raised in this appeal with respect to the scope or the limits of the disclosure required to maintain part of the confidentiality of the information, for example, whether the recordings of interviews with witnesses are protected, or even, whether confidentiality extends to the documents describing the investigator's work, such as his notes and his work plans or his reports. Each circumstance requires a separate assessment.

[78] I consider that the protection covering the information of witnesses is the simplest case to resolve in that the Commissioner has already recognized the duty to disclose the names of witnesses and a summary of the evidence on which he relies. The only outstanding issues concern the disclosure of information collected from witnesses that has not been raised and the level of detail that must be provided with respect to information obtained from witnesses and how it was obtained. In my view, none of this information is protected in the face of the important duties of natural justice imposed on the Commissioner.

[79] First, it is difficult for me to contemplate political reasons that would allow the protection of any information obtained from or that refer to witnesses. Supposing that they are not the individuals who disclosed the wrongdoing, or if so, whose identity is not revealed based on the information provided, there is no duty of fairness or provision of natural justice to my knowledge that would limit the full communication of information provided to an investigator in an investigation that may be used in a final decision with a negative impact on the applicant.

[80] Because of the duties attached to their positions, I find that the witnesses are required to co-operate in an investigation into wrongdoing. In this sense, their participation is involuntary. Therefore, witnesses who are sought as part of the investigation cannot be put in the same category as the public servants who have disclosed a wrongdoing, whose identity must not be revealed according to Parliament, unless it is absolutely necessary.

[81] The Commissioner already disclosed a summary of the information provided by the witnesses. The respondents argued that no additional information should be provided beyond that contained in the certified record. I cannot believe that they are serious when they suggest that only the documents before the Commissioner should be produced. In any event, in this case the extent of the production of information from witnesses is determined largely by the need that it be disclosed in such a manner as to allow the assessment of what I believe to be the key issue before the Court with respect to the fairness and the appropriateness of the investigation. I have no hesitation in requiring the disclosure of all the investigator's documents, including his notes and the recordings of interviews, as well as the information obtained from other witnesses that was not raised or quoted in the investigator's reports.

[82] In my view, the applicant must be authorized to be fully aware of the allegations made against him; not only must he be aware of the findings, but also the manner in which these findings were made and the level of interaction between the investigator and the witnesses. I know that these concerns were shared by the Prothonotary with respect to allegations of bias by the investigator, who, in her view, required a more complete disclosure of all the investigator's information.

[83] However, I make a distinction between the two decisions in terms of justification of the scope of the required disclosure. Using an investigation to reach the type of findings of fact made in this case, including those of credibility, is a new form of decision-making through which a final conclusion is drawn, which results in significant negative consequences for individuals. Therefore, to a certain extent, I find that it will be up to the respondents to establish that an investigation may be used for this purpose, or at least to show that the application of an investigation process that lacks transparency is not unfair given the significance of the outcome. This requires an investigation on the investigation process in its entirety, if only to respond to the concerns regarding the fairness of the process and to identify the protocols that should apply so as to respect the rules of natural justice.

[84] Issues of bias, however, would not always lead to the same extent of disclosure because the burden of evidence is on the applicant to show the need for production. At any given time, the request for detailed documentation may be a fishing expedition, rather than obtaining evidence in support of credible facts. This was the concern of the respondents in such a

disclosure of the investigator's file. In my view, this limitation only applies when the issue relates to the appropriateness and fairness of the investigation process itself.

Protection of the identity of public servant(s) who disclose wrongdoings

[85] The Act is clear in its intention to grant the broadest protection possible to public servants who disclose wrongdoings in the public service. These protections are tempered somewhat by the compensatory requirements to grant to the individuals affected by the Commissioner's investigations and decisions the right to fairness and natural justice. However, I consider that the statutory directions are to encourage the courts by abundance of caution to protect the identity of individuals who have disclosed wrongdoings during the interpretation of these provisions.

[86] The greatest challenge in protecting the identity of disclosers occurs naturally in the situation faced here where the Commissioner noted, following an investigation, that the applicant was the wrongdoer. In my view, the other situations foreseen by the Act, such as when the Commissioner refers a complaint of reprisals to the Tribunal or decides not to pursue a disclosure or a complaint of reprisals, do not result in the same seriousness of the consequences for the person concerned or the same finality of the decision. The content of the duty of fairness in these situations is not as great as it is in this case. The applicant argued that once the finding that he committed a wrongdoing has been made, it is no longer necessary to protect the identity of the discloser of information. I do not agree. As described, I find that Parliament's intention was to protect the identity of these individuals unless the circumstances of the Act require that it be revealed.

[87] For example, if the Commissioner had not relied on the evidence of the individual who made the disclosure, but rather based his decision on the evidence of other witnesses, normally there would be no reason to disclose either the name of the discloser, or his testimony. Similarly, if the report describes the evidence of a number of witnesses with their names, including the name of the discloser, it is not necessary for this individual to be identified as the initiator of the proceeding. The Commissioner may also take other measures to avoid identifying the discloser.

[88] Nevertheless, in some cases, it is not possible to protect the identity of the discloser, for example when this individual is the only witness of the events, or when his identity is revealed by deduction. If the information provided by the discloser is raised, this information must be disclosed, without necessarily revealing its source, subject to the Commissioner's point of view with respect to the level of fairness appropriate in the circumstances. Moreover, there are circumstances where the context simply requires revealing the identity of the person disclosing the wrongdoing. That is the case here, as it concerns workplace disputes.

The discloser's personal interest or ill will in the outcome of the matter as reason to make the disclosure

[89] I think that the duty to reveal the identity of the discloser arises when there is a fear that personal interest or ill will may be motivating factors underlying the disclosure, in particular when issues of credibility are present. The individuals may have various reasons to reveal wrongdoings. I recognize that the inspiration for the Act stems from the circumstances of the sponsorship scandal. Parliament identified the need to have legislation that encourages public servants to disclose wrongdoings in the public service and to make sure that no reprisals occur as a result. Described as whistleblowing legislation, the image that comes to mind is that of

disinterested disclosure made by concerned public servants who seek to prevent wrongdoings observed but not reported, somewhat like encouraging a neighbour to report a crime taking place in the house next door without fear of reprisal.

[90] That does not seem to be the situation in this case. There are indications that the disclosers and witnesses are motivated by ill will toward the applicant, in addition to benefitting personally from a finding that he had committed wrongdoing against them. When issues of personal interest or work relationships may be a factor in the complaint, the decision-maker must determine whether the disclosure of an allegation of wrongdoing is being used as a sword rather than as a shield. What I mean is situations that occur often where management attempts to improve productivity or resolve wrongful conduct and faces a series of complaints, in particular relating to harassment, intimidation or discrimination. I do not know the specific facts of this case, but it seems that 14 members of the staff who were declared surplus were asked to return to work and the applicant was suspended, all because of the disclosure of wrongdoing. The applicant alleges that this is a factor in the evidence gathered against him. In this sense, the discloser is, in fact, a complainant against the individual alleged to have committed the wrongdoing.

[91] Where there are concerns with respect to personal interest or ill will toward the guilty party, it becomes an important issue in a confrontation to establish credibility. Similarly, the concerns are greater when a group of employees organizes itself to oppose management. The reality is that individuals may be influenced by others to do something that they would never have considered without prompting from others. Further, defence generally begins with the

individual who filed the complaint and goes forward from there, following the timeline of events, in this case, the investigation, where other witnesses may join the process.

[92] Given the motivation behind the disclosure, another factor that, in my view, must be considered when determining whether it is appropriate to disclose information regarding the discloser is to know whether the disclosure of wrongdoing could have been resolved by another complaint process available to the public service where the identity of the complainants and witnesses cannot be concealed. In this respect, it seems that the Commissioner's findings on the serious breaches of management in terms of harassment, intimidation and inappropriate workforce reduction are all issues subject to the protection of the other rights of employment by harassment grievances or complaints. In the case of serious allegations in the employment sector, the person alleged to have caused the prejudice has the right to know the identity of the complainant and the entirety of the evidence against him.

[93] Therefore, in conclusion, to determine whether it is required for the purposes of fairness to the applicant to disclose the identity of the discloser(s) of wrongdoings, it is especially a matter of context. While the Commissioner is required, under the PSDPA, to guarantee the confidentiality of the identity of the person who made the disclosure, I find that the duties of procedural fairness and natural justice outweigh these protections and require the identification of the discloser(s) of the wrongdoings and the details of the evidence provided by these individuals contained in the investigator's file.

Suspension of the order requiring the communication of the documents

[94] The respondents obtained a suspension of the Prothonotary's order so they could have this appeal heard. Recognizing that the respondents may appeal this decision, the execution of the order to disclose the documents is suspended awaiting the respondents' future right of appeal.

ORDER

THE COURT ORDERS that:

1. The appeal is dismissed.
2. Paragraphs 2 to 6 of the Prothonotary's order dated November 21, 2013, are set aside.
3. The communication of the information to the applicant by the Commissioner is required in accordance with the order requested by the applicant in the conclusion of his notice of motion dated August 12, 2013.
4. The execution of this order is suspended awaiting the respondents' future right of appeal.
5. The applicant will be entitled to the costs of this appeal and the motion, the taxation of which will be adjourned awaiting the respondents' future right of appeal.

"Peter Annis"

Judge

Certified true translation

Catherine Jones, Translator

APPENDIX

Public Servants Disclosure Protection Act, SC 2005, c 46

Duty of chief executives

Obligations de l'administrateur général

11. (1) Each chief executive must

11. (1) L'administrateur général veille à ce que :

(a) subject to paragraph (c) and any other Act of Parliament and to the principles of procedural fairness and natural justice, protect the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;

a) sous réserve de l'alinéa c) et de toute autre loi fédérale applicable, de l'équité procédurale et de la justice naturelle, l'identité des personnes en cause dans le cadre d'une divulgation soit protégée, notamment celle du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;

(b) establish procedures to ensure the confidentiality of information collected in relation to disclosures of wrongdoings; and

b) des mécanismes visant à assurer la protection de l'information recueillie relativement à une divulgation soient mis en place;

(c) if wrongdoing is found as a result of a disclosure made under section 12, promptly provide public access to information that

c) dans les cas où il est conclu par suite d'une divulgation faite au titre de l'article 12 qu'un acte répréhensible a été commis, soit mise promptement à la disposition du public de l'information faisant état :

(i) describes the wrongdoing, including information that could identify the person found to have committed it if it is necessary to identify the person to adequately describe the wrongdoing, and

(i) de l'acte répréhensible, y compris l'identité de son auteur si la divulgation de celle-ci est nécessaire pour en faire état adéquatement,

(ii) sets out the recommendations, if any, set out in any report made to the chief executive in relation to the wrongdoing and the

(ii) des recommandations contenues, le cas échéant, dans tout rapport qui lui a été remis et des mesures correctives prises par lui-

corrective action, if any, taken by the chief executive in relation to the wrongdoing or the reasons why no corrective action was taken.

même ou des motifs invoqués pour ne pas en prendre.

Exception

(2) Nothing in paragraph (1)(c) requires a chief executive to provide public access to information the disclosure of which is subject to any restriction created by or under any Act of Parliament.

Exception

(2) L'alinéa (1)c) n'oblige pas l'administrateur général de mettre à la disposition du public de l'information dont la communication est restreinte sous le régime d'une loi fédérale.

Duties

22. The duties of the Commissioner under this Act are to

(a) provide information and advice regarding the making of disclosures under this Act and the conduct of investigations by the Commissioner;

(b) receive, record and review disclosures of wrongdoings in order to establish whether there are sufficient grounds for further action;

(c) conduct investigations of disclosures made in accordance with section 13, and investigations referred to in section 33, including to appoint persons to conduct the investigations on his or her behalf;

(d) ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;

(e) subject to any other Act of

Attributions

22. Le commissaire exerce aux termes de la présente loi les attributions suivantes :

a) fournir des renseignements et des conseils relatifs aux divulgations faites en vertu de la présente loi et à la tenue des enquêtes menées par lui;

b) recevoir, consigner et examiner les divulgations afin d'établir s'il existe des motifs suffisants pour y donner suite;

c) mener les enquêtes sur les divulgations visées à l'article 13 ou les enquêtes visées à l'article 33, notamment nommer des personnes pour les mener en son nom;

d) veiller à ce que les droits, en matière d'équité procédurale et de justice naturelle, des personnes mises en cause par une enquête soient protégés, notamment ceux du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;

e) sous réserve de toute autre loi

Parliament, protect, to the extent possible in accordance with the law, the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;

(f) establish procedures for processing disclosures and ensure the confidentiality of information collected in relation to disclosures and investigations;

(g) review the results of investigations into disclosures and those commenced under section 33 and report his or her findings to the persons who made the disclosures and to the appropriate chief executives;

(h) make recommendations to chief executives concerning the measures to be taken to correct wrongdoings and review reports on measures taken by chief executives in response to those recommendations; and

(i) receive, review, investigate and otherwise deal with complaints made in respect of reprisals.

Purpose of investigations

26. (1) Investigations into disclosures and investigations commenced under section 33 are for the purpose of bringing the existence of wrongdoings to the attention of chief executives and making recommendations

fédérale applicable, veiller, dans toute la mesure du possible et en conformité avec les règles de droit en vigueur, à ce que l'identité des personnes mises en cause par une divulgation ou une enquête soit protégée, notamment celle du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;

f) établir des procédures à suivre pour le traitement des divulgations et assurer la confidentialité des renseignements recueillis relativement aux divulgations et aux enquêtes;

g) examiner les résultats des enquêtes menées sur une divulgation ou commencées au titre de l'article 33 et faire rapport de ses conclusions aux divulgateurs et aux administrateurs généraux concernés;

h) présenter aux administrateurs généraux concernés des recommandations portant sur les mesures correctives à prendre et examiner les rapports faisant état des mesures correctives prises par les administrateurs généraux à la suite des recommandations;

i) recevoir et examiner les plaintes à l'égard des représailles, enquêter sur celles-ci et y donner suite.

Objet des enquêtes

26. (1) Les enquêtes menées sur une divulgation ou commencées au titre de l'article 33 ont pour objet de porter l'existence d'actes répréhensibles à l'attention des administrateurs généraux et

concerning corrective measures to be taken by them.

de leur recommander des mesures correctives.

Informality

Absence de formalisme

(2) The investigations are to be conducted as informally and expeditiously as possible.

(2) Les enquêtes sont menées, dans la mesure du possible, sans formalisme et avec célérité.

Notice to chief executive

Avis à l'administrateur général

27. (1) 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.

27. (1) Au moment de commencer une enquête, le commissaire informe l'administrateur général concerné de la tenue de celle-ci et lui fait connaître l'objet de la divulgation en cause.

Notice to others

Avis aux autres personnes

(2) The Commissioner, or the person conducting an investigation, may also notify any other person he or she considers appropriate, including every person whose acts or conduct are called into question by the disclosure to which the investigation relates, and inform that person of the substance of the disclosure.

(2) Le commissaire ou la personne qui mène l'enquête peut aussi informer toute personne, notamment l'auteur présumé des actes répréhensibles visés par la divulgation, de la tenue de l'enquête et lui faire connaître l'objet de la divulgation en cause.

Opportunity to answer allegations

Droit de réponse

(3) It is not necessary for the Commissioner to hold any hearing and no person is entitled as of right to be heard by the Commissioner, but if at any time during the course of an investigation it appears to the Commissioner that there may be sufficient grounds to make a report or recommendation that may adversely affect any individual or any portion of the public sector, the Commissioner must, before completing the investigation, take every reasonable measure to give to that individual or the chief executive responsible for that portion of the public sector a full and ample opportunity to

(3) Le commissaire n'est pas obligé de tenir d'audience, et nul n'est en droit d'exiger d'être entendu par lui. Toutefois, si au cours de l'enquête, il estime qu'il peut y avoir des motifs suffisants pour faire un rapport ou une recommandation susceptibles de nuire à un particulier ou à un élément du secteur public, il prend, avant de clore l'enquête, les mesures indiquées pour leur donner toute possibilité de répondre aux allégations dont ils font l'objet et, à cette fin, de se faire représenter par un conseiller juridique ou par toute autre personne.

answer any allegation, and to be assisted or represented by counsel, or by any person, for that purpose.

Confidentiality

44. Unless the disclosure is required by law or permitted by this Act, the Commissioner and every person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties under this Act.

Secret

44. Sauf si la communication est faite en exécution d'une obligation légale ou est autorisée par la présente loi, le commissaire et les personnes agissant en son nom ou sous son autorité sont tenus au secret en ce qui concerne les renseignements dont ils prennent connaissance dans l'exercice des attributions que leur confère la présente loi.

Federal Courts Rules, SOR/98-106

Material from tribunal

317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

Matériel en la possession de l'office fédéral

317. (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

Request in notice of application

(2) An applicant may include a request under subsection (1) in its notice of application.

Demande incluse dans l'avis de demande

(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.

Service of request

(3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties.

Signification de la demande de transmission

(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.

Material to be transmitted

318. (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(a) a certified copy of the requested material to the Registry and to the party making the request; or

(b) where the material cannot be reproduced, the original material to the Registry.

Objection by tribunal

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

Directions as to procedure

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

Order

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

Documents à transmettre

318. (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet:

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

Opposition de l'office fédéral

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

Directives de la Cour

(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

Ordonnance

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1137-13

STYLE OF CAUSE: SYLVAIN MARCHAND v THE PUBLIC SECTOR
INTEGRITY COMMISSIONER and THE ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: FEBRUARY 12, 2014

**REASONS FOR ORDER
AND ORDER:** ANNIS J

DATED: APRIL 3, 2014

APPEARANCES:

Benoit Duclos FOR THE APPLICANT

Y. Monica Song FOR THE PUBLIC SECTOR INTEGRITY
COMMISSIONER

Diane Pelletier FOR THE ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

Letellier Gosselin FOR THE APPLICANT
Counsel
Gatineau, Québec

Dentons Ottawa FOR THE PUBLIC SECTOR INTEGRITY
Counsel COMMISSIONER
Ottawa, Ontario

William F. Pentney
Deputy Attorney General of Canada
Ottawa, Ontario

FOR THE ATTORNEY GENERAL OF CANADA