Federal Court  Cour fédérale

Date: 20171208

Docket: T-917-16

Citation: 2017 FC 1127

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 8, 2017

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

E.S.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant, E.S., is seeking a judicial review of a decision issued by the Canadian Human Rights Commission [Commission] on May 4, 2016, dismissing his complaint against the Royal Canadian Mounted Police [RCMP] under paragraph 44(3)(b) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA]. In his complaint, following a decision by the RCMP to

end the processing of his application for employment, the applicant alleges that he was discriminated against on the ground of a conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered, in violation of section 7 of the CHRA. Based on the report by the investigator assigned to examine the applicant's complaint and the parties' submissions in response to the report, the Commission found that the applicant was not refused employment on the ground of a conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered, but because the employment process revealed that the applicant had not been honest with respect to his criminal history.

[2] The applicant argues, among other things, that he did not lie about his criminal record, as the RCMP application form stated that he was not obliged to answer the questions regarding convictions for which he had been granted a record suspension. The respondent submits that the Commission's decision is reasonable.

[3] For the following reasons, this Court is of the opinion that the Commission's decision does not meet the criteria of justification, transparency and intelligibility required for a decision to be deemed reasonable. Consequently, the application for judicial review is allowed.

II. Background

[4] On September 14, 2011, the applicant applied to become a regular member of the RCMP. The selection process consisted of an initial job application, a series of aptitude tests, an

applicant questionnaire, an interview, a polygraph test, a criminal background check, fingerprinting, and a field investigation.

[5] The checks conducted by the RCMP as part of the recruitment process revealed that, over the years, the applicant had been unable to keep a job for long periods and demonstrate occupational stability. They also revealed that the applicant had been involved in several files with [TRANSLATION] "police from various judicial districts." The fingerprint check revealed that the applicant had been granted a record suspension on August 16, 2011.

[6] Under subsections 6(2) and 6(3) of the *Criminal Records Act*, RSC 1985, c C-47 (CRA), the RCMP requested and obtained authorization from the Minister of Public Safety and Emergency Preparedness [Minister of Public Safety] to disclose the applicant's criminal record. The RCMP learned that the applicant was apparently convicted on seven (7) criminal charges and found not guilty on two (2) other charges.

[7] In conversations with the RCMP investigator during the hiring process, the applicant denied three (3) times that he had been the subject of a police investigation and that he had been convicted of a criminal offence.

[8] On February 27, 2014, the RCMP notified the applicant in a letter that it was ending the processing of his application for employment because of the results of the evaluation of his record. It indicated that the evaluation examined the [TRANSLATION] "various personal competencies and capacities that constitute reliable indicators of a temperament conducive to

becoming a peace officer with the RCMP." The decision was confirmed on March 3, 2014, despite the applicant's request for a review.

[9] On March 5, 2014, the applicant filed a complaint against the RCMP with the Commission for discrimination on the ground of a conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. Among other things, he alleged that the suspension of his criminal record vacated the conviction in question, which should no longer tarnish his reputation. He also asserted that the person who examined his request for a review made discriminatory statements about him, citing his pardon as reason to refuse to recommend his case.

[10] During the Commission's investigation, the applicant, the eligibility reviewer responsible for the applicant's hiring file at the RCMP, and the non-commissioned officer responsible for the RCMP National Recruiting Processing Centre were questioned.

[11] On February 8, 2016, the Commission investigator submitted her investigation report to the applicant for comments. She recommended that the Commission dismiss the complaint on the ground that the evidence did not support the allegation that the RCMP refused to hire the applicant because of a conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. She asserted that the evidence gathered during the investigation showed instead that the applicant's application was rejected for reasons of assiduity and because the complainant lied during the hiring process. Finally, she found that it

was reasonable for the RCMP to consider all the information available regarding the integrity and honesty of applicants given the position of trust held by members of a police force.

[12] On March 7, 2016, the applicant sent the Commission his submissions regarding the report. On February 23, 2016, and on March 18, 2016, the RCMP confirmed its position to the Commission that the applicant's complaint should be dismissed.

[13] On May 4, 2016, the Commission dismissed the applicant's complaint against the RCMP. Relying on the investigator's report, the Commission noted:

> [TRANSLATION]
> There is an important distinction between, on the one hand, a refusal to hire a person who has a criminal record for which a suspension has been ordered and, on the other hand, a refusal to hire that person because he or she was not honest when asked questions about his or her criminal history, which includes not only a criminal record for which a suspension was ordered, but also other criminal activities.

It concluded that the applicant's case fell into the second category, which is not covered by the CHRA.

[14] The Commission also added, in response to an argument raised by the applicant, that the CHRA does not allow it to examine the process used by the RCMP to obtain disclosure of information regarding the applicant's criminal record from the Minister of Public Safety to determine whether the RCMP was negligent in obtaining such information.

[15] The applicant argues that the Commission's decision must be set aside because it is based on discriminatory and incomplete information that is protected by the CHRA and the CRA. He also cites the biased nature of the decision and accuses the RCMP of lacking diligence regarding information that is protected under the CRA.

[16] Like the respondent, this Court feels that the determinative issue in this case is whether the Commission's decision to dismiss the applicant's complaint under paragraph 44(3)(b) of the CHRA was reasonable.

III. Standard of review

[17] When determining whether a complaint is to be referred back to the Canadian Human Rights Tribunal [Tribunal], the Commission acts as an administrative and screening body. Its role is to determine whether, based on the provisions of the CHRA and all the facts, there is sufficient evidence to justify referring the complaint to the Tribunal. While the Commission benefits from a discretionary power in this regard, it is not up to it to determine whether the complaint is well founded (*Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at paragraph 53; *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission*), [1989] 2 SCR 879 at page 899; *Wong v Canada (Public Works and Government Services)*, 2017 FC 633 at paragraph 27; *Ritchie v Canada (Attorney General)*, 2016 FC 527 at paragraphs 35–36 [*Ritchie*], citing *Alkoka v Canada (Attorney General)*, 2013 FC 1102 at paragraph 40, which cites *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 at paragraph 60).

[18] It is well-established that the Commission's decision to dismiss a complaint under paragraph 44(3)(b) of the CHRA raises questions of mixed fact and law. It is therefore reviewable on the standard of reasonableness. This standard carries a high degree of deference and "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*]; *Miakanda-Batsika v Bell Canada*, 2016 FCA 278 at paragraph 19; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 47 [*Sketchley*]; *Ritchie* at paragraphs 27–28; *Mansley v Canada (Attorney General)*, 2016 FC 389 at paragraph 18 [*Mansley*]; *Lubaki v Bank of Montreal Financial Group*, 2014 FC 865 at paragraph 37 [*Lubaki*]; *Lamolinaire v Bell Canada*, 2012 FC 789 at paragraphs 22, 27).

[19] The standard of review applicable to issues of procedural fairness is the standard of correctness *(Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43; *Mission Institution v Khela*, 2014 SCC 24 at paragraph 79). The issue is not so much whether the decision was correct, but instead, whether the process used by the decision-maker was fair (*Makoundi v Canada (Attorney General)*, 2014 FC 1177 at paragraphs 33–35).

IV. Analysis

A. *Preliminary questions*

(1) Applicant's record

[20] First, the respondent raises the non-compliance with the technical rules set out in sections 70 and 309 of the *Federal Court Rules*, SOR/98-106 [Rules], noting primarily the laconic nature of the memorandum of fact and law contained in the applicant's record. He argues that the applicant has not discharged his burden of demonstrating how the Commission's decision was unreasonable, that his allegations are vague and imprecise and, finally, that his allegations of a lack of procedural fairness are not supported by any specific and concrete facts or any claim put forth to support his claims.

[21] It is true that the applicant's record contains irregularities. The applicant's memorandum of fact and law is not consistent with section 70 of the Rules. The applicant's claims are contained on one (1) and a half pages in the form of statements, issues and orders sought, and the facts on which he relies are found in the applicant's sworn affidavit, which consists of two (2) pages, dated July 8, 2016.

[22] However, under paragraph 72(2)(b) of the Rules, the Court can accept the filing of a document even if it is not in the form required. In the case at hand, the applicant is representing himself and does not seem to have a good understanding of the Rules of this Court. After a generous reading of the applicant's affidavit and written submissions and considering his oral

submissions at the hearing *(Duverger v 2553-4330 Québec Inc. (Aéropro)*, 2015 FC 1071 at paragraphs 19, 23), this Court can nonetheless understand the arguments whereby the applicant challenges the Commission's decision. The applicant's submissions are essentially summarized as follows:

A. He did not lie, as the form that he completed as part of the hiring process stated that he was not obliged to answer the questions regarding convictions for which he had received a record suspension.

B. The investigator's report contained information that was protected under the CRA and incorrect information.

C. The Commission's decision lacked impartiality, as the investigator did not conduct her own analysis in her report.

[23] Since the respondent's memorandum responds to the applicant's arguments, this Court intends to rule on the merits of the issue, despite the laconic nature of the applicant's written submissions.

(2) Admissibility of the affidavits and attachments

[24] It is well-established that a judicial review of a decision must be based on the evidentiary record that was before the decision-maker. There are some exceptions to that rule, namely: (1) when the evidence contains general information that is likely to help the Court understand the issues related to the judicial review; (2) when the information serves to demonstrate procedural defects that could not be identified in any other way before the decision-maker; and (3) when the

evidence reveals the total lack of evidence available to the decision-maker in reaching a conclusion *(Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paragraphs 13–14; *Delios v Canada (Attorney General)*, 2015 FCA 117 at paragraphs 42–43; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraphs 19–20 [*Association of Universities and Colleges of Canada*]).

[25] In the case at hand, each of the parties filed documents in support of their records that are not listed in the certificate filed by the Commission under paragraph 318(1)(a) of the Rules.

[26] Although no objections were raised by the parties, the Court invited them, following the hearing, to submit observations on the admissibility of those documents based on the general rule, but also because of an order issued on November 10, 2016, by Prothonotary Richard Morneau, upholding the Commission's objection to the request to transmit documents presented by the applicant under section 317 of the Rules.

[27] In fact, on July 12, 2016, the respondent asked the Commission to send a copy of [TRANSLATION] "the entire record regarding the complaint . . . that led to the decision on May 4, 2016," to this Court's registry and to the parties. On August 2, 2016, by means of a certificate, the Commission sent a certified copy of the documents that were before it when it issued its decision. The documents are as follows:

a. Summary of the complaint and complaint form, dated March 5, 2014;

b. Investigator's report, dated February 8, 2016;

c. Written submissions from the RCMP, dated February 23, 2016;

d. Written submissions from the applicant, dated March 7, 2016;

e. RCMP response to the applicant's written submissions, dated March 18, 2016.

[28] The Commission objected to the scope of the application filed by the respondent on the ground that it did not contain enough details to show that disclosure would be relevant for the purposes of the application for judicial review and that, in general, [TRANSLATION] "when the applicant challenges the Commission's decision, the documents relevant to the application are those that were before the Commission when it made its decision."

[29] On August 4, 2016, the respondent sought directions from the Court under subsection 318(3) of the Rules to challenge the Commission's objection, alleging that, when the Commission provides only brief reasons, the investigator's report is part of the Commission's reasoning. According to the respondent, the documents obtained by the investigator and presented by the parties in support of the report are relevant to the findings of the report and must, therefore, be included in the documents transmitted pursuant to subsection 318(1) of the Rules.

[30] Given this impasse, a deadline was set for filing written submissions on the issue.

[31] Thus, in its written submissions, the Commission argued that, as a general rule, when an applicant challenges a Commission decision, the documents relevant to the application are those that were before the Commission when it made its decision. Documents that were created or considered by Commission employees, but that were not presented before the Commission itself,

are not generally relevant. Although there are exceptions to that general rule, the respondent did not submit any grounds to justify disclosure of such documents. The Commission also brought to the Court's attention the sensitive nature of the documents submitted by the RCMP as part of the investigation.

[32] In response, the respondent reiterated that documents relevant to a challenge of a Commission decision are not only those that were before the Commission when it made its decision, but also those that were created or considered by Commission employees, but not presented before it. Regarding the risk of disclosing personal or protected information, the respondent claimed that that was not a reason to justify refusing to include such documents in the Commission's certified record and instead suggested that the documents be disclosed in redacted versions.

[33] The applicant did not file any submissions.

[34] In a decision dated November 10, 2016, Prothonotary Morneau upheld the Commission's objection on the ground that the purpose of section 317 of the Rules is to limit the disclosure of evidence in documents that were in the hands of the decision-maker at the time of the decision. He cited *Access Information Agency Inc v Canada (Attorney General)*, 2007 FCA 224 at paragraph 21 and *Lukács v Canada (Transportation Agency)*, 2016 FCA 103 at paragraph 5. Although he acknowledged that, in a broad sense, beyond the application of section 317 of the Rules, the documents obtained by a Commission investigator may be an underlying part of the investigator's report and may be relevant to the report's findings, Prothonotary Morneau cited an

excerpt from *Lubaki*, above, at paragraph 4, to support the general principle that investigation documents are not relevant if they were not before the decision-maker.

[35] Three (3) weeks later, the respondent served the affidavit from Stéphane Gagné in accordance with section 307 of the Rules. That affidavit included exhibits A to G. Exhibit A consists of excerpts from the RCMP "Administration Manual" regarding pre-employment interviews and polygraph tests, the background check and security clearance, and the conditions for eligibility for employment when there are criminal activities or offences. Exhibits B, C, D, E and F include correspondence between the Commission and the RCMP as part of the processing of the complaint and the Commission's investigation. Finally, Exhibit G contains the following documents, among others:

- the hiring questionnaire completed by the applicant;
- an RCMP "Continuation Report";
- the expert polygraph report prepared following the pre-employment polygraph;
- the "Security Clearance Form 330-60F";
- the [TRANSLATION] "Pre-employment polygraph test acknowledgement" and the [TRANSLATION] "Continuation Report";
- emails and correspondence exchanged with the applicant.

[36] The affidavit and its exhibits were subsequently incorporated into the respondent's record.

[37] Given that none of these documents were part of the Commission's certified record, after the hearing, the Court requested written submissions concerning the admissibility of Mr. Gagné's affidavit and its attachments. The Court also asked the parties to share their submissions with it concerning the admissibility of certain attachments to the applicant's affidavit for the same

reasons. This included two (2) emails exchanged with the RCMP informing the applicant that his application would not be recommended (P-1) and that his request for reconsideration was refused (P-2), as well as copies of letters from the Commission (P-4, P-5, P-6 and P-7).

[38] In submissions to the Court, the respondent again argued that the investigator is considered to be an extension of the Commission, that she is part of the federal office that is the Commission, that the exhibits filed in support of the affidavit were available to the Commission itself and that, accordingly, the affidavit and the exhibits are admissible. The respondent also added that it is a sworn statement that is not challenged, as Mr. Gagné was not cross-examined on his affidavit.

[39] Regarding the applicant's affidavit and its exhibits, the respondent argued that the same reasoning should apply. He mentioned, however, that he did not know whether the applicant provided the information mentioned at paragraphs 3, 4, 5, 6 and 11 and in Exhibit P-1 to the Commission. As for paragraphs 13 to 18 of the affidavit, the respondent acknowledged that the allegations raise breaches of procedural fairness, which would be admissible according to *Association of Universities and Colleges of Canada*, above.

[40] The applicant did not follow up on the direction from this Court.

[41] As the Court has already set out above, a judicial review must be examined based on the evidentiary record that was before the administrative decision-maker, unless it is shown that the new evidence falls within one of the exceptions to the general rule.

[42] In the case at hand, the Commission stated several times during the proceedings that only the documents listed in the certificate filed under subsection 318(1) of the Rules were before it when it made its decision. Although jurisprudence recognizes that the investigator's report may constitute the Commission's reasons when it adopts the investigator's recommendations or when it provides very brief reasons (*Phipps v Canada Post Corporation*, 2016 FCA 117 at paragraph 6 [*Phipps*]; *Sketchley* at paragraph 37; *Mansley* at paragraph 8; *Lubaki* at paragraph 57), the fact remains that the documents submitted to the investigator were not before the Commission, even though they were available to the Commission. Because the respondent did not allege any of the exceptions that would allow for a departure from the application of the general rule, the reasonableness of the decision must be assessed in light of the information that was before the Commission.

[43] Moreover, because the respondent did not appeal the decision from November 10, 2016, this Court feels that that decision cannot be excluded without new grounds.

[44] For the above reasons, attachments A, B, C, D, E, F and G of Mr. Gagné's affidavit are inadmissible. The same is true for exhibits P-1, P-2, P-4, P-5, P-6 and P-7 included with the applicant's affidavit. Those documents were therefore not considered for the purposes of this case.

[45] This Court also does not intend to consider the document included in the applicant's record entitled: [TRANSLATION] "2011 Audit Report from the Office of the Privacy

Commissioner of Canada.” Not only is that document not part of the Commission’s certified record, but the applicant did not demonstrate how the document is relevant to his application.

B. *Reasonableness of the decision*

[46] As mentioned above, the applicant essentially argues that the Commission’s decision and the investigator’s report are based on discriminatory information that is protected under the CRA, as the true reason for the refusal to hire is allegedly the existence of a criminal record for which a record suspension was granted, not his lack of honesty. He also accuses the investigator and the Commission of having concluded that he lied during the hiring process when the instructions on the RCMP application form stated that he was not obliged to answer the questions regarding convictions for which he had received a record suspension. He argues that, under the CRA, receipt of a suspension eliminates the existence of the criminal record.

[47] The respondent counters that the Commission’s decision is based on the true reason for refusing to hire the applicant, namely the negative and incorrect responses he gave to questions regarding his past on the hiring questionnaire and during the ensuing investigation. Although the applicant was not obliged to provide information regarding suspended convictions, he nonetheless had to show integrity, transparency and honesty in his responses, which he did not do. The respondent argued that a record suspension does not allow a pardoned person to deny the existence of past convictions. In that regard, he cited the Supreme Court of Canada in *Therrien (Re)*, 2001 SCC 35, at paragraphs 116 and 127 [*Therrien*], which states that a pardon does not retroactively wipe out a criminal conviction, but simply ensures that future consequences of it

are minimized. Not only could the applicant not deny the existence of a conviction, he had to answer the questions honestly.

[48] As mentioned previously, it is well-established that, when the Commission adopts the investigator's recommendations and provides only brief reasons, the investigation report constitutes the Commission's reasons for the purposes of a decision under subsection 44(3) of the CHRA (*Phipps* at paragraph 6; *Sketchley* at paragraph 37; *Mansley* at paragraph 8; *Lubaki* at paragraph 57).

[49] In the case at hand, it seems from both the Commission's decision and the investigation report that the basis for dismissing the complaints was the investigator's findings that the applicant had allegedly lied several times during the hiring process. In the analysis section entitled "Findings," which includes five (5) paragraphs, the investigator noted that the applicant's application was not retained by the RCMP because of his lack of assiduity and because he lied several times during the hiring process. She noted that, by denying several times that he was the subject of criminal investigations, including two criminal prosecutions in which he was found not guilty and that were not protected by the record suspension, the applicant allegedly lied to the RCMP. She then noted that, given the nature of the offences committed by the applicant, the RCMP [TRANSLATION] "could not ignore them" given its standard of honesty and integrity. She therefore found that it was reasonable for the RCMP to have doubts about the applicant's honesty and integrity because he [TRANSLATION] "lied more than once during the internal investigation" and because he [TRANSLATION] "denied three times that he had been the subject of a police investigation and was convicted of a criminal offence."

[50] For the following reasons, this Court is of the view that the Commission's decision was not transparent, intelligible and justified given the evidence presented by the RCMP and reported by the investigator in her report.

[51] First, the Court notes an inconsistency in the investigator's report regarding the finding that the applicant allegedly lied to the RCMP.

[52] The investigator first noted that candidates are told that the questions on the hiring form are related to honesty, integrity, and ethics and that they are informed at every stage of the hiring process that [TRANSLATION] "deceit, dishonesty, or non-disclosure at any stage of the application process may result in elimination from the process or from any future employment with the RCMP."

[53] She then noted that candidates are advised that they are not obliged to provide information regarding offences for which they have received a record suspension. In this regard, she reproduced the instructions given to candidates for positions as regular members on the RCMP hiring form:

> [TRANSLATION]
> NOTICE REGARDING THE CANDIDATE QUESTIONNAIRE -
> You are not obliged to provide any information in the applicant questionnaire that relates to a conviction for which a pardon has been received. [*sic*]

[54] The Court does not question the Commission's finding that honesty and integrity are fundamental values that individuals must have if they want to become members of a police force. However, the Court is of the view that, in her findings regarding the applicant's lies, the

investigator should have addressed the inconsistency arising from the RCMP's evidence regarding candidates' obligations to provide honest answers on the one hand, and their right to not be obliged to provide information regarding criminal offences for which they have received a record suspension on the other hand. Based on the report, it is also impossible to determine the questions to which the applicant allegedly gave untrue answers, or which offences were the subject of the record suspension and which were not. Indeed, at paragraphs 13 and 30 of the report, there is confusion between the offences for which the applicant was allegedly acquitted and those for which he allegedly obtained the record suspension.

[55] The investigation report also does not reveal whether the investigator questioned the reasonableness of the RCMP's finding that the applicant had [TRANSLATION] "lied" on his application form when that document clearly stated that he was not obliged to provide information regarding criminal offences for which he had received a record suspension. That gap in the investigation report is even more important in light of section 8 of the CRA, which states that "no person shall use or authorize the use of an application form that contains a question that by its terms requires the applicant to disclose a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect."

[56] Regarding the respondent's argument based on *Therrien*, the Court does not intend to rule on the application of the principles set out in that case, as it is of the opinion that the decision lacks transparency, intelligibility, and justification.

[57] Secondly, the Court notes another inconsistency in the report regarding the application of the policy for the eligibility of candidates for a position as a regular member of the RCMP.

[58] The investigator mentioned at paragraph 27 of her report that the RCMP has no specific guidelines or policies regarding candidates who have obtained a record suspension and that it simply follows the guidelines set out in the CRA. However, the investigator cited the RCMP eligibility policy set out in section 1.1.3 of its Administration Manual and, in that regard, reproduced an excerpt from that section at paragraph 15 of the report. According to that policy, subsequent processing of the application of a candidate who has been convicted of a criminal offence cannot be recommended unless that conviction has been pardoned in Canada.

[59] At paragraph 37 of her report, the investigator then noted the RCMP's position that [TRANSLATION] "based on the policy regarding criminal offences, [the applicant] was not eligible for a position as a regular member." Yet, the investigator had noted at the start of the report that the applicant had obtained a record suspension in 2011.

[60] The Court is of the opinion that it would be inaccurate to claim that the applicant was "not eligible" for a position as a regular member if he had received a record suspension, thus the importance of clarifying which offences were included in the record suspension and which ones were not.

[61] The Court agrees that the Commission's decision to dismiss the applicant's complaint is discretionary and requires great restraint. However, as stated by the Federal Court of Appeal in

Keith v Canada (Correctional Service), 2012 FCA 117, at paragraph 45, when the Commission dismisses a complaint, it is a final decision that definitively ends the processing of the complaint and "a more probing review should be carried out." In the case at hand, for the reasons above, the Court is of the opinion that the investigation report and, therefore, the Commission's decision lack transparency, intelligibility and justification and do not meet the standard of reasonableness as set out in *Dunsmuir*.

[62] Given the Court's finding, there is therefore no need to rule on the other grounds raised by the applicant.

C. *Confidentiality order*

[63] After filing his notice of application on June 9, 2016, the applicant filed a written motion to obtain a confidentiality order. That motion was dismissed by Prothonotary Morneau on July 11, 2016, on the grounds that a personal interest in keeping his affairs private did not constitute legal grounds for obtaining a confidentiality order and that, in this case, the evidence presented by the applicant did not present any serious risk.

[64] Despite that order, in his memorandum dated February 3, 2017, the applicant was still seeking a confidentiality order from the Court regarding certain information in the record. The conclusions sought are as follows:

> ORDER that all documents containing the identity, age, sex, address or status of the applicant be kept confidential, including the Court docket, so the applicant cannot be identified [*sic*];
>
> ORDER that all documents already protected by federal legislation not be accessible and that they be kept confidential in accordance

> with the security level predetermined by the Government of Canada [*sic*];
>
> ORDER that the Canadian Human Rights Commission destroy all information obtained from the RCMP that is protected by the *Criminal Records Act* [*sic*].

[65] For his part, the respondent noted that the applicant cannot make a disguised appeal of the order from July 11, 2016, in which his confidentiality motion was dismissed. He also noted that information protected under the CRA and contained in the Court record was redacted. Citing *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, at paragraph 53 [*Sierra Club*] and *MJ v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 786, the respondent nonetheless agreed to have the style of cause, the reasons for the decision and the entries in the Court ledger amended and replaced by the applicant's initials to allow for an appropriate balance between the open court principle and the protection of the applicant's private information.

[66] The open court principle is well-recognized in jurisprudence (*Sierra Club*, at paragraphs 53–57; *Canadian Broadcasting Corporation v New Brunswick (Attorney General)*, [1996] 3 SCR 480; *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835).

[67] Nonetheless, since the order on July 11, 2016, documents containing sensitive information have been placed in the record of the Court.

[68] First, the Commission's investigation report submitted by the applicant refers to various criminal convictions, which may have been suspended under the CRA.

[69] As well, Exhibit G from the affidavit by Stéphane Gagné, deemed inadmissible, contains the following documents:

- The hiring questionnaire completed by the applicant;
- An RCMP “Continuation Report”;
- The expert polygraph report prepared following the pre-employment polygraph;
- The “Security Clearance Form 330-60F”;
- The [TRANSLATION] “Pre-employment polygraph acknowledgement” and the “Continuation Report”
- Emails and correspondence exchanged with the applicant.

[70] The purpose of the record suspension set out in section 2.3 of the CRA is to minimize the consequences of a criminal record.

[71] Consequently, the Court orders that the unredacted investigator’s report contained in the Commission’s record and in the applicant’s record be sealed. Those copies of the Commission’s report shall be replaced by the redacted copy provided by the respondent. The Court also orders that Exhibit G from Stéphane Gagné’s affidavit be sealed. These documents shall be kept in a separate file and shall be accessible only with authorization.

[72] Considering the spirit of the CRA and the respondent’s consent, the record must also be anonymized. The Court allows the applicant to be referred to by his initials for the purposes of the judgment and orders that his name and any information that could identify him be removed from the Court’s index of proceedings.

JUDGMENT in T-917-16

THE COURT ORDERS that:

1. This application for judicial review is allowed;
2. Exhibits A, B, C, D, E, F and G attached to Stéphane Gagné's affidavit and exhibits P-1, P-2, P-4, P-5, P-6 and P-7 attached to the applicant's affidavit are struck;
3. The case is referred back to the Canadian Human Rights Commission for reconsideration to reflect these reasons;
4. The investigator's report contained in the Canadian Human Rights Commission's record and in the applicant's record, and Exhibit G from Stéphane Gagné's affidavit are sealed;
5. The redacted copy of the investigator's report contained in the respondent's record is added to the Canadian Human Rights Commission's record and the applicant's record;
6. The applicant is referred to by his initials, and his name and any other identifying information shall be removed from the Court's index of proceedings;
7. No order as to costs for the parties.

"Sylvie E. Roussel"
Judge

Certified true translation
This 4th day of March 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-917-16
STYLE OF CAUSE:	E.S. v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 20, 2017
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DATED:	DECEMBER 8, 2017

APPEARANCES:

E.S.	FOR THE APPLICANT (ON HIS OWN BEHALF)
Nadine Perron	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT