

Federal Court



Cour fédérale

Date: 20170921

Docket: T-1308-17

Citation: 2017 FC 847

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 21, 2017

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

GENEVIÈVE DESJARDINS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] The applicant, whose identity has been protected thus far, is seeking an interlocutory injunction to prevent the Public Sector Integrity Commissioner of Canada (the Commissioner) from not [sic] submitting the case report—or any other portion of this case—to the speakers of the two houses of Parliament until a final decision is rendered concerning her application for judicial review. At the same time, she is asking that the Court seal this record, issue a publication ban and order non-disclosure of the proceedings.

[2] A special hearing was held in Ottawa on September 20, 2017, before the undersigned Justice to debate the issue of whether the Court should extend any or all of the injunction issued against the Commissioner to not table the case report before Parliament, and the order to keep the record confidential, which were granted temporarily on August 23, 2017, by Madam Justice Mactavish, and renewed by Mr. Justice Bell until September 22, 2017, or until the Court issued another order, whichever came first.

[3] Given the short timeline and the need to issue an order today ruling on the applicant's motion for an interlocutory injunction and confidentiality order, I will not repeat herein the facts cited by the parties during the proceedings or their respective arguments—which were debated at length the day before—except to focus on key factual aspects or key arguments in this case.

[4] The Office of the Public Sector Integrity Commissioner of Canada (the Office) received a disclosure of wrongdoing on October 19, 2015, in which it was alleged that the conduct of the applicant, a senior executive with the Canadian Food Inspection Agency (the Agency), constituted wrongdoing within the meaning of paragraphs 8(c) and (e) of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 (the Act), namely gross mismanagement and a serious breach of a code of conduct.

[5] On February 12, 2016, an investigation was launched by the Office. On April 26, 2016, the Commissioner advised the applicant of the allegations under investigation. On July 24, 2017, the applicant received an unfavourable decision from the Commissioner, concluding that the applicant had in fact committed some of the wrongdoings alleged by the persons making the disclosures. At the same time, in a separate correspondence, the Commissioner reported his

conclusions and recommendations to the chief executive of the Agency on July 24, 2017. In particular, he recommended that the Agency determine whether it would be appropriate to impose disciplinary action on the applicant. Upon receipt of the response from the chief executive on August 15, 2017, the Commissioner prepared a case report, which must be submitted to the speakers of the House of Commons and the Senate no later than September 22, 2017.

[6] I am satisfied that the issues raised by the applicant are serious.

[7] In her application for a judicial review, filed on August 22, 2017, the applicant challenged the Commissioner's conclusions. First, the disclosure of wrongdoing was allegedly motivated by reasons contrary to sections 24.1 and 40 of the Act. Second, they were made in bad faith and are untrue. Third, the persons making the disclosures used the Act as an undue pressure tactic to obtain personal gain and the Commissioner refused to address it. Fourth, the Commissioner acted without jurisdiction or *ultra vires*, while the Commissioner's public statements raise a reasonable apprehension of bias. Fifth, although the applicant was interviewed in May 2016 and was able to make submissions concerning the preliminary report dated August 12, 2016, the Commissioner did not comply with the principles of natural justice or procedural fairness. The applicant is therefore asking for the Commissioner's report to be cancelled. Alternatively, the applicant is seeking an order declaring that the Commissioner did not comply with the principles of natural justice and procedural fairness or the procedure that he was required to follow under the Act.

[8] I am also prepared to assume, for the purposes hereof, that tabling the case report prepared by the Commissioner in Parliament could cause irreparable harm to the applicant's reputation, but I am not satisfied that public disclosure could affect any ongoing disciplinary investigation. In fact, the Agency has asked an independent third party to assess the harassment complaints that have been filed against the applicant in the past. In his previous case report, tabled in Parliament in February 2017, the Commissioner criticized the former President of the Agency and the former Vice-President of Human Resources for having committed wrongdoings by not fairly and fully dealing with the harassment complaints in question. In addition, the applicant was placed on leave with pay on August 16, 2017, until the independent third party completed the investigation into the harassment complaints by the persons who made the disclosure.

[9] That said, the criteria for obtaining an interlocutory injunction are conjunctive and must all be satisfied. Whether the Commissioner's obligation to report to Parliament is considered a legal barrier to issuing an injunction, or a matter of public interest—taking precedence over the applicant's reputation—on a balance of convenience, it seems evident to me that the Court cannot block the legislator's clear intent for the case report referred to in subsection 38(3.1) of the Act to be tabled in both houses of Parliament within the 60 days set forth in subsection 38(3.3) of the Act, meaning that this motion for injunction must be dismissed.

[10] The relevant provisions of section 38 of the Act read as follows:

(3.1) If the Commissioner makes a report to a chief executive in respect of an investigation into a disclosure or an investigation commenced	(3.1) S'il a fait un rapport à un administrateur général à l'égard d'une enquête menée sur une divulgation ou commencée au titre de l'article
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- under section 33 and there is a finding of wrongdoing in the report, the Commissioner must, within 60 days after making the report, prepare a case report setting out
- 33 où il conclut qu'un acte répréhensible a été commis, le commissaire prépare, dans les soixante jours, un rapport sur le cas faisant état :
- (a) the finding of wrongdoing;
- a) de sa conclusion;
- (b) the recommendations, if any, set out in the report made to the chief executive;
- b) des recommandations qu'il a faites, le cas échéant, dans le rapport à l'administrateur général;
- (c) the time, if any, that was specified in the report to the chief executive for the chief executive to provide the notice referred to in section 36;
- c) le cas échéant, du délai dans lequel l'administrateur général était tenu de lui donner l'avis visé à l'article 36;
- (d) the Commissioner's opinion as to whether the chief executive's response to the report to the chief executive, up to that point in time, is satisfactory; and
- d) du fait que, en date du rapport sur le cas, il est d'avis que la réponse de l'administrateur général au rapport fait à ce dernier est ou n'est pas satisfaisante;
- (e) the chief executive's written comments, if any.
- e) les observations écrites faites, le cas échéant, par l'administrateur général.
- (3.2) Before making a case report, the Commissioner must provide the chief executive with a reasonable opportunity to make written comments.
- (3.2) Avant la présentation du rapport sur le cas, le commissaire donne à l'administrateur général la possibilité de lui présenter des observations écrites.
- (3.3) Within the period referred to in subsection (1) for the annual report and the period referred to in subsection (3.1) for a case report, and at any time for a special report, the Commissioner shall submit the report to the Speaker of the Senate and the Speaker of the
- (3.3) Le commissaire présente, dans le délai prévu au paragraphe (1) ou (3.1) dans le cas du rapport qui y est visé ou à toute époque de l'année dans le cas d'un rapport spécial, son rapport au président de chaque chambre, qui le dépose immédiatement devant la

<p>House of Commons, who shall each table the report in the House over which he or she presides forthwith after receiving it or, if that House is not then sitting, on any of the first fifteen days on which that House is sitting after the Speaker receives it.</p>	<p>chambre qu'il préside ou, si elle ne siège pas, dans les quinze premiers jours de séance de celle-ci suivant la réception du rapport.</p>
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<p>(4) After it is tabled, every report the Commissioner stands referred to the committee of the Senate, the House of Commons or both Houses of Parliament that may be designated or established for the purpose of reviewing the Commissioner's reports.</p>	<p>(4) Les rapports du commissaire sont, après leur dépôt, renvoyés devant le comité, soit du Sénat, soit de la Chambre des communes, soit mixte, chargé de l'examen de ces rapports.</p>
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[11] The applicant does not question the constitutionality of section 38 of the Act and, even in constitutional matters, interlocutory injunctions preventing the application of a legislative provision are only issued in clear and obvious cases (*Harper v. Canada (Attorney General)*, [2000] 2 SCR 764, at paragraph 9). In the case at hand, the institution of judicial review proceedings cannot prevent the Commissioner from acting in accordance with the Act. The 60-day statutory period is strict. Under the principles of separation of powers and the rule of law, the Court cannot prescribe a different time frame for carrying out the duties incumbent on the Commissioner under the Act. The interlocutory injunction sought by the applicant amounts to a suspension of the application of the Act for the duration of the legal proceedings.

[12] Moreover, the tabling in Parliament of investigation reports by the Commissioner—who is an officer of Parliament—clearly serves the public interest. It helps maintain and increase public trust in the integrity of public servants. On the other hand, if the applicant's reputation

were damaged by the Commissioner's report, given the public nature of the legal proceedings, as argued before me by the representative of the Attorney General of Canada, a favourable final judgment would, if applicable, [TRANSLATION] "restore the reputation" of the applicant. If the applicant were successful on the merits, in addition to reversing the decision that is being challenged, the Court would have broad declaratory power.

[13] As the applicant's identity would become public with the tabling in Parliament of the case report required under section 38 of the Act, it follows that the temporary confidentiality order that she was granted would become moot and would not need to be extended today. Moreover, the risks of damage to the applicant's reputation do not justify issuing a general confidentiality order. It is in the public interest that the facts giving rise to the disclosure of wrongdoing and the investigation by the Office be known to the public and the media. The order sought by the applicant is far too broad.

[14] One of the fundamental principles of the legal process is transparency, both in the procedures used, and in the elements relevant to the resolution of the dispute. In her originating notice, in particular, the applicant accuses the Commissioner and the Office's staff of being biased and refusing to assess the credibility of the persons making the disclosures and the witnesses in question. That is her absolute right. It remains to be determined whether the names of the persons in question should be redacted, as suggested by counsel for the Commissioner. I do not believe so. These are legal proceedings launched by the applicant, not a confidential document obtained or prepared by the Office during the investigation in question. The Office's investigation is now complete. At this stage, I am not satisfied that, given the specific nature of

the allegations made by the applicant in her originating notice, the names of the persons making the disclosures and the witnesses in question should be struck from before the Court.

[15] Finally, in light of the submissions made at the hearing by counsel, these proceedings must continue as specially managed proceedings. Counsel has agreed to a timeline for the order issued this day by the Court. That timeline may be modified, as applicable, by the prothonotary or judge responsible for the management of proceedings.

[16] There will be no costs.

ORDER in T-1308-17

THE COURT ORDERS that:

1. The applicant's motion for an interlocutory injunction and confidentiality order is dismissed;
2. These proceedings shall continue as specially managed proceedings, and this order shall be brought to the attention of the Judicial Administrator to have the Chief Justice of the Court appoint a prothonotary or judge to assist in managing these proceedings;
3. The parties shall comply with the following timeline:
 - a) The Office of the Public Service Integrity Commissioner of Canada (the Federal Office) shall transmit to the Court Registry and to the parties the material requested by the applicant, in accordance with Rule 317 of the *Federal Court Rules* (the material) on or before October 2, 2017;
 - b) If the Federal Office refuses to transmit certain documents mentioned by the applicant in her originating notice, it must advise the parties and the Judicial Administrator in writing of the reasons for its objection on or before October 2, 2017;
 - c) Unless directed otherwise by the Court, any objection by the Federal Office under rule 318 shall be decided based on written submissions by the parties and the Federal Office;
 - d) The applicant shall serve on the respondent the affidavits and documentary exhibits to be used in support of the application, on or before November 16, 2017, or, if there is an objection under rule 318, within

45 days of the date on which the material is transmitted pursuant to the order by this Court;

- e) The respondent shall serve the affidavits and documentary exhibits that are to be used in support of its position within 45 days of the date on which the applicant's affidavits are served;
 - f) The examinations on the affidavits shall be completed within 45 days of the date on which the respondent's affidavits are served;
 - g) The applicant shall serve and present her application file within 45 days of the date on which cross-examinations end;
 - h) The respondent shall serve and present its response file within 45 days of the date on which the applicant's file is served;
 - i) The applicant shall serve and present the application for a hearing within 45 days of the date on which the respondent's response file is served;
- 4. This timeline may be modified, as applicable, by the prothonotary or case management judge;
 - 5. The whole without costs.

“Luc Martineau”

Judge

Certified true translation
This 7th day of October 2019

Lionbridge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1308-17

STYLE OF CAUSE: GENEVIÈVE DESJARDINS v. ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: SEPTEMBER 20, 2017

ORDER AND REASONS: MARTINEAU J.

DATED: SEPTEMBER 21, 2017

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