Federal Court of Appeal  Cour d'appel fédérale

**Date: 20220729**

**Docket: A-461-19**

**Citation: 2022 FCA 140**

[ENGLISH TRANSLATION]

**CORAM:** **BOIVIN J.A.**
**DE MONTIGNY J.A.**
**LEBLANC J.A.**

**BETWEEN:**

**YACINE AGNAOU**

**Applicant**

**and**

**PUBLIC PROSECUTION SERVICE OF CANADA**
**BRIAN SAUNDERS**
**GEORGES DOLHAI**
**ANDRÉ A. MORIN**
**DENIS DESHARNAIS**
**PUBLIC SECTOR INTEGRITY COMMISSIONER**

**Respondents**

Heard at Montréal, Quebec, on May 4, 2022.

Judgment delivered at Ottawa, Ontario, on July 29, 2022.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: BOIVIN J.A.
LEBLANC J.A.

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## REASONS FOR JUDGMENT

**DE MONTIGNY J.A.**

[1] This application for judicial review is the culmination of a long saga involving the applicant and certain managers at the Public Prosecution Service of Canada. It stems more directly from a decision of the Federal Court (*Agnaou v. Attorney General of Canada*, 2017 FC

338) ordering the Public Sector Integrity Commissioner (the Commissioner) to apply to the Public Servants Disclosure Protection Tribunal (the Tribunal) in order to request that it hear the applicant's reprisal complaint, pursuant to subsection 20.4(1) of the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 (the Act).

[2] At the end of a 19-day hearing during which some 30 witnesses were heard, the Tribunal found that Mr. Agnaou had not shown, on a balance of probabilities, that he had made a protected disclosure under section 12 of the Act in April 2009, or that the fact that he was not appointed to a higher-level position constituted a reprisal within the meaning of the Act.

[3] After having carefully reviewed the file and the parties' written and oral submissions, I am of the opinion that the application for judicial review should be dismissed.

## I. The facts

[4] The facts that gave rise to this dispute have been repeated many times in the numerous decisions rendered by this Court and by the Federal Court following the disclosure of wrongdoings made to the Commissioner on October 13, 2011. The Tribunal also conducted an exhaustive review of the evidence that was submitted before it and included a detailed summary of this evidence in its decision; that summary was more than 50 paragraphs long. I do not intend to repeat that exercise and will therefore confine myself to the most relevant aspects for the purpose of deciding the issues before us. The following summary is based primarily on the findings of fact made by the Tribunal.

[5] I am aware that the applicant is challenging several of these findings, and for that matter, he spent a great deal of time during his oral argument trying to show us that the Tribunal had erred in its interpretation of the evidence. However, this Court's role is not to retry the case and carry out its own assessment of the evidence, unless it can be demonstrated that there are palpable errors or fundamental flaws. It is thus from this perspective that the following narrative should be read. In my analysis of the issues, I will review the main points of disagreement between the applicant and the Tribunal in light of the evidence.

[6] Mr. Agnaou is a lawyer and a member of the Barreau du Québec. He joined the Prosecution Service's economic crimes team in 2003 as a federal Crown prosecutor. He then became a member of the Public Prosecution Service of Canada (PPSC), also within the Quebec Regional Office (QRO).

[7] In January 2006, the Canada Revenue Agency (CRA) submitted an investigation report to the PPSC recommending that proceedings be instituted against a company that had failed to respond to its requirements for information. Mr. Agnaou was assigned the file and had to determine whether criminal charges should be laid. He quickly came to the conclusion that proceedings should indeed be instituted, but his supervisors and experienced counsel expressed reservations in this regard and considered that it would be premature to proceed. At the time that this disagreement occurred, it seems that the relationship between Mr. Agnaou and his supervisors had deteriorated for various reasons, in particular because of his behaviour in the workplace.

[8] After his supervisors determined that proceedings should not be instituted, Mr. Agnaou contacted the Chief Federal Prosecutor at the QRO, André Morin, one of the respondents in these proceedings, directly and informed him of the impasse at which he found himself following his disagreement with his managers. He also asked to be assigned to another manager, which Mr. Morin accepted.

[9] Given the ongoing disagreement between Mr. Agnaou and his managers, the QRO's general counsel committee was asked to provide a recommendation on the advisability of instituting proceedings in the case. Following a meeting held on March 9, 2009, to which Mr. Agnaou was not invited, the committee recommended that no proceedings be instituted. Mr. Agnaou's manager informed him of this decision on March 23, 2009. During a meeting with his managers the next day, he received a memorandum from Mr. Morin documenting the decision not to institute proceedings and asking him to close the file. On the same day, Mr. Agnaou sent Mr. Morin a long memorandum asking him to reconsider his decision and stating the reasons for which he considered that proceedings should be instituted.

[10] After receiving confirmation from Mr. Morin on April 1, 2009 that his decision remained unchanged, Mr. Agnaou sent the following email to his supervisor:

> [TRANSLATION]
>
> Moreover, as I told you, I cannot, in good conscience, not submit this case to the Director of Public Prosecutions. It is clear that QRO management had already decided in the fall of 2008 (if not immediately after the Department of Justice's intervention in September 2007) to find a way to close the file. The arguments submitted at the November 4, 2008 and February 24, 2009 meetings, and in the March 9, 2009 minutes, are almost identical.

> I contend that the consultation of the general counsel committee was intended to provide "credibility" to a decision made outside the usual procedure set out in Chapter 15 of the FPS Deskbook. I also contend that today's meeting was never intended to allow the Chief Prosecutor to reconsider his decision, which was probably discussed by QRO management before the final version of the prosecution report was received (January 2009). These forums were not established as a means to truly debate facts of this case. The factual errors in the general counsel committee's minutes and the lack of familiarity with the prosecution report that I noted among QRO management members speak volumes about the reasons for its intervention in this case.
>
> Therefore, could you please explain how I should bring this case to the attention of the Director of Public Prosecutions? I could send to the contact person that you will provide my attached statement of the facts, as well as its appendices (which André did not read before confirming his decision) and the complete prosecution report.

[11] After being informed that the CRA had been notified of the decision not to institute proceedings, Mr. Agnaou sent his manager a second email on April 2, 2009, with a copy to Mr. Morin and a general counsel:

> [TRANSLATION]
>
> Given that the external stakeholders have already been notified of our Chief Prosecutor's decision, I can only reassess the timeliness of my efforts to persuade the Director of Public Prosecutions that this decision was made contrary to our organization's policies and is harmful to the public interest.
>
> In the coming weeks, I will focus on my active files and think about what actions to take in this serious matter. My decisions will be defined by my responsibilities as a Crown prosecutor as set out in our Acts and policies. If necessary, our Chief Prosecutor will be informed by the competent authorities.

[12] As part of the reprisal complaint that he submitted to the Office of the Commissioner in January 2013, Mr. Agnaou identified these two emails as protected disclosures of wrongdoing under section 12 of the Act.

[13] On April 3, 2009, Mr. Morin recommended to Mr. Agnaou that he take time off and consult his doctor regarding his ability to work. On that day, Mr. Agnaou filed three grievances, four harassment complaints and one complaint under section 127.1 of the *Canada Labour Code*, R.S.C. 1985, c. L-2. In February 2009, he had also filed a complaint with the Public Service Staffing Tribunal contesting the results of a selection process launched by the QRO. It was clear that the relationship of trust between Mr. Agnaou and his supervisors was now broken. Nevertheless, Mr. Agnaou returned to the office on June 2 after he received a fit-to-work certificate from his doctor and the Health Canada doctor.

[14] In May and June 2009, Mr. Agnaou contacted the Office of the Commissioner anonymously to enquire about what could constitute a case of gross mismanagement and about how the Office of the Commissioner operates. Then, in a second message, he identified himself and provided to the Office of the Commissioner the facts related to the CRA file, indicating that he was thinking about making a formal disclosure of wrongdoing.

[15] In June 2009, during a mediation session regarding the complaint that he had filed with the Staffing Tribunal, Mr. Agnaou negotiated an agreement with the Deputy Director of the PPSC, George Dolhai. In this memorandum of understanding signed on June 26, 2009, the PPSC granted Mr. Agnaou an 18-month leave of absence with full pay, followed by educational leave without pay but with full allowance for one year, at the end of which the Public Service Commission would consider him a priority for one year. In return, Mr. Agnaou agreed to withdraw all of his complaints and grievances, leave the PPSC, and vacate his office no later than July 3, 2009. He also agreed not to return to his office during or after the leave or during the

period when the Public Service Commission would consider him a priority. A few days after he left the PPSC, the applicant learned that he had qualified in a pool of candidates created during a selection process for positions at the LA-2B level.

[16] On October 13, 2011, Mr. Agnaou sent the Integrity Commissioner a letter to which he attached a disclosure of wrongdoing form and 86 appendices. His form stated that the wrongdoing constituted gross mismanagement in the public sector, as provided for in paragraph 8(c) of the Act, and that said wrongdoing had been reported to a supervisor or a colleague. Mr. Agnaou also indicated that he had reported the wrongdoing to the Office of the Commissioner on May 25, 2009.

[17] In his letter of allegations, Mr. Agnaou identified three QRO managers, including Mr. Morin, as the perpetrators of the wrongdoings that he claims occurred, adding that they were probably not the main instigators. However, the April 1 and 2, 2009 emails are not reproduced in his letter, and neither his letter nor the disclosure form refers to those emails as disclosures of wrongdoing. It was not until January 2013, in response to questions from an analyst with the Office of the Commissioner as part of the review of his complaint, that he made this claim.

[18] The Commissioner having recused himself because he knew some of the people mentioned in Mr. Agnaou's letter, in particular the Director of the PPSC, Brian Saunders, the Deputy Commissioner took charge of the file. On September 6, 2012, the Deputy Commissioner decided not to investigate Mr. Agnaou's disclosure; relying on paragraphs 24(1)(e) and (f) of the

Act, he found that the subject-matter of the disclosure related to a matter that resulted from a balanced and informed decision-making process that did not suggest any wrongdoing.

[19] On October 1, 2012, Mr. Agnaou filed an application for judicial review of that decision. The Federal Court dismissed his application on January 27, 2014 (*Agnaou v. Canada (Attorney General)*, 2014 FC 86). This Court dismissed the appeal from that decision on February 2, 2015 (*Agnaou v. Canada (Attorney General)*, 2015 FCA 30). The Court was of the opinion that the trial judge could find that the Commissioner's decision was reasonable given the existence of an honest difference of opinion between an employee and his supervisors, and the discretion conferred on the Commissioner under section 24 of the Act.

[20] As these events were unfolding, the PPSC had been facing pressure from two counsel since the spring of 2011, if not earlier. They considered that they were performing duties above their current positions. Mr. Dolhai initially attempted to address their concerns by eliminating the LA-2A positions that they held and replacing them with two LA-2B positions. When he received authorization to proceed, he used the pool for the selection process in which these two counsel had qualified to propose that they be appointed to these two positions.

[21] Informed of these developments, Mr. Agnaou notified the Public Service Commission (PSC) and asserted his priority entitlement. Surprised to learn that Mr. Agnaou wanted to claim his priority entitlement even though he had agreed never to return to the PPSC, a decision was made to abandon the appointment process and to proceed by reclassifying the positions held by the two counsel. It must be said that the PSC had informed the PPSC that the memorandum of

understanding clause under which Mr. Agnaou had agreed not to return to the PPSC was not binding because his priority entitlement was provided for by the legislation and could not be overridden by an agreement.

[22] When informed that the PPSC had abandoned the appointment process and had decided to reclassify the positions instead, Mr. Agnaou objected. On August 31, 2012, he wrote to his director, Mr. Saunders, asking him to state the reasons for which the Service had proceeded as it had. The PPSC Director General of Human Resources, Denis Desharnais, replied to him on September 10, 2012, indicating that it was more appropriate to reclassify the positions under the circumstances and that such an action did not require consideration of priority entitlements. He also assured him that his priority entitlements were not affected. According to Mr. Agnaou, it is this letter that constituted the alleged reprisal.

[23] Following this reply, Mr. Agnaou contacted the PSC on September 17, 2012, to express his dissatisfaction. The Vice-President of the Commission's policy branch provided him with an answer on October 19, 2012, stating that the PPSC, not the Commission, was authorized to make the decision and that the Commission had nevertheless discussed the matter with the Service to ensure that the decision had not been made in order to skirt Mr. Agnaou's priority entitlement. Mr. Agnaou subsequently requested that an investigation be conducted. This request was denied on December 31, 2012, on the grounds that the Commission had no jurisdiction over internal appointment processes. The applicant did not challenge this decision or the PPSC's decision to reclassify the positions.

[24] On January 7, 2013, Mr. Agnaou filed a reprisal complaint with the Office of the Commissioner, in which he alleged that the individual respondents had retaliated against him by refusing to appoint him to an LA-2B position on the grounds that he had filed a disclosure of wrongdoings with the Commissioner in 2011. He specifically referred to Mr. Desharnais's September 10, 2012 letter confirming the PPSC's decision to proceed with the reclassification of the two counsel's positions.

[25] On February 12, 2013, the Deputy Commissioner refused to deal with the reprisal complaint, considering it inadmissible under paragraph 19.3(1)(c) of the Act. He found that the reclassifications could constitute a reprisal within the meaning of the Act, such that the first condition to be met before the Commissioner could investigate was satisfied. However, he was of the opinion that the April 2, 2009 email could not constitute an internal disclosure within the meaning of the Act, insofar as it contained [TRANSLATION] "no mention of disclosure, of wrongdoings as defined in section 8 of the Act, of the Act or any agency whatsoever". Moreover, the chief executive concerned—the PPSC—was never informed about the disclosure to the Office of the Commissioner because no investigation was initiated in relation to this disclosure under subsection 27(1) of the Act. As Mr. Agnaou was unable to show how his managers might have learned of the disclosure, the reprisal could not have arisen from the existence of a protected disclosure, and the second condition to be met before the Commissioner could deal with a complaint was not fulfilled.

[26] The Federal Court dismissed the application for judicial review that Mr. Agnaou filed against this decision (*Agnaou v. Canada (Attorney General)*, 2014 FC 87), but this Court

allowed the appeal from that judgment: *Agnaou v. Canada (Attorney General)*, 2015 FCA 29 [*Agnaou FCA 2015*]. After a lengthy analysis, Madam Justice Gauthier (writing for a unanimous panel) determined that the Commissioner could not reasonably find that it was plain and obvious that the emails mentioned by Mr. Agnaou could not constitute an internal disclosure within the meaning of section 12 of the Act. As a remedy, this Court declared the complaint admissible and referred it back to the Commissioner to be dealt with appropriately.

[27] The Commissioner therefore conducted his investigation, following which he dismissed the complaint because there were no reasonable grounds to believe that reprisals had been taken against Mr. Agnaou. Given the terms of the memorandum of understanding, the Commissioner stated that he had no reasonable grounds to believe that the failure to appoint Mr. Agnaou to the sought-after position was related to his alleged disclosure. He therefore dismissed the complaint under section 20.5 of the Act. Mr. Agnaou filed a new application for judicial review of this decision by the Commissioner; this application was allowed by the Federal Court on March 31, 2017: *Agnaou v. Canada (Attorney General)*, 2017 FC 338. This time, the Court ordered the Commissioner to apply to the Tribunal to deal with the complaint and determine whether a reprisal had been taken against him, in accordance with subsection 20.4(1) of the Act. The Commissioner did just that on July 18, 2017.

## II. The impugned decision

[28] Even before the hearing was held, the Tribunal rendered three interlocutory decisions, two of which have been challenged by the applicant. In the first decision, rendered on

November 13, 2018 (*Agnaou v. Public Prosecution Service of Canada et al.*, 2018 PSDPT 2 [*Agnaou 1*]), the Tribunal had to rule on a motion for disclosure of documents filed by the applicant. On the basis of the case law, the Tribunal determined that a motion for disclosure of documents must be relevant to the case, that it must not be vague or amount to a fishing expedition, and that the documents requested must be described with reasonable precision.

[29] With respect to the first category of documents requested, all of which related to the decision not to institute criminal proceedings, the Tribunal had no difficulty in finding that these documents were not relevant because whether the respondents had committed any wrongdoing was not at issue before it. The Tribunal's authority and jurisdiction are in effect dependent on the scope of the Commissioner's notice of application: *El-Helou v. Courts Administration Service*, 2011 PSDPT 1 [*El-Helou 1*].

[30] As for the other categories of documents sought, the Tribunal established that these had to be described in a reasonably precise manner so that the request did not amount to a fishing expedition: *Turner v. Canada Border Services Agency*, 2018 CHRT 9. In the current matter, the Tribunal held that the applicant did not describe or identify in any way the documents that he was seeking to have disclosed; he limited himself to setting out categories of documents without providing any details that would make it possible to conclude that they even existed. The Tribunal therefore dismissed the applicant's motion, stating that it was of the view that it amounted to a fishing expedition.

[31] In its second interlocutory decision, which it rendered on May 6, 2019 (*Agnaou v. Public Prosecution Service of Canada et al.*, 2019 PSDPT 2 [*Agnaou 2*]), the Tribunal had to rule on motions filed by all the respondents to reduce the applicant's list of 55 witnesses. Before ruling on these motions, the Tribunal pointed out that it was master of its own procedure and that it was up to the Tribunal to reduce the number of individuals called to testify in order to observe the principle of proportionality, while ensuring that it complied with the principles of procedural fairness and allowed the complainant to present his or her case. That said, an applicant cannot embark on a fishing expedition and must establish that the witnesses for whom he or she intends to seek a subpoena are likely to provide relevant and non-repetitive evidence.

[32] Applying these principles, the Tribunal granted the respondents' motions in part. As in its first interlocutory decision, the Tribunal determined that the witnesses related to the case in which the applicant sought to lay criminal charges were not relevant given that the Tribunal did not have to determine whether a wrongdoing had been committed. Similarly, the Tribunal also removed from the applicant's list of witnesses the witnesses related to his harassment complaints, his access to information requests, and the manner in which the Commissioner conducted investigations and dealt with complaints, on the grounds that these issues were not relevant to the dispute. The Tribunal also excluded other potential witnesses requested by Mr. Agnaou because their announced testimony constituted a fishing expedition.

[33] Lastly, the Tribunal removed the PPSC's former departmental counsel from Mr. Agnaou's list of witnesses. The Tribunal found that the applicant had not established that

communications between the PPSC and the PSC in which this witness was allegedly involved would not affect solicitor-client privilege.

[34] On November 13, 2019, the Tribunal (Madam Justice St-Louis) dismissed the complaint on the merits: *Agnaou v. Public Prosecution Service of Canada et al.*, 2019 PSDPT 3 [*Agnaou 3*]. Having determined that it derived jurisdiction from the Commissioner's notice under subsection 20.4(1) of the Act, the Tribunal found that: (1) only the April 1 and April 2, 2009 emails could be considered internal disclosures; (2) only the communication to the Commissioner dated October 13, 2011 could be considered an external disclosure; and (3) the alleged reprisal measure was the reclassification of the two LA-2B positions to avoid appointing Mr. Agnaou to one of these two positions despite his priority entitlement.

[35] On the basis of previous case law and the definition of the term "reprisals" that is set out in subsection 2(1) of the Act, the Tribunal then ruled on the burden and standard of proof. According to the Tribunal, it was for the complainant to demonstrate, on a balance of probabilities, that: (1) he or she made a protected disclosure within the meaning of the Act; (2) he or she was the subject of one of the measures listed in the definition of "reprisal" under the Act; and (3) the measure was taken against him or her because he or she made a protected disclosure. In so doing, the Tribunal rejected Mr. Agnaou's argument that the complainant's burden of proof should be reduced so as not to undermine the effectiveness of the public servants disclosure protection system.

[36] With respect to the first element, the Tribunal agreed with the parties that the communication to the Commissioner on October 13, 2011 constituted a protected disclosure under section 13 of the Act, the first subsection of which reads as follows:

| | |
|---|---|
| **Disclosure to the Commissioner** | **Divulgation au commissaire** |
| A public servant may disclose information referred to in section 12 to the Commissioner. | Le fonctionnaire peut faire une divulgation en communiquant au commissaire tout renseignement visé à l'article 12. |

[37] However, the Tribunal found that the April 1 and 2, 2009 emails did not constitute an internal disclosure within the meaning of section 12 of the Act, which states:

| | |
|---|---|
| **Disclosure to supervisor or senior officer** | **Divulgation au supérieur hiérarchique ou à l'agent supérieur** |
| A public servant may disclose to his or her supervisor or to the senior officer designated for the purpose by the chief executive of the portion of the public sector in which the public servant is employed any information that the public servant believes could show that a wrongdoing has been committed or is about to be committed, or that could show that the public servant has been asked to commit a wrongdoing. | Le fonctionnaire peut faire une divulgation en communiquant à son supérieur hiérarchique ou à l'agent supérieur désigné par l'administrateur général de l'élément du secteur public dont il fait partie tout renseignement qui, selon lui, peut démontrer qu'un acte répréhensible a été commis ou est sur le point de l'être, ou qu'il lui a été demandé de commettre un tel acte. |

[38] After considering the purpose of the Act and the broad and liberal interpretation that it should be given, as well as the dictionary definitions of the terms "disclosure" and "disclose", the Tribunal was of the opinion that, for a public servant, the purpose of a disclosure is to

denounce an act that undermines the integrity of the public service (at para. 104). The Tribunal was also of the view that a disclosure should "communicate any information that could objectively demonstrate that a wrongdoing has been or is about to be committed" (at para. 106). The Tribunal noted that the recipients of the emails sent by Mr. Agnaou were indeed his supervisors and that this Court had determined in its 2015 decision that the information provided in his April 1 and 2, 2009 emails could refer to a case of gross mismanagement.

[39] However, on the basis of the evidence, the Tribunal determined that the supervisors to whom the emails were sent were unaware that these communications constituted a disclosure and they instead believed that Mr. Agnaou was signalling his intention to continue the debate internally (at paras. 107–108). Once again relying on the evidence in the record, the Tribunal also held that Mr. Agnaou had not shown, on a balance of probabilities, that he himself had intended to disclose a wrongdoing under the Act when he sent his emails (at paras. 109–112).

[40] With respect to the second element, the Tribunal found that reclassifying the positions constituted a measure within the meaning of the Act and that this had been established by the applicant (at paras. 118–123). However, the Tribunal specified that Mr. Morin had not participated in taking this measure.

[41] Lastly, the Tribunal found that Mr. Agnaou had not established the necessary link between the alleged measure and a protected disclosure. According to the Tribunal, even if it were assumed that the April 1 and 2, 2009 emails constituted an internal disclosure within the meaning of the Act, it was more likely, on the basis of the evidence, that the measure was taken

to ensure that both counsel accessed the LA-2B positions, to ensure that the appropriate process for recognizing their duties was followed, to avoid having priority public servants appointed to one of these positions, and to prevent the applicant from returning to the PPSC (at para. 127).

[42] Furthermore, the Tribunal noted that proof of the link between the measure and the disclosure requires proof of knowledge, by those who made the decision, of the existence of the disclosure. However, the Tribunal found that Mr. Agnaou had not discharged his burden of proof in this respect and did not provide any evidence that, in September 2012, the respondents knew that the April 1 and 2, 2009 emails were, or could constitute, a disclosure of wrongdoing (at paras. 139–145).

[43] With respect to the link between the measure and the applicant's disclosure to the Office of the Commissioner, the Tribunal found that the applicant had failed to demonstrate, on a balance of probabilities, that the Office of the Commissioner had informed the PPSC that a disclosure had been forwarded to it on or before September 10, 2012 (the date on which the applicant had been informed that the two positions had been reclassified). The Tribunal added that to conclude otherwise would require disregarding all the testimony provided at the hearing, with the exception of Mr. Agnaou's testimony, and finding that the Office of the Commissioner had failed to comply with its home statute and had informed the PPSC of the disclosure made to it. As a result, the Tribunal determined that the complainant had failed to establish, on a balance of probabilities, the existence of a link between his disclosure to the Office of the Commissioner and the reclassification of the two positions. The complaint was therefore dismissed because Mr. Agnaou had not shown that the respondents had taken reprisals against him.

## III. The request for recusal

[44] A few days before the hearing of this application for judicial review, the applicant sent a letter to this Court in which he raised a potential conflict of interest involving a member of this panel. The applicant argued that the Honourable Mr. Justice LeBlanc had previously recused himself in a case (T-2064-15) involving the same parties when he was a member of the Federal Court. Justice LeBlanc explained that the feared conflict of interest resulted from the fact that an employee of the Office of the Commissioner who had participated in the decision-making process that had led to the dismissal of his reprisal complaint was a long-time friend.

[45] After giving Mr. Agnaou the opportunity to explain his request for recusal at greater length at the start of the hearing, this Court withdrew to consider his request. When it returned, Justice LeBlanc read the following reasons, which I have reproduced in full below:

> [TRANSLATION]
>
> After having considered the appellant's letter, dated April 28, 2022, and the submissions that he has just made to us, I am of the opinion that an informed, sensible, and reasonable person, viewing the matter realistically and practically—and having thought the matter through—would think that it is more likely than not that I would render a fair decision in these proceedings for the following reasons:
>
> (a) Firstly, the proceedings before us here involve a decision of the Public Servants Disclosure Protection Tribunal of Canada, not a decision of the Public Sector Integrity Commissioner; in other words, the proceedings do not concern the Commissioner's decision to dismiss the reprisal complaint—a case from which I recused myself in November 2017—or any other decision made by this decision-maker;
>
> (b) Secondly, as evidenced by the judgment of the Federal Court disposing of the judicial review from which I had recused myself, namely, the judgment delivered

> on March 31, 2017, the Commissioner made an about-face on that date and was willing to refer the appellant's reprisal complaint to the Public Servants Disclosure Protection Tribunal of Canada. Consequently, for all intents and purposes, the issue of the reasonableness of the decision in relation to the proceedings in which this friend had participated no longer arose;
>
> Lastly, the friend who prompted my recusal from the November 2017 case retired from the federal public service in June 2017, a few weeks before the Commissioner formally referred the appellant's reprisal complaint to the Tribunal, which happened in August 2017; in other words, this friend was no longer employed by the Office of the Public Sector Integrity Commissioner when the proceedings before the Tribunal in connection with the appellant's reprisal complaint were initiated, conducted and concluded.
>
> I therefore see no reason to recuse myself from this case.

## IV. Issues

[46] The applicant raised several issues in his memorandum and oral submissions, which respondent André A. Morin essentially repeated. The Commissioner, for his part, set out 12 issues, while the Attorney General, Mr. Saunders, Mr. Dolhai and Mr. Desharnais focused their arguments on the standard of review, the reasonableness of the Tribunal's decisions, and observance of the principles of procedural fairness.

[47] In the end, I am of the view that all the arguments raised by the parties can be grouped around the following issues:

(1) Did the Tribunal err in determining that the April 1 and 2, 2009 emails were not protected disclosures under section 12 of the Act?

(2) Did the Tribunal err in finding that Mr. Agnaou did not demonstrate the necessary causal link between his disclosure and the alleged measure?

(3) Did the Tribunal err in dismissing the motion for disclosure?

(4) Did the Tribunal observe the principle of procedural fairness?

## V. Analysis

[48] The applicant argues that the applicable standard of review should be correctness on the grounds that the Act is quasi-constitutional in nature. However, he did not rely on any precedents to support his contention and at most alluded vaguely to the connection between the protection of persons who disclose and the values that underpin the Constitution. Without wishing to deny the importance of the Act in the architecture of our government institutions, this seems to me to be quite insufficient to give it a fundamental status similar to that of the *Official Languages Act*. Be that as it may, the Federal Court has already refused to recognize the quasi-constitutional status of the Act in *Chopra v. Canada (Attorney General)*, 2013 FC 644 at paras. 74 to 75. Although this issue was not explicitly commented on upon appeal, the fact remains that this Court upheld the Federal Court decision (2014 FCA 179) and the applicant did not explain why it would be appropriate to depart from these decisions.

[49] Even if it were to be assumed that the Act could be characterized as quasi-constitutional, the applicant has not explained how this should suffice to set aside the principle that an administrative decision-maker interpreting its home statute is entitled to deference: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 [*Human Rights Commission*] at para. 29. The Supreme Court did not challenge this presumption in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; on the contrary, the

highest court in the land reiterated the presumption that reasonableness is the applicable standard when a court reviews administrative decisions. It is true that this presumption will be set aside when constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to jurisdictional boundaries are at issue. However, one should not confuse the quasi-constitutional status of legislation (if the Act is quasi-constitutional legislation) and the particular questions that arise in the application of that legislation, as has been acknowledged by the Supreme Court in *Human Rights Commission* (at para. 30).

[50] When deciding on the reasonableness of an administrative decision, the reviewing court must determine whether that decision is based on an inherently coherent and rational chain of analysis, and whether it is justified in relation to the relevant facts and law: *Vavilov* at para. 85; *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67 at para. 31; *Caron Transport Ltd. v. Williams*, 2020 FCA 106 at para. 16. This standard applies to all substantive aspects of an administrative decision.

[51] However, the standard of reasonableness is irrelevant to whether the duty to act in compliance with procedural fairness has been satisfied. In fact, whether the principles of procedural fairness were respected is an issue that does not lend itself well to an analysis based on the standard of review, insofar as this exercise involves examining the results whereas procedural fairness involves the procedure followed to achieve these results. As Justice Binnie wrote in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 (at para. 102), “[t]he content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his

deliberations." See also this Court's exhaustive analysis of this issue in *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paragraphs 32–56. While these issues are generally reviewed on the standard of correctness, what ultimately matters is whether the process followed by the administrative decision-maker was fair to all parties. While acknowledging that administrative tribunals enjoy considerable latitude in choosing the procedures that they follow, an applicant must always be treated fairly, know the case that he has to meet, and be given the opportunity to respond. These are indispensable requirements whose violation cannot be given any deference: *Algoma Tubes Inc. v. Canada (Attorney General)*, 2022 FCA 89 at para. 8.

A. *Did the Tribunal err in determining that the April 1 and 2, 2009 emails were not protected disclosures under section 12 of the Act?*

[52] The applicant argued that the Tribunal erred in finding that the April 1 and 2, 2009 emails did not constitute protected disclosures because it considered only the text of those emails without taking into account the context in which the emails had been sent or the events that had preceded or followed them or that had been occurring at the time that they had been sent. He also argued that the emails had to be analyzed while taking into consideration why Mr. Agnaou had sent them (*i.e.*, to provide his supervisors with information that he believed could show that a wrongdoing had been committed).

[53] As mentioned previously, the term "disclosure" is not defined in the Act. To give it meaning, the Tribunal referred to the purpose of the Act, the context in which it was enacted, and the definitions provided in French-language dictionaries. The Tribunal deduced from this

analysis that the purpose of a disclosure within the meaning of the Act is to denounce, reveal or sound the alarm about an act that undermines the integrity of the public service. Section 12 of the Act sets out that the disclosure may be made internally to the supervisor or to the senior officer designated for the purpose by the chief executive, while section 13 authorizes the public servant to make a disclosure to the Commissioner. In this case, the Tribunal had no difficulty recognizing that a communication had been made to the Commissioner on October 13, 2011, but it indicated that it was of the opinion that the April 1 and 2, 2009 emails did not constitute an internal disclosure.

[54] First of all, it should be emphasized that the Tribunal, drawing inspiration from the decisions rendered in *El-Helou 1* and *Agnaou FCA 2015*, recognized that the Act must be given a broad and liberal interpretation. Moreover, the Tribunal took care to preface its analysis with a warning that its findings regarding its interpretation of a disclosure within the meaning of section 12 of the Act were not intended to be general in scope, but only applied to the circumstances of this case, given the absence of submissions from Mr. Agnaou in this respect.

[55] Contrary to what the applicant asserted, I consider that the Tribunal took into account the context of the April 1 and 2, 2009 emails. At the end of a 19-day hearing, the Tribunal was well aware of the sequence of events surrounding these emails. In response to Mr. Agnaou's argument that Mr. Boileau and Mr. Morin could not [TRANSLATION] "not know" that this was a disclosure, the Tribunal responded that Mr. Agnaou had not specified what evidence supported this argument, and referred to several pieces of contextual evidence that tended to show the contrary (Decision, para. 108). It is well established that weighing the evidence is an issue that falls

within the area of the Tribunal's expertise, and Mr. Agnaou has not demonstrated that there was any error that would warrant intervention by this Court. At most, he disagreed with the findings made by the Tribunal and tried to persuade us of his version of the facts. However, it is not the role of this Court in an application for judicial review to reweigh the evidence: *Vavilov*, para. 125; *Kalonji v. Deputy Head (Immigration and Refugee Board of Canada)*, 2018 FCA 8 at para. 7.

[56] There are two problems with Mr. Agnaou's argument that only his perspective should be taken into account to determine whether the April 1 and 2, 2009 emails constituted a protected disclosure. Firstly, as the Tribunal aptly argued, the evidence did not establish that it was "more likely than not" that he himself intended to disclose a wrongdoing (Decision, para. 109). I agree with the Commissioner when he claimed that Mr. Agnaou's decision to send his messages to the very people whom he alleged he wanted to denounce rather than to the PPSC disclosure protection coordinator could not be determinative in view of the fact that the Act itself gives public servants the choice to make their disclosure to their supervisor, the senior officer designated for the purpose by the chief executive, or the Office of the Commissioner. The fact remains that the choice to send his emails to his supervisors may be indicative of Mr. Agnaou's state of mind on April 1 and 2, 2009.

[57] I also agree with the Commissioner that, in determining Mr. Agnaou's intention, consideration should also not be given to the understanding that the recipients of the emails may have had of these messages. The meaning of a communication cannot depend on the perception of the people who receive it. It is only at the final stage of the analysis, when it is time to

determine whether a link has been established between the reprisal measure and the protected disclosure, that the issue of whether the people who took the reprisal measures were aware of the disclosure will arise.

[58] That being said, the fact that no witnesses involved in the infamous "A" case, including Mr. Agnaou's shop steward, believed that the April 1 and 2, 2009 emails constituted a disclosure can certainly be taken into consideration. As the Tribunal also noted, it appears that prior to January 2013, Mr. Agnaou never indicated that his emails constituted a disclosure under the Act, and neither the disclosure form nor the 36-page allegation letter that Mr. Agnaou sent to the Commissioner in October 2012 refers to the emails as internal disclosures (Decision, para. 111). The evidence also revealed that it was not unusual for a prosecutor to disagree with the managers' decision as to whether or not to prosecute, and in his letter of allegations to the Commissioner, Mr. Agnaou himself referred to his [TRANSLATION] "dispute" with the managers (applicant's record, at 729). Accordingly, it was not unreasonable for the Tribunal to find that Mr. Agnaou had not established, on a balance of probabilities, that he himself intended to make a disclosure within the meaning of the Act when he sent his emails on April 1 and 2, 2009.

[59] In light of this finding, it is not necessary to rule on Mr. Agnaou's other contention, namely, that the existence of a disclosure must be assessed from the subjective point of view of the person making the disclosure. Even assuming that Mr. Agnaou was right on this point, he did not demonstrate that he really intended to make a disclosure by sending his emails.

[60] That said, I think it is important to add the following observations. In specifying in section 12 that "[a] public servant may disclose to his or her supervisor ... any information that the public servant believes could show that a wrongdoing has been committed or is about to be committed, or that could show that the public servant has been asked to commit a wrongdoing" (emphasis added), Parliament, it seems clear to me, intended to protect a public servant who is acting in good faith. As this Court stated in *Agnaou FCA 2015* (at para. 73), "[d]enying a public servant statutory protection from reprisals when he or she has been fired for disclosing information on what he or she believed in good faith to be a wrongdoing as defined by the Act would render the system totally ineffective." For a communication to be considered a disclosure likely to lead to reprisals, it will therefore suffice that it be made to the supervisor or to the senior officer designated for the purpose by the chief executive, and that it reveal information that may show that a wrongdoing has been, is being or is about to be committed.

[61] However, the communication must reveal an intention to denounce or to divulge a wrongdoing as defined in section 8 of the Act. While a public servant does not have to specify that he or she is making a disclosure or explicitly refer to the Act, as this Court acknowledged in *Agnaou FCA 2015* (at para. 75), it is necessary to be able to deduce this intention from the language used and the circumstances surrounding his or her communication. It is precisely in this respect that the April 1 and 2, 2009 emails were lacking, as mentioned above.

[62] In short, I am of the opinion that the Tribunal did not err in finding that Mr. Agnaou had not shown, on a balance of probabilities, that he had made a protected disclosure under

section 12 of the Act. The Tribunal could therefore reasonably find that he was not entitled to the protection that the Act provides a public servant who has made an internal disclosure.

B. *Did the Tribunal err in finding that Mr. Agnaou did not demonstrate the necessary causal link between his disclosure and the alleged measure?*

[63] As mentioned previously, the Tribunal found that even if the April 1 and 2, 2009 emails could be considered internal disclosures, Mr. Agnaou had not demonstrated that there was a link between making these disclosures and not being appointed to an LA-2B position. Mr. Agnaou challenges this finding on the ground that the Tribunal had allegedly misinterpreted the evidence and been too demanding with respect to the link that had to be shown to exist between the disclosure and the alleged reprisal.

[64] In my opinion, the Tribunal adequately explained why the reclassification of the two positions and the decision not to appoint him to one of those positions were not related to his emails. The Tribunal relied on the fact that it was more likely that the measure had been taken to address the concerns of the two counsel who, since 2011, had been lobbying for recognition of the level of work that they performed. The Tribunal also accepted Mr. Dolhai's testimony that his unit did not have the necessary funds to both reclassify the two positions and hire a priority employee. The Tribunal also noted that the managers had been surprised to learn that Mr. Agnaou had asserted his priority entitlement despite the memorandum of understanding, which had been signed because relations with management had been strained and the relationship of trust had been broken. Lastly, the perpetrators of the alleged reprisal measure had no knowledge of the internal disclosure at the time this measure was taken. It is perfectly

understandable that the applicant disagrees with the Tribunal's findings. However, this is not enough to establish that its decision was unreasonable. Barring exceptional circumstances, which have not been demonstrated here, it is up to the Tribunal and not this Court to assess the evidence that was submitted.

[65] The same applies to the link (or rather the lack of a link) between the alleged reprisal measure and the disclosure made to the Commissioner in October 2011. The Tribunal found that the evidence did not support in any way Mr. Agnaou's contention that his disclosure had been leaked and communicated to his employers. The Tribunal wrote the following at paragraph 151 of its decision:

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

[66] The applicant did not submit evidence showing that the Commissioner had breached his oath of office and his duty to maintain the privilege of the information communicated to him. Indeed, the Commissioner testified that he did not communicate the existence of the external disclosure to anyone within the PPSC or outside the Office of the Commissioner. Given the fact that Mr. Agnaou himself acknowledged not only that the proof of the link between the measure and the disclosure was strictly circumstantial, but also that he did not establish the existence of this link on a balance of probabilities, the Tribunal was entitled to conclude that his reprisal

complaint should be dismissed. As the Supreme Court pointed out in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (at para. 14), reasonableness review is not a "line-by-line treasure hunt for error" (reiterated in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 at para. 54 and *Vavilov* at para. 102).

[67] While stating that he agreed with the Tribunal's decision that the applicant had not demonstrated the link between the protected disclosures and the impugned measures, the Commissioner asked this Court to clarify the burden of proof required to illustrate such a link. Relying on the definition of the word "reprisal" found in subsection 2(1) of the Act, and in particular on the word "because", the Commissioner considered that, in order to establish, on a balance of probabilities, that a measure described in paragraphs (a) through (e) of this definition was taken as a reprisal, it was sufficient for the complainant to show a connection with the protected disclosure. According to the Commissioner, it would therefore not be necessary to demonstrate that the protected disclosure was the only reason for which the measure was taken, contrary to what the Tribunal had decided.

[68] The Tribunal based its argument on the case law emanating from the Canadian Human Rights Tribunal in relation to section 14.1 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA). According to this provision, it is a discriminatory practice for a person against whom a complaint has been filed to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim. However, on the basis of the case law of the Human

Rights Tribunal, it is sufficient, for a complaint to succeed, to prove that the complaint was one of the factors leading to the adverse effect: see, for example, *Dixon v. Sandy Lake First Nation*, 2018 CHRT 18 at para. 24. The courts have adopted the same interpretation in the context of provincial laws prohibiting discrimination: see, in particular, *Quebec (Commission des droits de la personne et de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789 at para. 48 [*Bombardier*], citing *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665 at para. 67 [*City of Montréal*]; *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, 463 D.L.R. (4th) 567 at para. 96; *Peel Law Association v. Pieters*, 2013 ONCA 396 at para. 59.

[69] Despite the similarities that the Act and anti-discrimination laws may have in some respects, an important distinction should be noted. As the Supreme Court pointed out in *Bombardier*, *City of Montréal* and *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591 (at para. 24), a discrimination complaint does not focus on discriminatory intent, but rather on the discriminatory effect of a decision, act or gesture, such that discrimination can take various forms and can even occur involuntarily. From this standpoint, focusing solely on the perpetrator's intention would inevitably undermine the objective of combating all forms of human rights violations such as discrimination. Furthermore, human rights laws are quasi-constitutional in nature: see *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, 462 D.L.R. (4th) 585 at para. 14; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 at para. 8.

[70] However, the Act is not quasi-constitutional in nature and its purpose is to enhance public trust in the integrity of the public service and its public servants. The Act therefore allows public servants to disclose information that could reveal that a wrongdoing has occurred or is about to occur within the public service. In return, persons who make disclosures are protected against any reprisals—defined as measures taken "because" the public servant has made a disclosure—that may be taken against them. In the absence of any evidence that the purpose of the Act would not be achieved if reprisals were required to be a measure taken against a public servant primarily because of a disclosure, I am of the opinion that it would be inappropriate to adopt the position put forth by the applicant and the Commissioner.

C. *Did the Tribunal err in dismissing the motion for disclosure?*

[71] The applicant argues that the Tribunal misinterpreted paragraphs 20(1)(c) and (e) of the *Public Servants Disclosure Protection Tribunal Rules of Procedure*, SOR/2011-170 (the Rules) in dismissing his application for disclosure. These provisions require each party to serve and file a statement of particulars that includes, among other things, a list of documents that are relevant to the matter at issue and that are in their possession or no longer in their possession. The applicant claims that the Tribunal set an overly stringent standard of relevance by requiring a precise description of the documents sought. He argues that the standard with respect to the disclosure of documents must be the same as the one used in the criminal process; that the Tribunal erred in relying on human rights case law; and that the adopted approach must consider the imbalance between the parties and the fact that the objective of the Act is not only to serve the private interests of the complainants, but also to promote the common good.

[72] In my opinion, these arguments have no merit. First of all, it is important to point out that a proceeding before the Tribunal is not a matter of criminal law but of administrative law, such that the standard for disclosure of documents set out in *Stinchcombe* does not apply in this case: *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 at para. 91; *El-Helou v. Courts Administration Service*, 2011 PSDPT 4 at para. 54 [*El-Helou 2*].

[73] The process set out by the Act in subsection 21.6(1) for dealing with reprisal complaints is very similar to the process set out in subsection 50(1) of the CHRA. In both cases, the parties are given the opportunity to appear and present evidence and to make representations. Rule 6 of the *Rules of Procedure under the CHRA* (03-05-04), which were in force at the time of the Tribunal's decision, contained provisions similar to those of the Rules concerning the statement of particulars, disclosure and production of documents. In both cases, the parties must identify the various documents in their possession that relate to a fact, issue or form of relief sought. Consequently, the Tribunal was entirely justified in relying on the case law developed in relation to the CHRA to assess the applicant's motion: *Agnaou FCA 2015* at para. 62.

[74] In its decision, the Tribunal relied on section 20 of the Rules and on a CHRT judgment, *Turner v. Canada Border Services Agency* (2018 CHRT 9), to find that the requested communication must be relevant to the matter at issue, must not be speculative or amount to a fishing expedition, and that the documents must therefore be described in a sufficiently precise manner (*Agnaou 1* at para. 26). The Tribunal went on to say that there must be a rational connection between the documents requested and the matter at issue, while recognizing that the burden imposed on the person requesting the document should not be too onerous (*Ibid.* at

para. 30). In my opinion, this is an accurate description of the rule of relevance that the Tribunal had to apply.

[75] It is settled law that the Tribunal's jurisdiction is limited by the scope of the Commissioner's notice of application, which, as it were, constitutes the originating document before the Tribunal: see *El-Helou 1* at paras. 77, 77 to 81, 89, 91 and 94; and *El-Helou 2* at paras. 43 and 45. In the present matter, the Commissioner did not ask the Tribunal to rule on the wrongfulness of the PPSC's decision not to institute proceedings; this question was therefore not at issue. Indeed, the Deputy Commissioner had previously found that there was no information to suggest that any wrongdoing had been committed within the meaning of the Act, and the Federal Court and this Court had upheld that decision. In addition, if the applicant had had concerns about the scope of the Commissioner's notice of application, he could have challenged it, which he did not do. In this context, it was therefore entirely reasonable for the Tribunal to find that the documents related to the decision not to institute proceedings were not relevant to the dispute.

[76] With respect to the other categories of documents that he requested in his motion, Mr. Agnaou simply contended that it could be inferred from the exhibits on record that there had to be other undisclosed documents. The Tribunal was entirely justified in finding that this application amounted to a fishing expedition, insofar as Mr. Agnaou did not provide any details regarding the documents that he sought to have disclosed, nor did he provide a list of these documents; rather, he limited himself to setting out categories of documents without providing any details that would make it possible to conclude that these documents even existed (*Agnaou 1* at para. 35). Even adopting a broad and liberal interpretation of section 20 of the Rules, a mere

suspicion unsupported by any concrete evidence cannot suffice to order the production of documents: *Grand River Enterprises Six Nations Ltd. v. Canada*, 2011 FCA 121 at paras. 15 and 16.

[77] I am therefore of the opinion that the applicant has failed to show that the Tribunal's decision to dismiss his motion for disclosure of documents was unreasonable, having regard to the circumstances and to the information available to the Tribunal.

D. *Did the Tribunal observe the principle of procedural fairness?*

[78] In his written submissions and oral argument, the applicant alleged that the Tribunal had breached its duty of procedural fairness. He argued that the Tribunal did not do justice to the evidence submitted; did not make the necessary connections between certain evidence and his arguments and therefore did not consider the evidence supporting his position; showed bias in its microscopic analysis of the facts; allowed the Commissioner to participate in the hearings when his statements were not intended to serve the public interest; refused to summon some of the witnesses whom he wanted to testify at the hearing; and limited the questions he wanted to ask on cross-examination. After having carefully reviewed the whole file, I cannot agree with these arguments.

[79] Like any other administrative decision-maker, the Tribunal is master of its own procedure and can take the steps needed to ensure procedural fairness and prevent a party from embarking on a fishing expedition: *Lukács v. Swoop Inc.*, 2019 FCA 145, citing *AstraZeneca Canada Inc. v.*

*Novopharm Limited*, 2010 FCA 112 at para. 5 and *Kastner v. Painblanc*, [1994] F.C.J. No. 1671 (QL) at para. 4. Ultimately, the question to be answered by this Court is whether the applicant knew the case he had to meet and had a full and fair chance to respond: *Canadian Pacific Railway* at paras. 54 and 56; *Doyle v. Canada (Attorney General)*, 2020 FC 259 at paras. 28 to 30.

[80] In this case, after having read the transcripts and the decision, I do not think that there is any doubt that the applicant knew the case he had to meet and had ample opportunity to respond. The respondents served and filed, almost 18 months before the hearing, a statement of particulars in accordance with the Rules. The statement referred to the material facts that they intended to enter into evidence, including the reasons for which the PPSC had chosen a reclassification process, their position on each of the issues, and the witnesses they intended to produce (respondents' record, vol. 1, Tab C, at 17 to 33). Furthermore, one year before the hearing, the PPSC and the individual respondents served and filed the summaries of the witnesses they intended to produce (respondents' record, vol. 1, at 54 to 55 and 69 to 73). The applicant was therefore well aware of the case he had to meet.

[81] It is true that the Tribunal reduced the number of witnesses that the applicant wanted to call, excluding more than half of them from his list. However, it explained this by noting the terse summary of numerous testimonies submitted by the applicant and their lack of relevance to the issues in dispute. The Tribunal was also of the opinion that several of the proposed testimonies would amount to a fishing expedition. These considerations were entirely appropriate. The Tribunal had to find an appropriate balance between a party's right to submit

evidence and the other parties' right to procedural fairness. I would also note that the Tribunal gave the applicant the opportunity to respond to the respondents' motions before it made its decision. Ultimately, the Tribunal is master of its own procedure. It made its decision to reduce the number of the applicant's witnesses after having considered the applicant's submissions and applying the case law tests relative to subpoenas. In particular, the Tribunal considered the principle of proportionality, the privileges that a witness could claim, the fact that a hearing must proceed expeditiously and that it must be fair, and the relevance and significance of the testimony to be delivered: *Zündel, Re*, 2004 FC 798 at paras. 5 to 10; *Laboratoires Servier v. Apotex Inc.*, 2008 FC 321 at paras. 19 and 20.

[82] I would add that the Tribunal spent 19 days hearing this case, and that Mr. Agnaou was given a good deal of latitude in presenting his case, as well as in the examination and cross-examination of witnesses. Contrary to what the applicant argued, the Tribunal had the authority to restrict certain examinations and cross-examinations to ensure that the questions were relevant and connected to the issues in dispute: *Forrest v. Canada (Attorney General)*, [2002] F.C.J. No. 713 at para. 31; *Lukács* at para. 18; *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198 at paras. 62 and 63; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para. 34. In this respect, I would note that the Tribunal made cautious and limited use of this power.

[83] Mr. Agnaou also insinuated that the Tribunal was biased in dealing with the evidence, in that the Tribunal stated that it was not up to the Tribunal to identify on his behalf the relevant evidence likely to support his contentions. However, such an allegation should normally be

raised at the earliest possible opportunity, and the applicant bears the burden of demonstrating that a reasonable and informed person, viewing the matter realistically and practically—and having thought the matter through—would have a reasonable apprehension of bias on the part of the decision-maker: *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at para. 19; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 114; *Davidson v. Canada (Attorney General)*, 2021 FCA 226 at para. 15. It seems clear to me that the Tribunal's statement that it is not up to the Tribunal to identify the relevant evidence likely to support the applicant's allegations does not satisfy this test, especially since it is entirely consistent with the applicable law of evidence.

[84] Moreover, I see absolutely nothing reprehensible about the Commissioner's participation in the Tribunal's hearings. First, subsection 21.4(2) specifies that the Commissioner is a party to the proceedings before the Tribunal, and as such has full and ample opportunity to participate, appear, present evidence and make representations. The Tribunal could not therefore limit his participation, whereas under subsection 21.6(3), it could limit the participation of persons identified as being persons who may have taken the alleged reprisal. Second, the Commissioner does not represent the complainant before the Tribunal, but is there to adopt a position that is in the public interest (subsection 21.6(2) of the Act). It was therefore open to him to take the position that the evidence did not show that reprisals were taken. As this Court wrote in *El-Helou v. Canada (Courts Administration Service)*, 2016 FCA 273 at para. 73, "the Commissioner would be acting against the public interest if he were to support a complaint of reprisal even though he was of the view that no reprisal had taken place."

[85] In short, for all the foregoing reasons, I am of the opinion that the Tribunal observed all the principles of procedural fairness and that the applicant was granted an impartial and independent hearing of his case. The various measures taken and decisions made by the Tribunal in the management of the case and during the hearing complied with its home statute and adequately enabled the applicant to assert his rights while preserving those of the respondents.

## VI. Conclusion

[86] I would dismiss the applicant's application for judicial review, with costs.

"Yves de Montigny"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
René LeBlanc J.A."

Certified true translation
Melissa Paquette, Jurilinguist

## APPENDIX

### *Public Servants Disclosure Protection Act, S.C. 2005, c. 46*

| | |
|---|---|
| **Definitions** | **Définitions** |
| **2(1)** The following definitions apply in this Act. | **2(1)** Les définitions qui suivent s'appliquent à la présente loi. |
| … | […] |
| ***reprisal*** means any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33: | ***représailles*** L'une ou l'autre des mesures ci-après prises à l'encontre d'un fonctionnaire pour le motif qu'il a fait une divulgation protégée ou pour le motif qu'il a collaboré de bonne foi à une enquête menée sur une divulgation ou commencée au titre de l'article 33 : |
| **(a)** a disciplinary measure; | **a)** toute sanction disciplinaire; |
| **(b)** the demotion of the public servant; | **b)** la rétrogradation du fonctionnaire; |
| **(c)** the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal; | **c)** son licenciement et, s'agissant d'un membre de la Gendarmerie royale du Canada, son renvoi ou congédiement; |
| **(d)** any measure that adversely affects the employment or working conditions of the public servant; and | **d)** toute mesure portant atteinte à son emploi ou à ses conditions de travail; |
| **(e)** a threat to take any of the measures referred to in any of paragraphs (a) to (d). (*représailles*) | **e)** toute menace à cet égard. (*reprisal*) |
| … | […] |

| **Wrongdoings** | **Actes répréhensibles** |
| --- | --- |
| **8.** This Act applies in respect of the following wrongdoings in or relating to the public sector: | **8.** La présente loi s'applique aux actes répréhensibles ci-après commis au sein du secteur public ou le concernant : |
| **(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; | **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)** a misuse of public funds or a public asset; | **b)** l'usage abusif des fonds ou des biens publics; |
| **(c)** a gross mismanagement in the public sector; | **c)** les cas graves de mauvaise gestion dans le secteur public; |
| **(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; | **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)** a serious breach of a code of conduct established under section 5 or 6; and | **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). | **f)** les le fait de sciemment ordonner ou conseiller à une personne de commettre l'un des actes répréhensibles visés aux alinéas a) à e). |
| **(g)** [Repealed, 2006, c. 9, s. 197] | **g)** [Abrogé, 2006, ch. 9, art. 197] |
| … | […] |

**Disclosure to supervisor or senior officer**

**12.** A public servant may disclose to his or her supervisor or to the senior officer designated for the purpose by the chief executive of the portion of the public sector in which the public servant is employed any information that the public servant believes could show that a wrongdoing has been committed or is about to be committed, or that could show that the public servant has been asked to commit a wrongdoing.

**Divulgation au supérieur hiérarchique ou à l'agent supérieur**

**12.** Le fonctionnaire peut faire une divulgation en communiquant à son supérieur hiérarchique ou à l'agent supérieur désigné par l'administrateur général de l'élément du secteur public dont il fait partie tout renseignement qui, selon lui, peut démontrer qu'un acte répréhensible a été commis ou est sur le point de l'être, ou qu'il lui a été demandé de commettre un tel acte.

**Disclosure to the Commissioner**

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

**Divulgation au commissaire**

**13(1)** Le fonctionnaire peut faire une divulgation en communiquant au commissaire tout renseignement visé à l'article 12.

…

[…]

**Refusal to deal with complaint**

**19.3(1)** The Commissioner may refuse to deal with a complaint if he or she is of the opinion that

**Irrecevabilité**

**19.3(1)** Le commissaire peut refuser de statuer sur une plainte s'il l'estime irrecevable pour un des motifs suivants :

…

[…]

**(c)** the complaint is beyond the jurisdiction of the Commissioner; or

**c)** la plainte déborde sa compétence;

…

[…]

**Application to Tribunal**

**20.4(1)** If, after receipt of the report, the Commissioner is of the opinion that an application to the Tribunal in relation to the complaint is warranted, the Commissioner may apply to the

**Demande présentée au Tribunal**

**20.4(1)** Si, après réception du rapport d'enquête, le commissaire est d'avis que l'instruction de la plainte par le Tribunal est justifiée, il peut lui demander de décider si des

Tribunal for a determination of whether or not a reprisal was taken against the complainant and, if the Tribunal determines that a reprisal was taken, for

représailles ont été exercées à l'égard du plaignant et, le cas échéant :

**(a)** an order respecting a remedy in favour of the complainant; or

**a)** soit d'ordonner la prise des mesures de réparation à l'égard du plaignant;

**(b)** an order respecting a remedy in favour of the complainant and an order respecting disciplinary action against any person or persons identified by the Commissioner in the application as being the person or persons who took the reprisal.

**b)** soit d'ordonner la prise des mesures de réparation à l'égard du plaignant et la prise de sanctions disciplinaires à l'encontre de la personne ou des personnes identifiées dans la demande comme étant celles qui ont exercé les représailles.

…

[…]

**Dismissal of complaint**

**Rejet de la plainte**

**20.5** If, after receipt of the report, the Commissioner is of the opinion that an application to the Tribunal is not warranted in the circumstances, he or she must dismiss the complaint.

**20.5** Si, après réception du rapport d'enquête, le commissaire est d'avis, compte tenu des circonstances relatives à la plainte, que l'instruction de celle-ci par le Tribunal n'est pas justifiée, il rejette la plainte.

…

[…]

**Rights of parties**

**Droits des parties**

**21.6(1)** Every party must be given a full and ample opportunity to participate at any proceedings before the Tribunal — including, but not limited to, by appearing at any hearing, by presenting evidence and by making representations — and to be assisted or represented by counsel, or by any person, for that purpose.

**21.6(1)** Dans le cadre de toute procédure, il est donné aux parties la possibilité pleine et entière d'y prendre part et de se faire représenter à cette fin par un conseiller juridique ou par toute autre personne, et notamment de comparaître et de présenter des éléments de preuve ainsi que leurs observations.

**Duty of Commissioner**

**21.6(2)** The Commissioner must, in proceedings before the Tribunal, adopt the position that, in his or her opinion, is in the public interest having regard to the nature of the complaint.

**Obligation du commissaire**

**21.6(2)** Dans le cadre de toute procédure, le commissaire adopte l'attitude qui, à son avis, est dans l'intérêt public, compte tenu de la nature de la plainte.

**Limitation — proceedings relating to remedy**

**21.6(3)** With respect to the portions of proceedings that relate solely to the remedy, if any, to be ordered in favour of the complainant, the Tribunal may, despite subsection (1), limit the participation of any person or persons identified as being the person or persons who may have taken the alleged reprisal.

**Limite imposée à la participation**

**21.6(3)** Malgré le paragraphe (1), le Tribunal peut limiter la participation de la personne ou des personnes identifiées comme étant celles qui auraient exercé les représailles lors de la partie de la procédure qui traite uniquement de la prise de mesures de réparation à l'égard du plaignant.

…

[…]

**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

**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)** 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;

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

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

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

**(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;

**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)** 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

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

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

…

[…]

**Notice to chief executive**

**27(1)** When commencing an investigation, the Commissioner must notify the chief executive concerned and inform that chief executive of the substance of the disclosure to which the investigation relates.

**Avis à l'administrateur général**

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

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-461-19 |
| **STYLE OF CAUSE:** | YACINE AGNAOU v. PUBLIC PROSECUTION SERVICE OF CANADA, BRIAN SAUNDERS, GEORGES DOLHAI, ANDRÉ A. MORIN, DENIS DESHARNAIS, PUBLIC SECTOR INTEGRITY COMMISSIONER |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | MAY 4, 2022 |
| **REASONS FOR JUDGMENT BY:** | DE MONTIGNY J.A. |
| **CONCURRED IN BY:** | BOIVIN J.A.<br>LEBLANC J.A. |
| **DATED:** | JULY 29, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Yacine Agnaou | FOR THE APPLICANT<br>(representing himself) |
| | FOR THE RESPONDENTS |
| Kétia Calix | PUBLIC PROSECUTION SERVICE OF CANADA, BRIAN SAUNDERS, GEORGES DOLHAI, and DENIS DESHARNAIS |
| Antoine Aylwin | ANDRÉ A. MORIN |
| Claudine Patry<br>Sherri Anderson | PUBLIC SECTOR INTEGRITY COMMISSIONER |

**SOLICITORS OF RECORD:**

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