Federal Court  Cour fédérale

Date: 20160729

Docket: T-2368-14

Citation: 2016 FC 886

Ottawa, Ontario, July 29, 2016

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

PUBLIC SECTOR INTEGRITY COMMISSIONER OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

A. *The Legislation at Issue*

[1] In 2007, Parliament passed the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [*PSDPA*], commonly known as "whistleblower" legislation. The *PSDPA* established the Office of the Public Sector Integrity Commissioner to receive disclosures of wrongdoings in the public sector.

[2] The Commissioner has a duty to review disclosures. Where the Commissioner determines there are sufficient grounds for further action, there is a duty to conduct an investigation of such disclosures. The Commissioner has a duty to submit a report to Parliament after making a finding of wrongdoing. Written comments from the chief executive of the investigated organization are included in the report.

[3] This judicial review requires, for the first time, an examination of subsection 23(1) of the Act. It restricts the ability of the Commissioner to deal with a disclosure "if a person or body acting under another Act of Parliament is dealing with the subject-matter of the disclosure".

[4] The idiom "the devil is in the details" applies to this dispute. The parties are each well-intentioned. The facts are largely undisputed but, each party takes a very different approach to what the facts mean and how to apply them to the legislation.

B. *The Finding of Wrongdoing*

[5] In November 2014, after investigating a disclosure involving the Ottawa Air Section [OAS] of the RCMP Air Services Branch [ASB], the Commissioner made a finding of wrongdoing and, as he is required to do in such an instance, he reported the details to Parliament. He found that false entries had been made by pilots in their Aircraft Journey Logbooks. The Commissioner found that with incorrect information in the logbooks, the RCMP could not ensure the aircraft were flown within weight and balance limits. He also found after reviewing several logbooks that aircraft had been flown overweight in 2012.

[6] The Commissioner concluded that paragraph 602.07(a) of *Canadian Aviation Regulations*, SOR/96-433, had been contravened because aircraft are required to be operated within the limitations in the flight manual. His report emphasized he was satisfied with the RCMP's response, they cooperated fully with the investigation, and the contraventions did not create dangers to the life, health or safety of persons. But, he noted, regulations were contravened, and that is defined in the *PSDPA* as a wrongdoing. [See *PSDPA* ss. 8(a) in the attached Annex.]

C. *The Sole Issue Raised by the RCMP is Jurisdiction*

[7] The RCMP says the Commissioner had no authority to investigate the disclosure because Transport Canada [TC] was already dealing with the subject-matter of the disclosure under the *Aeronautics* Act, RSC 1985, c A-2. The RCMP says therefore a plain reading of subsection 23(1) shows the Commissioner had no authority or jurisdiction to investigate the disclosure.

[8] The Commissioner says this is not a question of whether he had jurisdiction to investigate. It is a normal question of statutory interpretation by the Commissioner of the legislation under which he operates ─ his "home statute" ─ and he is entitled to deference in his interpretation. He interpreted both subsections 23(1) and 24(1) and says his interpretations in each case were reasonable given the nature of the TC activity was an "advisory assessment" that was in the nature of an audit.

D. *The Standard of Review*

[9] The parties agree the standard of review for the Commissioner's interpretation of subsection 24(1) is reasonableness, as previously determined in other cases. However, subsection 23(1) has not been previously interpreted and the parties do not agree on that standard of review.

[10] In the reasons that follow, I have determined the presumption of reasonableness review when a tribunal is interpreting its home statute, established *in Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [Alberta Teachers'] has not been rebutted. The standard of review of the interpretation of subsection 23(1) by the Commissioner is reasonableness.

E. *The Commissioner Raises Two Preliminary Issues*

[11] The Commissioner raises two preliminary issues: (1) whether the RCMP has the right to seek judicial review of the Case Report since the findings are non-binding recommendations; (2) whether any weight should be given to an affidavit filed by the RCMP as part of this proceeding.

[12] For the reasons that follow I have determined the RCMP may seek judicial review.

[13] I have also determined the affidavit will not be considered with respect to any matters that were not before the Commissioner nor any legal conclusions or analysis it contains.

F. *Order Sought by the RCMP*

[14] The Notice of Application by the RCMP seeks judicial review of the finding made by the Commissioner on October 14, 2014, as amended on October 31, 2014 [the "Amended Decision"] in respect of file No. PSIC 2012-D- 0328. Attached to the Amended Decision was the Case Report that subsequently was tabled in Parliament. The RCMP seeks an order quashing or setting aside the Amended Decision.

[15] Although originally there were four different grounds of review alleged by the RCMP, at the hearing of this matter the only ground pursued was that the Commissioner acted without jurisdiction either under subsection 23(1), when he investigated the disclosure, or under subsection 24(1), when he failed to exercise his discretion not to investigate the disclosure.

[16] For the reasons that follow, based on the specific facts of this case (the "details"), I have determined that the Commissioner's decision that subsection 23(1) did not apply to prevent his investigation was reasonable. I find his interpretation of subsection 24(1) was reasonable. I also find section 23(1) may not have applied at all given the timing and sequence of critical events.

[17] Relevant excerpts of the legislation referred to in this judgment are set out in the attached Annex.

II. **Background**

A. *The Attorney General as Applicant*

[18] The Attorney General, on behalf of the RCMP, has brought this application for judicial review. The Attorney General confirmed at the hearing that they were not appearing as of right as a public interest litigant. They appear solely on behalf of the RCMP. To avoid any confusion, these reasons for judgment will refer to the RCMP as if they were the Applicant.

B. *Significant Activities of the Commissioner's Office and TC*

[19] In considering whether the Commissioner reasonably interpreted subsection 23(1) or properly exercised his discretion under subsection 24(1), it is useful to review the chronology of significant activities of TC and the Commissioner in relation to the OAS. The chronology of events ("the details") setting out "who was doing what and when" is important when looking at the legislation to review the reasonableness of the Commissioner's interpretations.

(1) Activities in 2013

[20] On January 7, 2013, the Commissioner received a disclosure of eight potential wrongdoings from a RCMP employee. They spanned the period from 2007/08 to then current date. A period of analysis ensued at the Commissioner's office including review of various documents submitted by the discloser.

[21] In August 2013, the RCMP asked TC to review the operations of the ASB. In response, TC prepared an Oversight Plan outlining that they would assess where current regulations were being met, provide observations where regulatory gaps existed, and suggest best practices with a

view to new aviation regulations about to come into force. The investigators never saw this document until the present proceedings.

[22] In October and November 2013, TC conducted the Oversight activities at RCMP Air Services Branch HQ and the Air Sections in Ottawa, London, Montreal, and Vancouver.

[23] On November 6, 2013, the analyst in the Commissioner's office who reviewed the disclosure prepared a Case Analysis recommending an investigation and not pursuing three of the allegations.

[24] On November 18, 2013, the Commissioner informed the RCMP by letter that he was going to investigate allegations of wrongdoing involving an employee of the OAS and the OAS itself.

[25] On December 2, 2013, the investigators made their first contact with TC. The investigators were told TC would be issuing a report in January 2014.

(2) Activities in 2014

[26] On January 15, 2014, TC prepared their report to the RCMP entitled "Private Operator – Advisory Assessment" [Advisory Assessment]. TC made observations and recommendations including that their sampling of Journey Logs did not reveal any non-compliance. However, they were shown other Journey Logs that suggested two kinds of aircraft had been flown in overweight condition. These documents form the basis for the Commissioner's subsequent

finding. The RCMP agreed to draft Corrective Action Plans [CAPs] to implement the recommendations.

[27] On January 20, 2014, TC sent the Advisory Assessment to the investigators. On January 21, 2014, TC began follow-up and monitoring of the development by the RCMP of CAPs.

[28] On March 7, 2014, the investigators prepared the Preliminary Investigation Report [PIR]. They concluded a wrongdoing was committed under paragraph 8(a) of the *PSDPA* by personnel at the OAS "making false entries on AJLs and flying overweight for years". As a result of the PIR the Commissioner determined the four allegations related to flying aircraft included several different pilots, not just one. AJLs received from TC on January 20, 2014 were used to make the finding.

[29] On March 10, 2014, the Commissioner delivered the PIR to the RCMP and advised them that the OAS, as a whole, would be named for those alleged wrongdoings rather than the individual employee.

[30] On March 14, 2014, the RCMP completed writing the CAP for document compliance to address the issue of the AJLs containing incorrect information. Expected completion date of the work was April 30, 2014.

[31] On May 22, 2014, the RCMP responded to the March 10, 2014 PIR. They stated, for the first time, that subsections 23(1) and 24(1) of the *PSDPA* applied and the Commissioner did not

have jurisdiction because "TC has been dealing with the OAS to address any deficiencies" and "OAS is working with TC Civil Aviation Safety Inspectors to address compliance by way of Corrective Actions Plans".

[32] On July 9, 2014, a revised PIR was sent to the RCMP as result of additional information provided by the RCMP.

[33] On July 30, 2014, the RCMP responded to the revised PIR renewing its objection to the jurisdiction of the Commissioner's office.

[34] On September 3, 2014, an investigator made a file note of a conversation with a TC employee to the effect that "[employee] was very clear that TC did not "go in under regulation assessment mode"" and "employee at the end also reiterated that "we are not working under any regs or Act for these CAPs - it is purely voluntary"".

[35] On October 6, 2014, after internal review of the investigator's amended report, the Commissioner accepted the recommendation that a finding of wrongdoing be made regarding one allegation and not the other four allegations.

[36] On October 14, 2014, the Commissioner delivered to the RCMP a draft of the Case Report of Wrongdoing, which was to be tabled in Parliament by December 5, 2014. He requested any comments for inclusion in the report be made no later than October 29, 2014.

[37] On October 27, 2014, the RCMP wrote to the Commissioner requesting the investigation be re-opened, renewing the jurisdictional challenge, and raising a question of procedural fairness. The RCMP's response to the Commissioner's recommendations was enclosed.

[38] On October 31, 2014, the Commissioner responded to the RCMP and enclosed the draft Case Report to be tabled during the week of November 17, 2014. He requested any final comments by November 6, 2014. He also enclosed a draft news release to be issued when the report was to be tabled.

[39] On November 6, 2014, the RCMP delivered the official response to the recommendations for inclusion in the report.

[40] On November 10, 2014, the Commissioner wrote to the RCMP to address certain matters not relevant to this proceeding and to reiterate why he believed subsection 23(1) did not apply as well as why he would not exercise his discretion under subsection 24(1) to discontinue the investigation.

[41] On November 14, 2014, the RCMP issued the Notice of Application in this matter.

[42] The Commissioner's Case Report was submitted to Parliament on December 2, 2014.

III. **The Two Preliminary Issues Raised by the Commissioner**

A. *Should the Affidavit filed by the RCMP be given any Weight?*

(1) Positions of the Parties

[43] The RCMP filed an affidavit from Sean Flatt, sworn on January 19, 2015. Mr. Flatt was the team leader for the TC Advisory Assessment. The RCMP says the affidavit has been tendered on the issue of the jurisdiction of the Commissioner. The RCMP relies generally on "cases decided under rule 306" of the *Federal Courts Rules*, SOR/98-106, [the "Rules"] to say that as subsection 23(1) raises a matter of jurisdiction between two tribunals they have the absolute right to submit the affidavit.

[44] The RCMP submitted at the hearing that the affidavit was tendered for two purposes, both going to the jurisdiction of TC when conducting the assessment. One was to show Mr. Flatt was not acting personally but rather as an officer of Transport Canada. The other was to show the breadth of duties set out in the *Aeronautics Act* and that, given those duties, TC had a broad scope and a number of ways in which they can engage with an entity.

[45] The Commissioner says I should give no weight to the affidavit because it contains information he did not have when he made his finding of wrongdoing. Noting the assertions about the capacity in which TC was conducting its Advisory Assessment and the lack of ability it had to enforce compliance with the CAPs, the Commissioner submitted at the hearing that the affidavit is simply an attempt to "bootstrap" what TC was doing by re-characterizing the voluntary, consultative process into an exercise of statutory power.

(2) Analysis and Conclusion

[46] The cases under rule 306 do not assist the RCMP's position. In *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, [*Access Copyright*] the Court of Appeal recognized three exceptions to the general rule that the evidentiary record on review should be the same as that before the administrative decision-maker. The exceptions are: where the affidavit provides general background to assist in understanding the issues; where it is necessary to bring procedural defects to the attention of the Court because they cannot be found in the evidentiary record; to highlight the complete absence of evidence before the decision-maker.

[47] During the course of the Commissioner's investigation, the RCMP raised the question of jurisdiction under subsection 23(1). Anything not conveyed by the RCMP in the May 22 and July 30 letters could have been provided either at that time or before the Case Report was tabled. The affidavit cannot now improve upon the position of the RCMP as originally put to the Commissioner. As stated by Mr. Justice LeBlanc in *Henri v Canada (Attorney General)*, 2014 FC 1141 at paragraph 21, judicial review does not "allow for an improvement of the factual matrix of the record, since that would be changing the fundamental nature of this proceeding".

[48] With respect to the stated purpose of showing that Mr. Flatt was acting as an officer of TC, the affidavit was unnecessary as there was no allegation to the contrary. With respect to the purpose of outlining the broad duties and powers of TC, the RCMP letters of May 22 and July 30, 2014 cover those topics. The legislation itself sufficiently shows the duties and powers of the

Minister. The affidavit is not necessary for that purpose. In my view, the affidavit does not fall into any of the three exceptions in *Access Copyright*.

[49] I will give no weight to any portions of the affidavit filed that contain information not originally given to the Commissioner. Nor will any legal arguments or conclusions of law in the affidavit be given any weight as the person who made the affidavit was not qualified to give such opinions. Where the affidavit recasts arguments made to the Commissioner by the RCMP, I will refer to the original arguments. Where the affidavit simply organizes and collects information given to the Commissioner at the time, I may refer to it as it is not new evidence.

B. *Does the RCMP Have the Right to Seek Judicial Review?*

[50] Applications for judicial review are governed by sections 18 and 18.1 of the *Federal Courts Act* [FCA]. Read together these sections establish the grounds for review, the relief available, powers of the Court on review, and who can bring an application for review.

[51] Under subsection 18.1(3), the Court has jurisdiction to review a "decision, order, act or proceeding" of a "federal board, commission or other tribunal". There is no dispute that the Commissioner was operating as a federal board, commission or other tribunal when he made his finding and tabled the Case Report in Parliament. The dispute relates to whether the RCMP was "directly affected by the matter in respect of which relief is sought" particularly given the non-binding nature of the recommendations in the Case Report. Stated another way, is this matter justiciable?

[52] The term "directly affected" has been extensively interpreted in the jurisprudence. In Air Canada v Toronto Port Authority et al, 2011 FCA 347 at paragraphs 24 and 29, [*Toronto Port Authority*] Mr. Justice Stratas summarizes the considerations applicable to whether a matter is reviewable. A reviewable "matter" is more than a decision, it is very broad and includes something "in respect of which a remedy may be available" under section 18 of the FCA. It also includes review of "administrative action". What is not reviewable is a matter that "fails to affect legal rights, impose legal obligations, or cause prejudicial effects".

(1) Positions of the Parties

[53] In keeping with *Toronto Port Authority*, the focus of the parties is whether the finding made by the Commissioner caused the RCMP prejudicial effects. There was no argument made that the finding in the Case Report affected legal rights or imposed legal obligations. Indeed, section 26 of the *PSDPA* makes it clear that investigations are conducted informally and the purpose of an investigation is to bring wrongdoings to the attention of the Chief Executive and make recommendations about corrective measures. There is no provision in the *PSDPA* that requires a Chief Executive to follow any recommendations.

[54] The RCMP says that as it is Canada's national police force the finding of wrongdoing by the OAS is very important to both the members of the RCMP and the OAS members. The reputation of the RCMP is affected by such finding. The very public aspect of the Case Report being tabled in Parliament is also an important factor. The RCMP relies on the decision in *Morneault v Canada (Attorney General)*, [2001] 1 FCR 30 (FCA), [*Morneault*] to say that when

there is an impact on reputation even a non-binding a matter is reviewable under subsection 18.1(1).

[55] The Commissioner counters that before the Case Report was sent to Parliament the RCMP sought, but was denied, an injunction prohibiting such submission. At that time, Mr. Justice Hughes of this Court found any damage to the reputation of the RCMP was purely speculative. As of the date of the hearing, no evidence of damage to their reputation has been submitted by the RCMP. The Commissioner says that, in any event, the RCMP has admitted regulations were contravened and accepted the recommendations of the Commissioner made in the Case Report. He too relies upon *Morneault*, where at paragraph 45 the Court of Appeal said:

> [45] If the findings in issue are supported by some evidence, the respondent could not really complain that the findings may have harmed his reputation. . . .

[56] Finally, the Commissioner says only the discloser is given status in the *PSDPA* as being directly affected. Neither the wrongdoer nor the CEO is given such status. The only remedy provided in the *PSDPA* is that the CEO of the RCMP may make a response in the Case Report if he disagrees with the Commissioner, as was done here.

(2) Analysis and Conclusion

[57] The balance of paragraph 45 in *Morneault*, cited in part by the Commissioner, contains a critical finding by the Court of Appeal. Although the report in that case was also a non-binding opinion and not strictly a decision or order, the Court of Appeal determined that serious harm might be caused to Col. Morneault's reputation by findings that lacked support in the record. The

court's review was determined to be a necessary part of being able to ensure that natural justice was done and no unjustified harm was caused to Col. Morneault's reputation.

[58] The only part of the finding with which the RCMP agrees is that making incorrect entries in the AJLs contravene the regulations. The record in this matter shows such contraventions are strict liability offences that require no degree of intention or negligence on the part of the perpetrator. The record also shows that TC, operating under a different legislative scheme, did not view the regulatory contraventions as seriously as the Commissioner. An August 18, 2014 email from TC to the investigators concluded with the statement "[d]welling on a punitive response to past non-compliance issues serves no further purpose other than to disrupt ongoing positive efforts."

[59] The RCMP response in the Case Report took issue with the Commissioner's use of the word "false" to characterize the AJL entries because it implied a deliberate deception or malfeasance. They also took issue with whether the AJLs alone could show an aircraft was flown overweight given various other factors that they list and say affects that determination. They agreed with the technical non-compliance but not the conclusion of aircraft being flown overweight.

[60] I am satisfied the RCMP have not accepted the finding in the Case Report to the extent submitted by the Commissioner. In this case, the degree of "acceptance" is not sufficient in and of itself to avoid judicial review.

[61] The RCMP seeks relief under paragraph 18.1(4)(a) of the FCA alleging the Commissioner acted without jurisdiction. In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [*Khosa*] Mr. Justice Binnie at paragraph 41 found that subsection 18.1(4) "enable[s] but do[es] not require judicial intervention." In other words, I may exercise my discretion in determining whether to hear this application for judicial review.

[62] In the circumstances of this case, given the high profile of the RCMP as Canada's national police force, the involvement of another regulatory authority, the lack of review provisions in the *PSDPA*, and the absence of jurisprudence under subsection 23(1) as well as the basis of the RCMP's arguments in this matter, I find it is appropriate to exercise my discretion and allow the judicial review to proceed in order to determine whether the Commissioner's interpretation of subsections 23(1) and 24(1) of the *PSDPA* was reasonable.

IV. **Standard of Review of the Interpretation of ss 23(1) and 24(1) by the Commissioner**

[63] The parties do not agree upon the standard of review. As previously stated, I have determined reasonableness is the standard of review for the Commissioner's interpretations of the *PSDPA*. The detailed explanation for that decision follows.

A. *Standard of Review of the Interpretation of Subsection 23(1)*

(1) Positions of the Parties

[64] The different perspectives of the RCMP and the Commissioner raise the question of the appropriate standard of review for the Commissioner's interpretation of subsection 23(1). The RCMP says the standard is correctness. The Commissioner says the standard is reasonableness.

[65] The RCMP submits the issue of whether subsection 23(1) prohibited the Commissioner from investigating in light of the involvement of TC raises a true question of jurisdiction or *vires*, therefore attracting a correctness standard of review. In support they cite an extract from *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 59 [*Dunsmuir*] to the effect that true jurisdiction questions involve the determination by a tribunal of whether they had "the authority to decide a matter" considering the statutory power given to the tribunal.

[66] In oral argument, the RCMP stated that it is not a matter of competing jurisdiction by two tribunals but rather a question of when each of them can exercise their authority. They submit however that the standard is still correctness but, should I find it to be reasonableness then, in any event, there is only one reasonable interpretation of the legislation and it is not the one applied by the Commissioner.

[67] The RCMP also referred to *Canadian Union of Public Employees, Local 2434 v Port Hawkesbury (Town)*, 2011 NSCA 28, [*Port Hawkesbury*] in which the Nova Scotia Court of Appeal discussed the principles of jurisdictional review they drew from *Dunsmuir*. In that case, the court determined the standard of review for the underlying decision by the Occupational Health and Safety Panel was correctness even in the face of a privative clause in the legislation.

[68] The Commissioner says that there is no question of jurisdiction; it was simply a matter of determining whether TC was dealing with the subject matter under an Act of Parliament. To make that determination required considering a question of mixed fact and law in deciding whether subsection 23(1) applied to prevent him from investigating the disclosures. The

Commissioner states that this is a question of mixed fact and law reviewable on the standard of reasonableness.

[69] The Commissioner relies upon *Alberta Teachers'*, and *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [*McLean*] to say that because the Commissioner is interpreting his "home" statute there is a presumption of deference and that entails a standard of review of reasonableness.

(2) Analysis and Conclusion

[70] I note that *Port Hawkesbury*, upon which the RCMP relies, was argued and decided prior to the release of *Alberta Teachers'* so it did not consider whether the presumption of reasonableness had been rebutted because no such presumption existed at that time.

[71] The interpretation by the Commissioner of subsection 23(1) required consideration of whether the activities undertaken by TC *vis-à-vis* the RCMP fell within subsection 23(1). To make that determination requires an application of the facts (what was undertaken by TC) to the law set out in subsection 23(1). A question of mixed fact and law attracts the standard of review of reasonableness, provided there is no extricable legal principle or error of law, see *Khosa* at paragraph 89 and *Imperial Manufacturing Group Inc v Decor Grates Incorporated*, 2015 FCA 100 at paragraph 19.

[72] In arriving at this conclusion I am mindful of the admonition in *Dunsmuir*, also found at paragraph 59, that "reviewing judges must not brand as jurisdictional issues that are doubtfully

so" as well as the observation made by Madam Justice Abella in *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 at paragraph 89, that:

> If every provision of a tribunal's enabling legislation were treated as if it had jurisdictional consequences that permitted a court to substitute its own view of the correct interpretation, a tribunal's role would be effectively reduced to fact-finding.

[73] I find the presumption in *Alberta Teachers'* has not been rebutted by the RCMP. The standard of review is reasonableness with respect to the Commissioner's interpretation of subsection 23(1) that he was not prohibited from investigating the disclosure.

B. *Standard of Review of the Interpretation of Subsection 24(1)*

[74] With respect to the Commissioner's interpretation of section 24 of the *PSDPA*, the standard of review has already been determined by the Court of Appeal in *Agnaou v Canada (Attorney General)*, 2015 FCA 30 at paragraph 35, [*Agnaou* #1] to be reasonableness.

[75] The RCMP does not dispute and I agree that reasonableness is the appropriate standard of review of the Commissioner's application of subsection 24(1).

V. **Was the Interpretation of subsection 23(1) Reasonable?**

[76] The interpretation of subsection 23(1) of the *PSDPA* is at the heart of the differences between the parties. The RCMP believes it is to be broadly interpreted and that in doing so I will find the TC review and Advisory Assessment was sufficient to oust the jurisdiction of the Commissioner. The Commissioner says the activities of TC do not meet the test for either

"dealing with" or "subject matter" and, in any event, TC was not "acting under another Act of Parliament" as required by the subsection 23(1).

A. *General Principles of Statutory Interpretation*

[77] The parties have dissected the various words found in subsection 23(1) and in particular the discrete phrases "dealing with", "subject matter", and "under another Act of Parliament". I will turn to those submissions shortly. First it is important to note the starting point for interpreting legislation, established by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at paragraph 21, [*Rizzo*], is that the words being considered are to be "read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act". This means "[a] court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading"", see *Canada (Attorney General) v Stanford*, 2014 FCA 234 at paragraph 44.

(1) The Scheme and Object of the *PSDPA*

[78] The *PSDPA* is whistleblower legislation designed to enable federal government employees to bring to light wrongdoings in the public sector without fear of reprisal. The provisions in the *PSDPA* purport to "achieve an appropriate balance" between the two important principles of loyalty to one's employer and the right to freedom of expression.

[79] The scheme of the *PSDPA* underscores the importance of an ethical public sector. Mr. Justice Diner in *Swarath v Canada (Attorney General)*, 2015 FC 963 at paragraph 1, found

the *PSDPA* is "designed to ensure that Canadians are protected by a lawful, transparent and uncorrupted public service".

[80] The preamble speaks of the federal public administration as being "part of the essential framework of Canadian parliamentary democracy". It also states that "confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings". To protect these values public access to findings of wrongdoing, whether resulting from an internal process or from an investigation by the Commissioner, is mandatory.

[81] The Commissioner has an explicit duty to review investigations and report his findings to the discloser and to the responsible chief executive. When wrongdoing has been found the Commissioner is required to table a report in Parliament. There is no duty to table reports with respect to matters not found to constitute wrongdoing. This distinction reinforces the high value Parliament has placed on making wrongdoings public.

[82] The Commissioner reports directly to Parliament by filing both an Annual Report of the activity of his office and a Case Report whenever there is a finding of wrongdoing. This underscores the importance of the Commissioner's work and the public interest that wrongdoings be publicly exposed in keeping with the values expressed in the preamble.

[83] The Court of Appeal in *Agnaou v Canada (Attorney General)*, 2015 FCA 29 at paragraph 60, [*Agnaou* #2] described the purpose of the *PSDPA* as being:

> . . . . to denounce and punish wrongdoings in the public sector and, ultimately, build public confidence in the integrity of federal public

> servants. The public interest comes first, and it is the Commissioner's responsibility to protect it.

[84] It is with this scheme and these objects in mind that subsections 23(1) and 24(1) are to be interpreted.

B. *Positions of the Parties*

(1) "Dealing with" and "Subject-matter"

(a) *The Position of the RCMP*

[85] The RCMP submits subsection 23(1) exists to avoid duplication of effort. They say the Commissioner acknowledged that TC was dealing with the subject matter of the disclosure in his letters of July 9, 2014 and October 14, 2014 as well as at page 10 of the Case Report. They stress there was overlapping subject matter being dealt with by TC including the one allegation of wrongdoing that the Commissioner substantiated: aircraft were being flown overweight in contravention of CAR paragraph 602.07(a). As such, internal RCMP resources were involved with two parallel processes contrary to the intention of subsection 23(1).

[86] The RCMP urges a broad interpretation of subsection 23(1) saying it casts a wide net and is written in very broad in general terms. They submit the phrase "dealing with" has a very broad and general ordinary meaning. The ordinary meaning of "dealing with" is the one that is "the reader's first impression meaning, the understanding that spontaneously comes to mind", see Sullivan on the Construction of Statutes, 5th ed (Markham: LexisNexis Canada, 2008) at pages 25-26. They refer to various dictionary definitions to say that "to deal with" includes "to act in regard to, administer, handle, dispose in any way of (a thing)."

[87] Counsel for the RCMP submitted that when TC was asked by the RCMP to assess whether their operations were in regulatory compliance and subsequently when TC reviewed the CAPs designed by the RCMP, TC was clearly "dealing with" the matter in the ordinary meaning of the expression.

[88] In an annex enclosed with their letter of July 30, 2014 to the Commissioner, the RCMP says their position is that the use of CAPs is authorized by section 4.2 of the *Aeronautics Act*, to ensure compliance with the CARs. That shows "the subject matter of the alleged wrongdoing is being dealt with administratively by the Minister of Transport". They go on to say "the law enforcement authorities set out in the *Aeronautics Act* have not been engaged" noting that is an important distinction. Subsection 23(1) contemplates a wrongdoing investigation may proceed in parallel with a law enforcement proceeding. The RCMP concludes that subsection 23(1) bars "parallel administrative proceedings dealing with the same subject matter as the alleged disclosure."

[89] The RCMP submits that the voluntary nature of the arrangement between the RCMP and TC is an irrelevant fact because subsection 23(1) is not limited in any way. Therefore, "dealing with" does not include any "consideration of the adequacy of the manner in which another body is dealing with the subject matter" nor is there any limitation on it other than any "dealing with" must be done under another Act of Parliament.

[90] Finally, the RCMP contrasts subsection 23(1) with paragraph 24(1)(a) to note that in paragraph 24(1)(a) the phrase "dealing with" is qualified in that the Commissioner is to form an

opinion of whether the subject matter has been adequately dealt with or could more appropriately be dealt with under another Act of Parliament but there is no such guidance or qualification in subsection 23(1). The RCMP says this means once another body is dealing with the subject matter the Commissioner may not deal with it. Applying the expression *unius est exclusion alterius*, the RCMP says under subsection 23(1) it does not matter how effectively or adequately the other body is dealing with the subject matter because, unlike section 24, Parliament did not give the Commissioner any discretion in subsection 23(1). As a result, he has no right to subjectively evaluate how the other body deals with the subject matter.

(b) *The Position of the Commissioner*

[91] The Commissioner submits that in light of the important objects of the *PSDPA* to maintain and enhance public confidence in the integrity of public servants and the requirement that a finding of wrongdoing be reported to Parliament, the limitation found in subsection 23(1) must be read narrowly. He urges it should only apply in the clearest of cases. In support he points to the sections of the *PSDPA* that require him to receive and investigate disclosures and give him broad discretion to initiate an investigation.

[92] The Commissioner says simply possessing an authority is not enough, there is a threshold of activity that must be met. He refers to the French wording of subsection 23(1) [“saisi de l’objet de celle-ci”] to submit that for subsection 23(1) to apply, TC has to be specifically seized of the matter in an administrative proceeding that is intended to dispose of or finally determine the precise matter or allegation, with binding effect. The voluntary, consultative process conducted by TC does not meet that requirement.

[93] The Commissioner says TC was not dealing with the subject matter of the disclosure and was not proceeding under another Act of Parliament. The RCMP voluntarily invited TC to review all their ASB operations as a consultant. The objective was to identify where regulatory gaps exist and to suggest best practices with a view to proposed new aviation regulations. Whereas the Commissioner was looking backward at behaviour during 2003 to 2012, TC was largely looking forward to future regulation and looked backward fewer than 12 months.

[94] The Commissioner says TC did not deal with the "subject matter of the disclosure" because, although they dealt with similar matters, subsection 23(1) requires that TC be dealing with the specific questions raised by the disclosure. Otherwise, meritorious disclosures may not be dealt with and the object of the *PSDPA* to bring wrongdoing to light would be circumvented by a body looking at different matters. As an example, they cite the TC focus as being to facilitate current and future compliance with the regulations but not to expose past wrongdoings or hold the RCMP to account. The Commissioner alleges the Advisory Assessment was completely different in approach and focus. It was an internal "eyes-only" review conducted at the request of the RCMP to provide technical advice and make recommendations for future compliance that could have been cancelled at any time by the RCMP.

[95] Regarding the argument that subsection 23(1) is to be read to "avoid duplication", the Commissioner points out that when a law enforcement agency is involved overlapping investigations are expressly authorized by subsection 23(1) thus avoiding duplication was not a legislative concern.

[96] Finally, the Commissioner raises the concern that if the RCMP is correct, any federal department could conduct a general, non-binding review with the result that it would pre-empt the accountability provisions of the *PSDPA*.

(2) "Under Another Act of Parliament"

(a) *The Position of the RCMP*

[97] Even though the RCMP invited TC to assess its operations, they state that given the provisions of the *Aeronautics Act*, TC can monitor legislative compliance at any time. As support, they point to the words in section 4.2, "[t]he Minister is responsible for the development and regulation of aeronautics and the supervision of all matters concerned with aeronautics". Very broad powers are given to the Minister in section 8.7, such as to enter any place for the purpose of making inspections or audits relating to enforcement, to seize any document or other thing from such a place if it will afford evidence with respect to an offence, and to detain any aircraft believed to be unsafe or likely to be operated in an unsafe manner.

[98] The RCMP says the Advisory Assessment and CAPs could only have been conducted under the powers in the *Aeronautics Act*. Relying on *Larny Holdings Ltd v Canada (Minister of Health)*, 2002 FCT 750 (TD), the RCMP submits that the phrase "under an Act" has been broadly interpreted to include someone purporting to exercise powers under an Act whether those powers were specifically conferred on the person or not.

[99] Applied to the present case, the RCMP says that "if the Transport Canada inspectors were not acting under the *Aeronautics Act*, what then were they doing?"

(b) *The Position of the Commissioner*

[100] To support his positon that TC was not operating under an Act of Parliament, the Commissioner relies heavily on the fact that the RCMP invited TC to conduct a review and TC told the investigators it was more in the nature of an audit. The RCMP held a Temporary Private Operators certificate. The Oversight Plan states "[s]ince there are no formal oversight requirements for Private Operators the TC team will be able to perform its duties as a consultant to the RCMP". Simply put, TC was not conducting a regulatory review so it was not acting under the *Aeronautics Act*.

[101] The Commissioner points out that the Advisory Assessment makes observations and recommendations, not findings. The focus by TC was on facilitating current and future compliance, not holding the RCMP to account for past infractions. TC did not investigate or make any determination with respect to the specific breaches of the regulations that formed the subject matter of the allegations.

[102] In answer to the *Larny Holdings* argument by the RCMP, the Commissioner says TC was not acting under any legislation nor did they purport to be. TC officials were just using their knowledge of the legislation and the CARs to provide advice to the RCMP as a consultant.

[103] The Advisory Assessment did not deal with any instances of overweight flying before 2013 but the disclosures all predate 2013. In terms of acting under legislation and having the ability to enforce regulations, section 26 of the *Aeronautics Act* precludes enforcement

proceedings in relation to incidents arising more than 12 months earlier unless they seek to suspend or revoke the operator's certificate or proceed by indictment.

[104] The Commissioner alternatively submits that even if TC was acting under another Act of Parliament, the activities of TC and the Commissioner's staff were not concurrent. When TC concluded the Advisory Assessment they were no longer acting under another Act of Parliament and the Commissioner could proceed with his investigation or, decide not to cease it under subsection 24(1).

C. *Analysis and Conclusion*

[105] The parties have focused on the phrases in subsection 23(1) but not necessarily in the context of the *PSDPA*. Given the importance of whistleblower legislation to "denounce and punish wrongdoings in the public sector" the phrase "dealing with" must take its meaning from this context. The phrase cannot be interpreted so broadly as to frustrate the scheme and purpose of the legislation. Simply bringing the wrongdoing to the attention of the CEO is but one aspect of the purpose of an investigation. Public exposure is mandatory whenever an investigation leads to a finding of wrongdoing.

[106] The legislation addresses wrongdoings of an order of magnitude that could shake public confidence if not reported and corrected. When the Commissioner is "dealing with" an allegation of wrongdoing, it is something that, if proven, involves a serious threat to the integrity of the public service. That is why, before an investigation is commenced, there is a period of analysis to

determine there is some merit to the disclosure. That is also why the investigators are separate from the analysts.

[107] The focus of the disclosure provision of the *PSDPA* is to uncover past wrongs, bring them to light in public and put in place corrections to prevent recurrence. As set out in the Oversight Plan and Advisory Assessment, the focus of TC was to find gaps in existing procedures and provide advice with respect to future regulations. The context and purpose of the activities of TC was entirely different than that of the Commissioner's analysis and investigation under the *PSDPA* of the allegations in the disclosure.

[108] TC was conducting a broad examination of the ASB, not a focused review of the OAS. Under the Oversight Plan, the ASB Headquarters and four air sections, including the OAS, were visited. The OAS was one of the 19 air sections in the ASB spread throughout the country.

[109] TC was also reporting to the potential wrongdoer, with no obligation to make any observations or recommendations public in any way. The flavour of the TC activities was consultative, not investigatory. TC repeatedly told the investigators in a variety of ways that it was acting more like a consultant to the RCMP, did not go in under "regulatory mode", and was essentially conducting an audit. Although the RCMP says the quality of the activity by the other body is not relevant, I am not persuaded the *PSDPA* should be read that broadly as to do so would completely ignore the context of the scheme and object of the legislation.

[110] An email on August 18, 2014 from Sean Flatt to one of the investigators highlights an important difference in the approach of TC versus the Commissioner in dealing with the issue of non-compliance by the OAS with the CARs. Mr. Flatt stated:

> The CAP method of dealing with non-compliance issues is the preferred method for any organization since our goal is to regain compliance. Escalating tools of enforcement are available if an organization does not come into compliance.
>
> . . .
>
> It is my sincere desire to see the RCMP Air Services Branch continue to focus their efforts on the Corrective Actions they've developed with a look toward ongoing regulatory compliance. Dwelling on a punitive response to past noncompliance issues serves no further purpose other than to disrupt ongoing positive efforts.

[111] The fact that the end result — the measures taken by RCMP with the advice of TC — were satisfactory to the Commissioner, does not alter or affect the legitimacy of his investigation into the wrongdoings. Tabling the report in Parliament is an important part of the whistleblowing process. The acceptance of the RCMP, albeit reluctant, of the finding that the regulations were contravened when incorrect entries were made in journey logs would not otherwise have become public.

[112] That TC handles such contravention in a different way is the difference between the approach of a regulator and the approach of the person charged with maintaining and enhancing the integrity of public servants and public confidence in the federal public administration. That is done by establishing effective procedures for the disclosure of wrongdoing. Once a disclosure is screened for merit, those procedures lead to further analysis and investigation where warranted.

It is one continuous "dealing with" the disclosure using a careful process that tries to ensure only important, timely disclosures made in good faith are handled.

[113] The *PSDPA* is remedial legislation. As such, section 12 of the *Interpretation Act*, RSC 1985, c.I-21 requires it to be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". Parliament cannot have intended that subsection 23(1) be read so broadly that a procedure undertaken months after the Commissioner begins to deal with a disclosure, led by another body for a different purpose, headed toward the qualitatively different outcome of a private report, regardless of the finding, and examining only recent, very different, evidence should be sufficient to prevent the Commissioner from determining whether a serious past allegation of wrongdoing occurred and, if so, exposing it.

[114] I acknowledge that the RCMP feel strongly that they took proactive steps when they first received the original negative report from Beaconfield. They sincerely believe they were unnecessarily subjected to the Commissioner's investigation. They want to understand the parameters of subsection 23(1). This case turns on its facts. Without knowing exactly where the line is that once it is crossed triggers subsection 23(1), I am sure it was not crossed in this instance. I have also provided, later in these reasons, an additional analysis that may prove helpful going forward.

[115] In my view the Commissioner reasonably interpreted the activities of TC when he determined that they were not operating under another Act of Parliament. TC communicated to his investigators directly by telephone and email and, in the Advisory Assessment they delivered.

Amongst his reasons, as communicated to the RCMP, the Commissioner stated he was satisfied subsection 23(1) did not apply because "[a]s confirmed by both you and TC, Corrective Action Plans are voluntary arrangements that do not engage the law enforcement tools under the Aeronautics Act" and"[b]ecause the RCMP can unilaterally remove itself from the Corrective Action Plans process and because Transport Canada cannot force or compel follow-up actions against the RCMP pursuant to the Corrective Action Plans themselves." (emails from the Commissioner to the RCMP on October 14, 2014 and November 10, 2014 respectively)

[116] Even if the RCMP's very broad interpretation is accepted as reasonable, the Commissioner's interpretation is equally so because of the important nature of his duties under the *PSDPA*. It is reasonable to find that a private report, organized by the alleged wrongdoer, even with the best of intentions, cannot displace the Commissioner's work. This is particularly so where the private report has no element of public accountability. When there are competing reasonable interpretations of a statute put forward, the Supreme Court of Canada has said the administrative decision-maker who is interpreting their home statute "has the discretion to resolve the statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear." In that event, judicial deference "is itself a principle of modern statutory interpretation." (*British Columbia (Securities Commission) v McLean*, 2013 SCC 67 at para 40.)

VI. **Was the Interpretation of Subsection 24(1) Reasonable?**

A. *Positions of the Parties*

[117] The RCMP says subsection 24(1) is not engaged because subsection 23(1) barred the Commissioner from conducting an investigation so subsection 24(1) is never reached. They

submit the Commissioner may rely on subsection 24(1)(a) to determine whether the other body has adequately dealt with the subject matter. In that case the Commissioner will have the advantage of the information from the other body.

[118] The RCMP submits this approach, where subsection 24 provides an after the fact review of how another body dealt with the subject matter rather than allowing the Commissioner to duplicate the process under subsection 23(1), is consistent with the purpose of the *PSDPA* which is to draw wrongdoings to the attention of CEOs and make recommendations for corrective steps. They limit their analysis to that aspect of subsection 24(1) and did not address the aspect of whether the other body could more appropriately deal with the subject matter or the additional purpose to denounce and punish wrongdoings in the public sector.

[119] The RCMP did urge the Commissioner to cease his investigation based on the provisions of subsections 24(1)(a),(d) and (f) because "[a]ny gaps with regulatory requirements are being addressed in consultation with TC Civil Aviation Safety Inspectors" and "[if] the OAS is unsuccessful in implementing Corrective Action Plans, it is already within the Minister of Transport's discretion to transition to enforcement measures or penalties under the *Aeronautics Act*." (letter of May 22, 2014 from Commissioner Paulson to Commissioner Dion)

[120] The Commissioner notes that TC had completed their assessment by November 2013 and, if subsection 23(1) had ever applied, the restriction was gone when the assessment by TC was finished. The Commissioner says at that time he was free to exercise his discretion under subsection 24(1) to continue his investigation.

[121] The Commissioner also argues that under subsection 24(1)(a) he can exercise his discretion to cease an investigation where he is "of the opinion" that the subject matter of the disclosure has been adequately dealt with "according to a procedure provided for under another Act of Parliament" and that by corollary he can refuse to cease to investigate if he is of the opinion that it has not been adequately dealt with by such other procedure.

[122] In his reply to Commissioner Paulson's comments about subsection 24(1) the Commissioner decided that as the preliminary results show "wrongdoing may have occurred on repeated occasions at the OAS" and, if so, they represent "serious matters of public interest" he did not believe the was a valid reason to cease the investigation prior to its conclusion.

B. *Analysis and Conclusion*

[123] The Court of Appeal in *Agnaou* confirms that the Commissioner "clearly has very broad discretion to decide not to deal with a disclosure or not to investigate under section 24 of the Act". (see paragraph 59)

[124] In *Detorakis v Canada (Attorney General),*2010 FC 39 (*Detorakis*) at paragraph 106, Mr. Justice Russell finds the Commissioner's discretionary power under subsection 24(1) is extremely wide:

> [. . .]
>
> The discretionary power under section 24(1) is extremely wide. Its apparent objective is to allow the PSIC to decide whether it is in the public interest to investigate a complaint or to determine, on the basis of the information provided by a complainant, whether the matter could be better dealt with under another Act. The PSIC's office must be taken to have some expertise in this matter;

[125] This finding in *Detorakis* has been noted with approval twice in the Court of Appeal (in *Agnaou #1* and also in *Agnaou v Canada (Attorney General),* 2015 FCA 29 (often referred to as *Agnaou* #2) as well as in several subsequent decisions of this Court.

[126] I agree with the RCMP that subsection 24(1) provides the Commissioner with an after the fact review of the activity of another body. The question is when did "after the fact" arise?

[127] What is somewhat unclear on the facts is when TC ceased to deal with the matters they were considering under the Oversight Plan. There is every indication that TC considered their work completed in January, 2014 when the Advisory Assessment was prepared and delivered. It contained the findings and recommendations. The Oversight Plan timeline was that the Final Report would be delivered in December/January. The conclusion in the last paragraph of the Advisory Assessment indicates TC viewed their the work as done:

> It is with sincere gratitude to the RCMP that Transport Canada was invited to assess the operations of the Air Services Branch. The ASB personnel are dedicated to doing their job in a very professional manner and there are high hopes for positive change. It is with confidence that this report is submitted as a further catalyst for improvement. Thank you for all your time and effort in accommodating the Transport Canada team.

[128] Given all this information it was reasonable for the Commissioner to determine that TC had completed its assessment either in December of 2013 or January of 2014 and he was free to decide whether it had been adequately done. He determined he would not cease his investigation given the preliminary finding of wrongdoing involved public safety matters in aviation.

[129] Alternatively, it was entirely reasonable, given the expertise of the Commissioner as stated in *Detorakis* for him to determine that the public interest required conclusion of his investigation. Paragraph 24(1)(f) gives the Commissioner authority to exercise his discretion if "there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation". By adding this "catch-all" Parliament has provided the Commissioner with enormous latitude. His consideration that the public interest required a final determination of whether the RCMP had committed wrongdoings, given the nature of the allegations, was reasonable.

VII. **Additional Analysis of Sections 23 and 24**

[130] There is an important detail that was not directly addressed by the parties but is under the surface of their arguments. The Commissioner was dealing with the disclosure of wrongdoings against the OAS long before TC was invited by the RCMP to review the ASB operations. The disclosure was received in January, 2013. TC was engaged by the RCMP in August, 2013.

[131] On plain reading, subsection 23(1) is written in the present tense. At the time the Commissioner began to deal with the disclosure and for the following seven months, no one else was dealing with the subject matter of the disclosure. In fact, until one year after he began dealing with the disclosure the Commissioner was unaware that TC was involved with the ASB. On that basis subsection 23(1) was properly engaged by the Commissioner from the outset.

[132] When TC was asked to review the ASB, nothing in section 23 prevented them from conducting their assessment. Section 23 only affects the Commissioner. To require the

Commissioner to yield the ground to another federal administrative body in these circumstances, given the value the *PSDPA* places on denouncing wrongdoings, requires very clear wording. The clear wording of when the Commissioner might decide to cease his investigation into the disclosure is found in paragraph 24(1)(a). Either another body has already adequately dealt with the subject matter or, another body could more appropriately deal with the subject matter.

[133] Section 23 has a relatively narrow application. It applies when the Commissioner receives a disclosure and there is already another body dealing with the subject-matter of the disclosure under an Act of Parliament. That is not this situation. But, if it had been then, as was argued here, I have found the determination of whether the Commissioner may not deal with the disclosure requires consideration of the nature of the "dealing with" in the context of the scheme and objects of the *PSDPA*.

[134] It was not until late November, 2013 that the Commissioner's investigators first learned of the involvement of TC. Contact was made with TC in early December, 2013 but the investigators had no information about the role of TC until January, 2014 when they received the Advisory Assessment. At that time, paragraph 24(1)(a) gave the Commissioner the discretion to cease his investigation if he was of the opinion that TC had adequately dealt with the subject-matter of the disclosure. Or, if the RCMP argument is accepted that TC was still dealing with the matter because of the CAPs, the Commissioner could have turned his mind to whether TC could more appropriately deal with the subject matter according to a procedure under the *Aeronautics Act*.

[135] In this instance, subsection 24(1) addressed what the Commissioner was to do when another body began to deal with the subject matter after he had already begun to deal with it under subsection 23. For the reasons already given it is my view that the Commissioner reasonably formed his opinion under section 24 once he had further information. He then provided sound reasons for refusing to cease to investigate the disclosure.

VIII. **Conclusion**

[136] Given the nature of the TC advisory assessment as set out in these reasons, the Commissioner's determination under subsection 23(1) that TC was not acting under another Act of Parliament was reasonable and should not be set aside.

[137] In light of the facts of this case and the Commissioner's expertise, as well as the acknowledged broad discretion he possesses under section 24, the Commissioner's decision not to cease his investigation once he was apprised of the TC activities is unassailable.

[138] For the reasons set out above, this application is dismissed.

[139] The parties agreed there would be no order as to costs, regardless of outcome.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed.

"E. Susan Elliott"
Judge

ANNEX

Public Servants Disclosure Protection Act	**Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles**
. . .	. . .
An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings	**Loi prévoyant un mécanisme de divulgation des actes répréhensibles et de protection des divulgateurs dans le secteur public**
. . .	. . .
Preamble	**Préambule**
Recognizing that	Attendu :
the federal public administration is an important national institution and is part of the essential frame-work of Canadian parliamentary democracy;	que l'administration publique fédérale est une institution nationale essentielle au fonctionnement de la démocratie parlementaire canadienne;
it is in the public interest to maintain and enhance public confidence in the integrity of public servants;	qu'il est dans l'intérêt public de maintenir et d'accroître la confiance du public dans l'intégrité des fonctionnaires;
confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings, and by establishing a code of conduct for the public sector;	que la confiance dans les institutions publiques ne peut que profiter de la création de mécanismes efficaces de divulgation des actes répréhensibles et de protection des fonctionnaires divulgateurs, et de l'adoption d'un code de conduite du secteur public;
public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the Canadian Charter of Rights and Freedoms and that this Act strives to achieve an appropriate balance between those two important principles;	que les fonctionnaires ont un devoir de loyauté envers leur employeur et bénéficient de la liberté d'expression garantie par la Charte canadienne des droits et libertés et que la présente loi vise à atteindre l'équilibre entre ce devoir et cette liberté;
the Government of Canada commits to establishing a Charter of Values of Public Service setting out the values that should guide public servants in their work and professional conduct;	que le gouvernement du Canada s'engage à adopter une charte des valeurs du service public énonçant les valeurs qui guident les fonctionnaires dans leur conduite et leurs activités professionnelles,

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

. . .

Interpretation

2 (1) The following definitions apply in this Act.

. . .

investigation means, for the purposes of sections 24, 25, 26 to 31, 33, 34, 36 and 37, an investigation into a disclosure and an investigation commenced under section 33. (enquête)

Wrongdoings

Wrongdoings

8 This Act applies in respect of the following wrongdoings in or relating to the public sector:

(a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act;

(b) a misuse of public funds or a public asset;

(c) a gross mismanagement in the public sector;

(d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;

(e) a serious breach of a code of conduct established under section 5 or 6; and

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

. . .

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

enquête Pour l'application des articles 24, 25, 26 à 31, 33, 34, 36 et 37, toute enquête menée sur une divulgation ou commencée au titre de l'article 33. (investigation)

Actes répréhensibles

Actes répréhensibles

8 La présente loi s'applique aux actes répréhensibles ci-après commis au sein du secteur public ou le concernant :

a) la contravention d'une loi fédérale ou provinciale ou d'un règlement pris sous leur régime, à l'exception de la contravention de l'article 19 de la présente loi;

b) l'usage abusif des fonds ou des biens publics

c) les cas graves de mauvaise gestion dans le secteur public ;

d) le fait de causer – par action ou omission – un risque grave et précis pour la vie, la santé ou la sécurité humaines ou pour l'environnement, à l'exception du risque inhérent à l'exercice des attributions d'un fonctionnaire;

e) la contravention grave d'un code de conduite établi en vertu des articles 5 ou 6;

(f) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).

. . .

Duties of the Commissioner
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 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) le fait de sciemment ordonner ou conseiller à une personne de commettre l'un des actes répréhensibles visés aux alinéas a) à e).

. . .

Attributions du commissaire
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 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) establish procedures for processing disclosures and ensure the confidentiality of information collected in relation to disclosures and investigations;

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) 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;

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) 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

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

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

Restriction - general

23 (1) The Commissioner may not deal with a disclosure under this Act or commence an investigation under section 33 if a person or body acting under another Act of Parliament is dealing with the subject-matter of the disclosure or the investigation other than as a law enforcement authority.

Interdictions d'intervenir

23(1) Le commissaire ne peut donner suite à une divulgation faite en vertu de la présente loi ou enquêter au titre de l'article 33 si une personne ou un organisme – exception faite d'un organisme chargé de l'application de la loi – est saisi de l'objet de celle-ci au titre d'une autre loi fédérale.

. . .

. . .

Right to refuse

24 (1) 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

(a) the subject-matter of the disclosure or the investigation has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament;

(b) the subject-matter of the disclosure or the investigation is not sufficiently important;

(c) the disclosure was not made in good faith or the information that led to the investigation under section 33 was not provided in good faith;

(d) the length of time that has elapsed since the date when the subject-matter of the disclosure or the investigation arose is such that dealing with it would serve no useful purpose;

(e) 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

(f) there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation.

. . .

Refus d'intervenir

24 (1) Le commissaire peut refuser de donner suite à une divulgation ou de commencer une enquête ou de la poursuivre, s'il estime, selon le cas :

a) que l'objet de la divulgation ou de l'enquête a été instruit comme il se doit dans le cadre de la procédure prévue par toute autre loi fédérale ou pourrait l'être avantageusement selon celle-ci;

b) que l'objet de la divulgation ou de l'enquête n'est pas suffisamment important;

c) que la divulgation ou la communication des renseignements visée à l'article 33 n'est pas faite de bonne foi;

d) que cela serait inutile en raison de la période écoulée depuis le moment où les actes visés par la divulgation ou l'enquête ont été commis;

e) que les faits visés par la divulgation ou l'enquête résultent de la mise en application d'un processus décisionnel équilibré et informé;

f) que cela est opportun pour tout autre motif justifié.

. . .

Notice of refusal

(3) If the Commissioner refuses to deal with a disclosure or to commence an investigation, he or she must inform the person who made the disclosure, or who provided the information referred to in section 33, as the case may be, and give reasons why he or she did so.

Avis

(3) En cas de refus de donner suite à une divulgation ou de commencer une enquête, le commissaire en donne un avis motivé au divulgateur ou à la personne qui lui a communiqué les renseignements visés à l'article 33.

Investigations

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 concerning corrective measures to be taken by them.

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Power to investigate other wrongdoings

33 (1) If, during the course of an investigation or as a result of any information provided to the Commissioner by a person who is not a public servant, the Commissioner has reason to believe that another wrongdoing, or a wrongdoing, as the case may be, has been committed, he or she may, subject to sections 23 and 24, commence an investigation into the wrongdoing if he or she believes on reasonable grounds that the public interest requires an investigation. The provisions of this Act applicable to investigations commenced as the result of a disclosure apply to investigations commenced under this section.

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Enquêtes

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 de leur recommander des mesures correctives.

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Enquête sur un autre acte répréhensible

33 (1) Si, dans le cadre d'une enquête ou après avoir pris connaissance de renseignements lui ayant été communiqués par une personne autre qu'un fonctionnaire, le commissaire a des motifs de croire qu'un acte répréhensible – ou, dans le cas d'une enquête déjà en cours, un autre acte répréhensible – a été commis, il peut, s'il est d'avis sur le fondement de motifs raisonnables, que l'intérêt public le commande, faire enquête sur celui-ci, sous réserve des articles 23 et 24; les dispositions de la présente loi applicables aux enquêtes qui font suite à une divulgation s'appliquent aux enquêtes menées en vertu du présent article.

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Reports

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Annual report

38 (1) Within three months after the end of each financial year, the Commissioner must prepare an annual report in respect of the activities of the Commissioner during that financial year.

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Case Report

(3.1) If the Commissioner makes a report to a chief executive in respect of an investigation into a disclosure or an investigation commenced under section 33 and there is a finding of wrongdoing in the report, the Commissioner must, within 60 days after making the report, prepare a case report setting out

(a) the finding of wrongdoing;

. . .

Tabling of Report

(3.3) Within the period referred to in subsection (1) for the annual report and the period referred to in subsection (3.1) for a case report, and at any time for a special report, the Commissioner shall submit the report to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides forthwith after receiving it or, if that House is not then sitting, on any of the first fifteen days on which that House is sitting after the Speaker receives it.

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Rapports

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Rapport annuel

38 (1) Dans les trois mois suivant la fin de chaque exercice, le commissaire prépare un rapport annuel de ses activités pendant l'exercice.

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Rapport sur le cas

(3.1) S'il a fait un rapport à un administrateur général à l'égard d'une enquête menée sur une divulgation ou commencée au titre de l'article 33 où il conclut qu'un acte répréhensible a été commis, le commissaire prépare, dans les soixante jours, un rapport sur le cas faisant état:

a) de sa conclusion;

. . .

Dépôt du rapport

(3.3) Le commissaire présente, dans le délai prévu au paragraphe (1) ou (3.1) dans le cas du rapport qui y est visé ou à toute époque de l'année dans le cas d'un rapport spécial, son rapport au président de chaque chambre, qui le dépose immédiatement devant la chambre qu'il préside ou, si elle ne siège pas, dans les quinze premiers jours de séance de celle-ci suivant la réception du rapport.

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Federal Courts Act

An Act respecting the Federal Court of Appeal and the Federal Court

Jurisdiction of Federal Court

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

Loi sur les Cours fédérales

Loi concernant la Cour d'appel fédérale et la Cour fédérale

Compétence de la Cour fédérale

Recours extraordinaires : offices fédéraux

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Recours extraordinaires : Forces canadiennes

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref *d'habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

. . .

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

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FEDERAL COURT

SOLICITORS OF RECORD

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