

Federal Court



Cour fédérale

**Date: 20161229**

**Docket: T-2157-15**

**Citation: 2016 FC 1416**

**Ottawa, Ontario, December 29, 2016**

**PRESENT: The Honourable Mr. Justice Brown**

**BETWEEN:**

**MURLIDHAR GUPTA**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Nature of the Matter

[1] This is an application for judicial review by Murlidhar Gupta [Applicant], pursuant to s. 51.2 of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [PDSPA] and s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision by the Commissioner of the Public Sector Integrity Commission of Canada [Commissioner], on November 25, 2015 [the Decision], in which the Commissioner declined to commence an investigation into alleged wrongdoing and

reprisal, as defined under sections 2 and 8 of the *PDSPA*, pursuant to paragraph 24(1)(f) of the *PDSPA*.

## II. Facts

[2] The Applicant is a Research Scientist at Natural Resources Canada [NRCan]. In 2005, he was assigned to the position of Scientific Authority on a project. The Applicant made no financial decisions in his capacity as Scientific Authority; rather, he provided recommendations to the Financial Authority concerning the Project's finances.

[3] On January 10, 2014, the Applicant submitted a protected disclosure complaint on the reprisal complaint form [Complaint]. In the Complaint, the Applicant alleged the project's Financial Authority had committed a wrongdoing, as defined by s. 8 of the *PSDPA*, by misusing public funds, retroactively altering a contract and entering into verbal contracts.

[4] The Applicant alleged that, in 2008<sup>1</sup>, the Financial Authority had intended to divert money from the project's contract in order to compensate a graduate student working on a different NRCan project and had directed the Applicant to take such action. The Applicant alleged that the Financial Authority entered a verbal contract with the student's university to this end. The Applicant alleged that by doing so, the Financial Authority contravened the *Financial Administration Act*, RSC 1985, c F-11 [*FAA*], the *Public Works and Government Services*

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<sup>1</sup> For completeness, I note that the alleged 2008 illegality was the subject of a different complaint to the Commissioner made by the Applicant, which was dismissed in part, in respect of which I dismissed judicial review: *Gupta v Canada (Attorney General)*, 2015 FC 535. An appeal from that decision was dismissed by the Federal Court of Appeal: *Gupta v Canada (Attorney General)*, 2016 FCA 50.

Canada [PWGSC] contracting policies and the NRCan contracting policies, thereby committing wrongdoings under paragraphs 8(a), (b) and (f) of the *PSDPA*.

[5] The Applicant alleges that he confronted the Financial Authority regarding the illegality of his proposed conduct in February 2008. He further alleges that, since that date, he has faced reprisals in various forms.

[6] In his Complaint, the Applicant identified November 12, 2013 as the day on which he became aware of the reprisals taken against him. He attached to his complaint form a document alleging multiple instances of harassment and intimidation since confronting the Financial Authority in 2008.

[7] On June 24, 2015, the Applicant's representative, Legal Counsel at the Professional Institute of the Public Service of Canada (the Applicant's union), submitted an amended disclosure complaint form and an amended reprisal complaint form [Amended Complaint]. In the Amended Complaint, the Applicant alleged additional wrongdoings of harassment and intimidation, contrary to subsections 8(d), (e) and (f) of *PSDPA*.

[8] On April 11, 2014, the Commissioner decided not to investigate the allegations contained in the Applicant's disclosure [Initial Denial]. The Applicant applied for judicial review of that decision (Court File No. T-1024-14), which application was settled such that a new Case Admissibility Analyst [Case Analyst] be assigned to the file. Several telephone meetings were held between the Case Analyst and the Applicant's representative and additional disclosure was

provided by the Applicant to the Case Analyst in the period leading up to the release of the new Case Admissibility Analysis [the Analysis]. The Analysis was given to the Commissioner and formed the basis upon which the Commissioner decided to dismiss the Complaint.

### The Analysis

[9] The Analysis was prepared on October 15, 2015. The purpose of the Analysis is stated as follows:

24. In order to determine whether an investigation is warranted under the *Act*, we must determine whether the disclosure concerns wrongdoing as defined at section 8 of the *Act* and whether the Commissioner has sufficient grounds for further action.

[10] The Case Analyst analyzed the Applicant's allegations under paragraphs 8(a), (b), (c), (d), (e) and (f) of the *Act* in order to come to and make a recommendation to dismiss the complaint.

### No basis under 8(a) or (b)

[11] First, the Case Analyst found that the Applicant's allegations of wrongdoing under paragraphs 8(a) and (b) were not supported by any information. These allegations were withdrawn by the Applicant during his interviews with the Case Analyst. After submitting his disclosure, the Applicant "clearly indicated that he no longer believes that [the Financial Authority] made any expenditure in contravention of PWGSC and NRCan contracting policies and the *FAA*". Thus, the premise underlying the claims of wrongdoing under subsections 8(a) and (b) were unsupported.

No basis under 8(f)

[12] The Case Analyst found there was no information provided to suggest that the Financial Authority had knowingly directed or counselled the Applicant to commit a wrongdoing as defined under subsection 8(f) of the *Act*: first, the Financial Authority seemed to have ceased pursuit of diverting funds once made aware of its allegedly illegal implications; second, the Applicant did not have financial authority to take the actions allegedly directed; and third, the email supplied by the Applicant as proof of these directions “not suggest that [the Financial Authority] directed the [Applicant] to divert moneys from the [project] ...”. Therefore, the Case Analyst concluded that the Commissioner had a valid reason not to commence an investigation under paragraph 8(f) of the *Act*.

No basis under 8(c)

[13] The Case Analyst determined that the alleged harassment of the Applicant did not constitute “gross mismanagement” under paragraph 8(c) of the *Act*, although some of the Applicant’s allegations could constitute harassment prohibited by the *Treasury Board’s Policy on Harassment Prevention and Resolution [TB Harassment Policy]*. In this respect, however, the Case Analyst noted, among other things, that there was nothing to suggest that management took or failed to take that would create a substantial risk of significant adverse impact upon the ability of NRCan to carry out its mandate. The Case Analyst further noted that the allegations of harassment appeared to all concern alleged misconduct geared towards one individual only, namely the Applicant. The behaviour alleged was not systemic or directed at several employees such as to affect the overall health of the workplace. Disclosure investigations under the *Act* are

not meant to replace other available recourse mechanisms such as the *TB Harassment Policy*.

Therefore, the Case Analyst concluded that the Commissioner had a valid reason not to commence an investigation under paragraph 8(c) of the *Act*.

No basis under 8(d)

[14] The Case Analyst considered whether the alleged conduct created a substantial and specific danger to the Applicant or his family's life, health or safety, thereby constituting a wrongdoing as defined in paragraph 8(d) of the *Act*. The Complaint in this respect was neither substantial nor specific. The Case Analyst rejected this ground of complaint because the legislation requires more than speculation:

53. After careful review of all the information provided, the [Applicant] appears to make reference to his family's physical and physiological well-being as a result of the harassment he endured by the senior managers and unnamed employees at NRCan. However, the [Applicant] made no reference to the creation of a specific danger to the life, health or safety of any person, including himself; the [Applicant] did not specify what, if any, ailments were created by the senior managers and unnamed employees at NRCan. No information was provided to link any danger to specific actions.

[15] The Case Analyst concluded that there was nothing in the file that suggested that wrongdoing as defined at paragraph 8(d) of the *Act* was committed. Therefore, the Case Analyst concluded that the Commissioner had a valid reason not to commence an investigation under paragraph 8(d) of the *Act*.

Potential Basis under 8(e)

[16] The Case Analyst considered subsection 8(e) of the *Act*, which states that “a serious breach of a code of conduct established under section 5 or 6” is wrongdoing in respect of which a Commissioner may commence an investigation.

[17] The Case Analyst found the alleged harassment could be a serious breach of the *Values and Ethics Code for the Public Service* [*Code*] and therefore constituted a wrongdoing per paragraph 8(e), but could be more appropriately dealt with under paragraph 24(1)(f) of the Treasury Board’s Directive on the *Harassment Complaint Process* [*TB Harassment Directive*].

[18] The Case Analyst reviewed the Applicant’s allegations under the *Code* and concluded that some of the Applicant’s allegations of harassment “could constitute a breach of subsections 2.1, 2.3, 2.4 and 3.1 ...”. The Case Analyst stated that some of the factors used to determine if there is a “*serious*” breach of the *Code* “could have been met”, and that “this allegation could still concern a serious breach of the *Code* and wrongdoing as defined” in paragraph 8(e).

[19] The Case Analyst noted, however, that the Commissioner would still have to consider if an investigation should be commenced, i.e., whether a disclosure investigation would be the best tool to address the situation under paragraph 24(1)(f) of the *Act*. Several considerations were noted, including the following: there was “no indication the matter concerns systemic or endemic breaches”; the alleged misconduct appeared geared towards the Applicant only; and, the disclosure mechanism is not meant to replace existing recourses available to individuals in the

public sector. The Case Analyst noted the *TB Harassment Directive* establishes a process to deal with harassment in the core public service including NRCan and flows from the *TB Harassment Policy*, which requires the establishment and maintenance of effective harassment complaint processes in the departments.

[20] The Case Analyst concluded that the Applicant's harassment allegation would be more appropriately dealt with according to the procedures provided under the *TB Harassment Directive* and that this was a valid reason not to commence an investigation. In this respect, the Case Analysis recommended the Commissioner exercise its discretion under paragraph 24(1)(f) of the *Act* and decline to commence an investigation as there was a valid reason for not dealing with the subject-matter of the Applicant's disclosure.

[21] In summary, the Case Analyst recommended that the Commissioner decline to investigate the Applicant's complaints of wrongdoing under paragraphs 8(a), (b) or (f) because there was nothing to suggest such wrongdoing occurred. The Case Analyst further recommended that no investigation take place under paragraphs 8(c) (gross mismanagement) or 8(d) (specific and substantial danger). Finally, the Case Analyst recommended that no investigation be commenced under paragraph 8(e), given such allegation could be more appropriately dealt with according to the procedure under the *TB Harassment Directive*.

[22] The Commissioner agreed with these recommendations and dismissed the Applicant's Amended Complaint by letter dated November 25, 2015. This Decision is now before this Court for review.



III. The Decision

[23] The Commissioner declined to investigate the Applicant's claim because it could more appropriately be dealt with under the department's harassment procedures, specifically, those implemented pursuant to the *TB Harassment Directive*.

[24] The Decision relied on the Case Admissibility Analysis, making all the same findings and coming to the same conclusions. Specifically, almost the entire substance of the Analysis regarding the allegations of wrongdoing under paragraphs 8(a) through (d) and (f) are included in the Commissioner's Decision. Exercising his authority under paragraph 24(1)(f) of the *Act*, the Commissioner declined to commence an investigation under the above mentioned grounds on the basis that he "[did] not have sufficient grounds for further action".

[25] The Decision borrowed heavily from the Analysis in determining the issue of the Applicant's allegations under paragraph 8(e) of the *Act*. The Commissioner exercised his discretion under subsection 24(1)(f) and declined to commence an investigation into the Applicant's allegations of harassment. He stated:

Given that TBS's Directive on the Harassment Complaint Process establishes a process to deal with harassment in the core public administration, which includes NRCan, it appears that the subject matter or your allegations could more appropriately be dealt with in accordance with the internal complaint procedure at NRCan. Under the circumstances, I am exercising my discretion, again pursuant to paragraph 24(1)(f) of the *Act*, not to conduct an investigation into this particular aspect of your disclosure.

[26] The Applicant applies for judicial review of this decision..

IV. Issues

[27] The following issues arise:

1. Whether the Commissioner breached the duty of procedural fairness to the Applicant in terms of identifying the issues that would be considered in reaching his Decision?
2. Whether the Commissioner's decision was reasonable in terms of the availability of an appropriate alternative recourse to resolve the Applicant's allegation of harassment?

V. Standard of Review

[28] In *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at paras 57 and 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. The Commissioner's conclusion that the Applicant's allegation of harassment would be more appropriately dealt with through the internal complaint procedure available at NRCan is reviewable on a standard of reasonableness: *Detorakis v Canada (Attorney General)*, 2010 FC 39, 358 FTR 266 at para 16 [*Detorakis*]. The discretionary nature of this decision reflects the Commissioner's expertise in addressing disclosures under the *PDS*: *Detorakis* at para 106(i). Such expertise favours a deferential approach to review which accordingly I will apply.

[29] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, 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.

[30] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required when conducting a review on the correctness standard:

When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

## VI. Relevant Provisions

[31] The *PSDPA* states:

### **Interpretation**

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

...

***Reprisal*** means any of the following measures taken against a public servant because the public servant has

### **Définitions**

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

...

***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

made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33:

- (a) a disciplinary measure;
  - (b) the demotion of the public servant;
  - (c) the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;
  - (d) any measure that adversely affects the employment or working conditions of the public servant; and
  - (e) a threat to take any of the measures referred to in any of paragraphs (a) to (d).
- (représailles)

#### **Taking a reprisal**

(2) Every reference in this Act to a person who has taken a reprisal includes a person who has directed the reprisal to be taken.

#### **Wrongdoings**

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

- (a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act;
- (b) a misuse of public funds or a public asset;
- (c) a gross mismanagement in

divulgence 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) toute sanction disciplinaire;
- b) la rétrogradation du fonctionnaire;
- c) son licenciement et, s'agissant d'un membre de la Gendarmerie royale du Canada, son renvoi ou congédiement;
- d) toute mesure portant atteinte à son emploi ou à ses conditions de travail;
- e) toute menace à cet égard. (reprisal)

#### **Prise de représailles**

(2) Pour l'application de la présente loi, la mention de la personne ayant exercé des représailles vaut mention de la personne qui en a ordonné l'exercice.

#### **Actes répréhensibles**

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

- a) la contravention d'une loi fédérale ou provinciale ou d'un règlement pris sous leur régime, à l'exception de la contravention de l'article 19 de la présente loi;
- b) l'usage abusif des fonds ou des biens publics;
- c) les cas graves de mauvaise

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

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

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

(g) [Repealed, 2006, c. 9, s. 197]

**Complaints Relating to Reprisals  
 Prohibition Against Reprisals**

**19** No person shall take any reprisal against a public servant or direct that one be taken against a public servant.

**Complaints**

**19.1 (1)** A public servant or a former public servant who has reasonable grounds for believing that a reprisal has been taken against him or her may file with the Commissioner a complaint in a form acceptable to the Commissioner. The complaint may also be filed by a person designated by the public servant or former public servant for the purpose.

**Duties of the Commissioner  
 Duties**

**22** The duties of the Commissioner under this Act

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

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

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

g) [Abrogé, 2006, ch. 9, art. 197]

**Plaintes en matière  
 représailles  
 Interdiction – représailles**

**19** Il est interdit d'exercer des représailles contre un fonctionnaire, ou d'en ordonner l'exercice.

**Plainte**

**19.1 (1)** Le fonctionnaire ou l'ancien fonctionnaire qui a des motifs raisonnables de croire qu'il a été victime de représailles peut déposer une plainte auprès du commissaire en une forme acceptable pour ce dernier; la plainte peut également être déposée par la personne qu'il désigne à cette fin.

**Attributions de commissaire  
 Attributions**

**22** Le commissaire exerce aux termes de la présente loi les

are to

...

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

...

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

### **Right to refuse**

**24 (1)** The Commissioner may refuse to deal with a disclosure or to commence an investigation — and he or she may cease an investigation — if he or she is of the opinion that

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

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

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

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

(e) the subject-matter of the disclosure or the investigation relates to a matter that results from a balanced and informed

attributions suivantes :

...

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

...

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

### **Refus d'intervenir**

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

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

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

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

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

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

decision-making process on a public policy issue; or  
 (f) there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation.

**Adjudicative decisions**

(2) The Commissioner must refuse to deal with a disclosure or to commence an investigation if he or she is of the opinion that the subject matter of the disclosure or the investigation relates solely to a decision that was made in the exercise of an adjudicative function under an Act of Parliament, including a decision of the Commissioner of the Royal Canadian Mounted Police under Part IV of the *Royal Canadian Mounted Police Act*.

décisionnel équilibré et informé;  
 f) que cela est opportun pour tout autre motif justifié.

**Décision judiciaire ou quasi judiciaire**

(2) Dans le cas où il estime que l'objet d'une divulgation ou d'une éventuelle enquête porte sur une décision rendue au titre d'une loi fédérale dans l'exercice d'une fonction judiciaire ou quasi judiciaire, notamment une décision rendue par le commissaire de la Gendarmerie royale du Canada sous le régime de la partie IV de la Loi sur la Gendarmerie royale du Canada, le commissaire est tenu de refuser de donner suite à la divulgation ou de commencer l'enquête.

VII. Analysis

Procedural Fairness

[32] The thrust of the Applicant's submissions is that he was not aware that the Commissioner would consider whether other avenues of recourse were available to him in determining whether to conduct an investigation or not. He says he did not know that reliance might be placed on paragraph 24(1)(f) of the *Act*, which he calls the "basket clause". This lack of notice, he claims, led to his inability to properly present his case, essentially because he was unaware of the threshold issues the Commissioner intended to pursue. He says he was not given an opportunity

to address them before the Commissioner rendered a decision and was therefore unaware of the case he had to meet; he only had notice that the Commissioner might act under paragraph 24(1)(a).

[33] There are several flaws in the Applicant's allegation of breach of procedural fairness.

[34] First, the complaint form notes in italics, under the heading "(C) Other Proceedings":

*Paragraph 24(1)(a) of the Act provides that the Commissioner may refuse to deal with a disclosure or to commence an investigation – and he or she may cease an investigation – if he or she is of the opinion that 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; ...*

[35] The Applicant filled in or responded to the sections of the form under this note, which indicates that the Applicant was aware that this section existed and was cognizant of what was contained therein. Not only did the Applicant complete this section in the Amended Complaint as the Respondent submits, but he had previously completed the same section in the Original Complaint. Furthermore, the Applicant amended one of his submissions under Part C in the Amended Complaint. All of this confirms that the Applicant interacted with this section of the form more than once and was well aware of its contents and substance.

[36] In my view the Applicant's main arguments is in effect that he should have been given a copy of the Case Analyst's report to the Commissioner; the Case Analyst's report would have included reference to paragraph 24(1)(f). However, the Federal Court of Appeal has decided that complainants such as this Applicant have no such right under the duty of fairness: *Agnaou (FCA)*



at para 39. The Federal Court of Appeal, in a reprisal complaint (this too is a reprisal complaint) stated:

[39] Having considered the content of the DPSIC's duty of procedural fairness, in light of the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)* 174 D.L.R. [39] at paragraphs 21 to 29, and even taking into account that the decision to reject a reprisal complaint can have a greater impact on the appellant's career than a decision under section 24 of the Act (Agnou #1), I am satisfied that there was no breach with regard to the appellant's rights to participate. The DPSIC did not have to let him comment on the analyst's report that was given to him before making a decision.

[emphasis added]

[37] With respect, if there is no right to comment on an analyst's report, there no right to see the analyst's report.

[38] In considering this issue it is relevant to recall that the *PDSPA* imposes a relatively low threshold for procedural fairness at the investigative level. The *PDSPA* explicitly provides that investigations into disclosures of wrongdoing should be "conducted as informally and expeditiously as possible": subsection 19.7(2). This suggests (and I agree) that the preliminary processes employed to determine whether an investigation is warranted under section 24 and in particular paragraph 24(1)(f) should also be informal and expeditious:

g. As section 26(2) of the PSDP Act makes clear "investigations are to be conducted as informally and expeditiously as possible." No investigation occurred in the present case, but there is no reason to conclude that decisions based upon subsection 24(1)(a) should not also be informal and expeditious;

(*Detorakis*, above at para 106(g))

[39] Such construction of paragraph 24(1)(f) also accords with the “extremely wide” discretion afforded to the Commissioner at the screening stage under subsection 24(1) of the *PDSPA* (*Detorakis*, above at para 106(i)), by which the Commissioner is authorized to determine those cases that should proceed and which may be determined through an alternative recourse system.

[40] In addition, it is material that the Applicant had the assistance of Legal Counsel in this matter, which in my respectful view makes it more difficult on this record for the Applicant to successfully allege he was not aware of the grounds on which his complaint might be dismissed by the Commissioner. There is certainly more to section 24 than paragraph 24(1)(a): there are five more paragraphs to consider, namely (b) through (f) with which his legal advisor was or should have been aware.

[41] The Applicant says he would have filed additional evidence if had he known his complaint might be dismissed due to the availability of the departmental harassment process. He says he would have requested information on the criteria to be applied, noted any such process would be unfair and biased since it involved senior NRCan managers and would have mentioned that he had already complained, without success, to the Deputy Minister, among other grounds.

[42] In my view, there is no merit to these objections. The fact of the matter is the forms completed by the Applicant and his counsel specifically asked him to advise if his allegations of wrongdoing had already been reported to a supervisor or to any other person at his place of work. The Applicant for whatever reasons chose not to inform the Commissioner that he had brought

his concerns about harassment to the attention of the Deputy Minister first on March 18, 2014 and again on May 23, 2014. He chose to mention only his contacts with various other officials from 2008 to 2010. He failed to put forward the allegation he currently makes regarding NRCan's lack of interest in addressing his concerns and failed to argue that, in any event, NRCan was unable to appropriately deal with his allegations. When asked if he had reported his allegations of wrongdoing to another person or body outside of his place of work acting under another Act of Parliament, he answered in the negative. On each of these questions, the Applicant was given room to elaborate but chose not to. I am not persuaded his failure to complete the form correctly can be so transformed into a breach of procedural fairness by the Commissioner.

[43] Nor am I persuaded by the Applicant's assertion that he might have been treated differently if he had answered the questions put to him; it seems to me that he cannot claim judicial review based on his own omissions.

[44] Further, while paragraph 24(1)(f)<sup>2</sup> was relied upon, the wording actually used by the Commissioner<sup>3</sup> is drawn from paragraph 24(1)(a)<sup>4</sup>, which is the very paragraph found on the complaint forms repeatedly signed by the Applicant. I see no reason in principle why the core rationale expressed in paragraph 24(1)(a), namely the availability of alternative recourse, may

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<sup>2</sup> Which reads: "(f) there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation".

<sup>3</sup> Who concluded: "[G]iven that TBS's Directive on the Harassment Complaint Process establishes a process to deal with harassment in the core public administration, which includes NRCan, it appears that the subject matter of your allegations could more appropriately be dealt with in accordance with the internal complaint procedure at NRCan. Under the circumstances, I am exercising my discretion, again pursuant to paragraph 24(1)(f) of the Act, not to conduct an investigation into this particular aspect of your disclosure."

<sup>4</sup> Which reads: "(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".

not equally ground a finding under paragraph 24(1)(f). As the Applicant argued, subsection 24(1)(f) is a form of “basket clause”.

[45] In my view, the Applicant has not established a breach of procedural fairness.

#### Reasonableness of the Decision

[46] The Applicant does not take issue with the findings made against him by the Commissioner in rejecting his complaints under paragraphs 8(1)(a), (b), (c), (d), or (f) of the *PSDPA*, nor otherwise with the reasonableness of the Decision. Although the Respondent made submissions on the issue of reasonableness, in these circumstances I need not address them.

[47] This application for judicial review must therefore be dismissed.

#### VIII. Costs

[48] Each party seeks costs. The parties agreed that the successful party should have costs assessed as an all-inclusive lump sum of \$3,200.00, which I find reasonable.

#### IX. Conclusion

[49] The Application is dismissed with costs payable by the Applicant to the Respondent in the all-inclusive lump sum of \$3,200.00.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is dismissed.
2. The Applicant shall pay to the Respondent costs in the all-inclusive lump sum of \$3,200.00.

“Henry S. Brown”

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Judge

## Appendix A

The relevant sections of the *PSDPA* state:

An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings

Recognizing that the federal public administration is an important national institution and is part of the essential framework of Canadian parliamentary democracy; it is in the public interest to maintain and enhance public confidence in the integrity of public servants; confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings, and by establishing a code of conduct for the public sector;

public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the Canadian Charter of Rights and Freedoms and that this Act strives to achieve an appropriate balance between those two important principles; the Government of Canada commits to establishing a Charter of Values of Public Service setting out the values that should guide public

Loi prévoyant un mécanisme de divulgation des actes répréhensibles et de protection des divulgateurs dans le secteur public

### **Préambule**

Attendu: que l'administration publique fédérale est une institution nationale essentielle au fonctionnement de la démocratie parlementaire canadienne; qu'il est dans l'intérêt public de maintenir et d'accroître la confiance du public dans l'intégrité des fonctionnaires; que la confiance dans les institutions publiques ne peut que profiter de la création de mécanismes efficaces de divulgation des actes répréhensibles et de protection des fonctionnaires divulgateurs, et de l'adoption d'un code de conduite du secteur public; que les fonctionnaires ont un devoir de loyauté envers leur employeur et bénéficient de la liberté d'expression garantie par la Charte canadienne des droits et libertés et que la présente loi vise à atteindre l'équilibre entre ce devoir et cette liberté; que le gouvernement du Canada s'engage à adopter une charte des valeurs du service public énonçant les valeurs qui guident les fonctionnaires dans

servants in their work and professional conduct;

**Interpretation**

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

...

**Commissioner** means the Public Sector Integrity Commissioner appointed under subsection 39(1).

(commissaire)

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

...

**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:

- (a) a disciplinary measure;
- (b) the demotion of the public servant;
- (c) the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;
- (d) any measure that adversely affects the employment or working conditions of the public servant; and
- (e) a threat to take any of the measures referred to in any of

leur conduite et leurs activités professionnelles,

**Définitions**

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

...

**commissaire** Le commissaire à l'intégrité du secteur public, nommé au titre du paragraphe 39(1). (Commissioner)

...

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

...

**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) toute sanction disciplinaire;
- b) la rétrogradation du fonctionnaire;
- c) son licenciement et, s'agissant d'un membre de la Gendarmerie royale du Canada, son renvoi ou congédiement;
- d) toute mesure portant atteinte à son emploi ou à ses conditions de travail;
- e) toute menace à cet égard. (reprisal)

paragraphs (a) to (d).  
(représailles)

### **Taking a reprisal**

(2) Every reference in this Act to a person who has taken a reprisal includes a person who has directed the reprisal to be taken.

### **Wrongdoings**

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

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

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

(c) a gross mismanagement in the public sector;

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

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

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

(g) [Repealed, 2006, c. 9, s. 197]

**Disclosure of Wrongdoings**  
**Establishment of internal**

### **Prise de représailles**

(2) Pour l'application de la présente loi, la mention de la personne ayant exercé des représailles vaut mention de la personne qui en

### **Actes répréhensibles**

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

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

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

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

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

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

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

g) [Abrogé, 2006, ch. 9, art. 197]

### **Divulgation**

**Mécanismes applicables aux**



**disclosure procedures**

**10 (1)** Each chief executive must establish internal procedures to manage disclosures made under this Act by public servants employed in the portion of the public sector for which the chief executive is responsible.

**Designation of senior officer**

**(2)** Each chief executive must designate a senior officer to be responsible for receiving and dealing with, in accordance with the duties and powers of senior officers set out in the code of conduct established by the Treasury Board, disclosures of wrongdoings made by public servants employed in the portion of the public sector for which the chief executive is responsible.

**Senior officer from other portion of public sector**

**(3)** A chief executive may designate as a senior officer for the portion of the public sector for which the chief executive is responsible a person who is employed in any other portion of the public sector.

**Exception**

**(4)** Subsections (1) and (2) do not apply to a chief executive if he or she declares, after giving notice to the Chief Human Resources Officer appointed under subsection 6(2.1) of the *Financial Administration Act*, that it is not practical to apply those

**divulgations**

**10 (1)** L'administrateur général est tenu d'établir des mécanismes internes pour s'occuper des divulgations que peuvent faire en vertu de la présente loi les fonctionnaires faisant partie de l'élément du secteur public dont il est responsable.

**Désignation de l'agent supérieur**

**(2)** Il désigne un agent supérieur chargé de prendre connaissance des divulgations et d'y donner suite d'une façon qui soit compatible avec les attributions qui lui sont conférées par le code de conduite établi par le Conseil du Trésor.

**Agent d'un autre élément du secteur public**

**(3)** L'agent supérieur désigné peut faire partie d'un autre élément du secteur public que celui dont l'administrateur général est responsable.

**Rapport envoyé au dirigeant principal des ressources humaines**

**(4)** Les paragraphes (1) et (2) ne s'appliquent pas à l'administrateur général qui, après en avoir donné avis au dirigeant principal des ressources humaines nommé en vertu du paragraphe 6(2.1) de la Loi sur la gestion des finances publiques, déclare que

subsections given the size of that portion of the public sector.

**Complaints Relating to Reprisals Prohibition Against Reprisals**

**19** No person shall take any reprisal against a public servant or direct that one be taken against a public servant.

**Complaints**

**19.1 (1)** A public servant or a former public servant who has reasonable grounds for believing that a reprisal has been taken against him or her may file with the Commissioner a complaint in a form acceptable to the Commissioner. The complaint may also be filed by a person designated by the public servant or former public servant for the purpose.

**Effect of filing**

**(4)** Subject to subsection 19.4(4), the filing of a complaint under subsection (1) precludes the complainant from commencing any procedure under any other Act of Parliament or collective agreement in respect of the measure alleged to constitute the reprisal.

**Duties of the Commissioner**

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

...  
(b) receive, record and review disclosures of wrongdoings in order to establish whether

l'élément du secteur public dont il est responsable ne se prête pas, en raison de sa taille, à l'application efficace de ces paragraphes.

**Plaintes en matière de représailles Interdiction - représailles**

**19** Il est interdit d'exercer des représailles contre un fonctionnaire, ou d'en ordonner l'exercice.

**Plainte**

**19.1 (1)** Le fonctionnaire ou l'ancien fonctionnaire qui a des motifs raisonnables de croire qu'il a été victime de représailles peut déposer une plainte auprès du commissaire en une forme acceptable pour ce dernier; la plainte peut également être déposée par la personne qu'il désigne à cette fin.

**Effet du dépôt**

**(4)** Sous réserve du paragraphe 19.4(4), s'il dépose une plainte au titre du paragraphe (1), le fonctionnaire ou l'ancien fonctionnaire ne peut intenter de recours au titre de toute autre loi fédérale ou de toute convention collective à l'égard des prétendues représailles.

**Attributions du commissaire**

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

...  
b) recevoir, consigner et examiner les divulgations afin d'établir s'il existe des motifs

there are sufficient grounds for further action;

...

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

### **Right to refuse**

**24 (1)** The Commissioner may refuse to deal with a disclosure or to commence an investigation — and he or she may cease an investigation — if he or she is of the opinion that

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

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

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

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

(e) the subject-matter of the disclosure or the investigation relates to a matter that results from a balanced and informed decision-making process on a public policy issue; or

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

suffisants pour y donner suite;

...

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

### **Refus d'intervenir**

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

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

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

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

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

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

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

investigation.

**Adjudicative decisions**

(2) The Commissioner must refuse to deal with a disclosure or to commence an investigation if he or she is of the opinion that the subject matter of the disclosure or the investigation relates solely to a decision that was made in the exercise of an adjudicative function under an Act of Parliament, including a decision of the Commissioner of the Royal Canadian Mounted Police under Part IV of the *Royal Canadian Mounted Police Act*.

**Décision judiciaire ou quasi judiciaire**

(2) Dans le cas où il estime que l'objet d'une divulgation ou d'une éventuelle enquête porte sur une décision rendue au titre d'une loi fédérale dans l'exercice d'une fonction judiciaire ou quasi judiciaire, notamment une décision rendue par le commissaire de la Gendarmerie royale du Canada sous le régime de la partie IV de la Loi sur la Gendarmerie royale du Canada, le commissaire est tenu de refuser de donner suite à la divulgation ou de commencer l'enquête.

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