

Federal Court



Cour fédérale

**Date: 20131107**

**Docket: T-1210-13**

**Citation: 2013 FC 1128**

**Ottawa, Ontario, November 7, 2013**

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

**BETWEEN:**

**CHANTAL COUSINEAU-MAHONEY**

**Applicant**

**and**

**THE PUBLIC SECTOR INTEGRITY  
COMMISSIONER, JOSÉE LÉPINE, LUCILLE  
LEMIRE and GUY MCKENZIE**

**Respondents**

**REASONS FOR ORDER AND ORDER**

**Introduction**

[1] The Attorney General, on behalf of the named respondents, seeks an order striking the applicant's notice of application for judicial review. In the alternative, it seeks an order to have the named respondents struck and to have the Attorney General of Canada substituted as the appropriate responding party.

[2] The applicant seeks to prohibit or restrain an ongoing investigation by the Public Sector Integrity Commissioner (hereinafter “the Commissioner”) into allegations of wrongdoing made against her pursuant to s. 26 of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [the Act].

[3] I grant the motion to strike the application as being contrary to the rule of non-interference with ongoing administrative processes for the reasons that follow below.

### **Background Facts**

[4] The applicant, Ms Cousineau-Mahoney, who is the subject of the investigation referred to, is a former Vice President and Chief Financial Officer of the Canadian School of Public Service [the “School”].

[5] The investigation arises out of disclosures of alleged wrongdoing by the applicant. The applicant alleges that some resentful employees refused to accept the impact of the new agenda of the School. She states that she became the victim of repeated defamatory attacks and threats against her character, integrity, and personal safety.

[6] On September 7, 2012, the applicant received a Notice of Investigation from the Commission setting out six allegations of misconduct claimed to have been put forward by Ms. Lépine and Ms. Lemire.

[7] Also on September 7, 2012, the applicant learned that confidential information about her from the Commission had been leaked within the School, identifying her as a subject of an investigation and describing the allegations against her. She complained to the Commission, first by telephone on September 10, 2012, and then in a formal complaint on September 13, 2012.

[8] The applicant was notified by letter on September 17, 2012 that the allegations against her had been modified. In fact, they were not “modifications”, but six new allegations upon which the Commission continued its investigation.

[9] The applicant requested that the Commission provide particulars of the allegations against her, since the existing information consisted of bald statements and precluded her from being able to identify the dates, events etc.

[10] On July 10, 2013, the applicant was advised that four of the six allegations had been dismissed and that the other two were still under review. The applicant was also informed of the substance of the disclosure against her in accordance with s. 27(2) of the Act.

[11] On the same day the applicant filed a notice of application (two other applications had previously been filed, but discontinued in light of developments in the file). The application sought to quash the investigation, or in the alternative requiring the Commissioner to provide extensive disclosure into the investigation, as detailed in four pages of particulars in the application.

[12] The Attorney General argues that the application was premature, as being contrary to the rule of non-interference with ongoing administrative processes, which might in any event not come to a conclusion against the applicant, thereby rendering the matter moot.

***The Public Servants Disclosure Protection Act***

[13] The Act, intended to protect whistleblowers, also establishes a mechanism pursuant to ss. 12 and 13 for federal public servants to disclose, in confidence, any information that they believe “could show that a wrongdoing has been committed or is about to be committed” by a public servant.

[14] On receipt of a disclosure, the Commissioner decides whether pursuant to s. 22(b) “there are sufficient grounds for further action, which should justify the conduct of an investigation.” If after an investigation a disclosure of wrongdoing is concluded to be well-founded, the Commissioner’s remedial options are limited by ss. 24(g), 24(h) and 26(1) to bringing the wrongdoing to the attention of the relevant chief executives and making recommendations for corrective measures.

[15] In addition, pursuant to s. 38(3.3) of the Act, the Commissioner must report to Parliament founded cases of wrongdoing within sixty days after the conclusion of the investigation.

[16] In keeping with the Act’s objective of protecting whistleblowers, the Commissioner is required by sections 22(e) and 22(f) to establish procedures which will ensure the confidentiality of information collected in relation to disclosures and investigations and will otherwise protect, to the extent possible in accordance with the law, the identities of persons involved in an investigation.

[17] Pursuant to s. 26(2), investigations are to be conducted informally and expeditiously. The Commissioner has no obligation to hold a hearing and pursuant to s. 27(3) “no person is entitled as of a right to be heard by the Commissioner”. Additionally, s. 27(2) of the Act provides that an investigator *may* notify a person whose conduct has been called into question and inform him or her of the substance of the disclosure.

[18] However pursuant to s. 27(3), if during the course of an investigation, “it appears to the Commissioner that there may be sufficient grounds to make a report or recommendation that may adversely affect any individual....the Commissioner must, before completing the investigation take every reasonable measure to give to that individual... a full and ample opportunity to answer any allegation, and to be assisted or represented by counsel, or by any person for that purpose.”

### **Issues**

[19] The issues are:

- a. Should the Court exercise its discretion to strike the application to quash the investigation?
- b. Should the Court exercise its discretion to strike the application ordering the Commissioner to provide the disclosure demanded?
- c. In the alternative, should the Court strike the individual respondents and substitute the Attorney General as the appropriate responding party?

## Analysis

*Issue #1: Should the Court exercise its discretion to strike the application seeking to quash the investigation?*

[20] There is no question that this Court is empowered to summarily dismiss an improper notice of application, but that doing so is an exceptional remedy. A motion to strike will not be granted except in the most obvious and exceptional circumstances where there is no reasonable prospect for success. In addition, the Court is required to accept for the purposes of the motion the facts as stated in the application.

[21] This said however, the rule of non-interference with ongoing administrative processes is vigorously enforced, being permitted only in the narrowest of exceptional circumstances measured against an exceptionally high threshold. Indeed, the Federal Court of Appeal in *CB Powell Ltd v Canada (Border Services Agency)*, 2010 FCA 62 has specifically limited “exceptional circumstances” to those where, without the interference of the court, issues cannot be raised or an effective remedy granted. I quote the relevant passage from the decision at para 33 as follows:

[33]... Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted...

[Emphasis added]

[22] The applicant raises issues of bias, procedural fairness, jurisdiction regarding one of the complaints and even that the process was stillborn by the disclosure of the applicant’s identity at its commencement. None of these issues are effectively prevented from being raised, either at the time

the applicant is provided with an opportunity to respond to prospective negative conclusions of the Commissioner under section 27(3), or in a judicial review proceeding that could be taken of the decision after the report is issued.

[23] In terms of an obstacle to raising issues, the applicant was limited to arguing that even were the report eventually set aside, she would suffer irreparable harm by the damage to her reputation caused by the original placing of the report before Parliament.

[24] I understand from counsel on behalf of the Attorney General that a report would not be presented to Parliament pending the outcome of a judicial review. But in any event, in my view a potential damage to reputation is not a salient factor that would either be recognized as a legitimate ground or a consideration of sufficient seriousness to permit interfering with an ongoing administrative process as an “exceptional circumstance”.

[25] On the same basis described above, I also cannot see any limitation on the applicant’s remedies if the administrative process proceeds.

[26] I also agree that the applicant’s request for the intervention of the courts is clearly premature. To date the original six grounds of complaint have been abandoned. Thereafter the Commissioner has indicated that it would not be proceeding on four of the six additional complaints.

[27] There exists the possibility therefore, that the complaints will be rejected in their entirety. If not, the remedy of having the report set aside by a judicial review remains extant to provide an effective remedy that would quash the report if found to have infringed administrative law principles.

[28] Accordingly, on the facts as described in the application, I find no exceptional circumstances that would permit interference with the Commissioner's on-going investigation, with the result that the motion is allowed, striking the remedy sought to restrain and prohibit the investigation.

*Issue #2: Should the Court exercise its discretion to strike the application ordering the Commissioner to provide the disclosure demanded?*

[29] In the alternative to quashing the investigation, the applicant seeks an order directing the Commissioner to provide extensive disclosure of reports, documentation, information and evidence particularized in four pages of her application.

[30] All of the same arguments with respect to the non-interference with an ongoing administrative process would have the same application to this request.

[31] In addition, this claim is contrary to the numerous provisions in the Act described above that provide the Commissioner with extensive powers and discretion with respect to the conduct of the investigation and the disclosure of information.



[32] Accordingly, the remainder of the applicant's application for judicial review is also struck and the remainder of the application dismissed.

*Issue #3: Should the Court strike the individual respondents and substitute the Attorney General as the appropriate responding party?*

[33] This issue does not arise in light of my conclusions above.

### **Conclusion**

[34] The Attorney General's motion to strike the applicant's notice of application and to dismiss her application for judicial review is granted with costs.

[35] The Attorney General may file its submission on cost not to exceed three pages within 15 days of the issue of this order. The applicant may file responding submissions within 15 days thereafter. Further reply submissions may be filed by the Attorney General if necessary within 10 days thereafter.

**ORDER**

**THIS COURT ORDERS that** the motion is granted striking the applicant's notice of application and dismissing application T-1210-13 with costs.

"Peter Annis"

---

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1210-13

**STYLE OF CAUSE:** CHANTAL COUSINEAU-MAHONEY v THE PUBLIC  
SECTOR INTEGRITY COMMISSIONER et al

**PLACE OF HEARING:** OTTAWA

**DATE OF HEARING:** OCTOBER 9, 2013

**REASONS FOR ORDER AND  
ORDER:** ANNIS J.

**DATED:** NOVEMBER 7, 2013

**APPEARANCES:**

Graham S. Ragan FOR THE APPLICANT

Y. Monica Song FOR THE RESPONDENT  
Public Sector Integrity Commissioner

Diane Pelletier FOR THE RESPONDENTS  
Stéphanie Lauriault Attorney General of Canada on behalf of Josée Lépine,  
Lucille Lemire and Guy McKenzie

**SOLICITORS OF RECORD:**

Gowling Lafleur Henderson LLP FOR THE APPLICANT  
Barristers & Solicitors  
Ottawa, Ontario

Dentons LLP FOR THE RESPONDENT  
Barristers & Solicitors Public Sector Integrity Commissioner  
Ottawa, Ontario

William F. Pentney, FOR THE RESPONDENTS  
Deputy Attorney General of Canada Attorney General of Canada on behalf of Josée Lépine,  
Ottawa, Ontario Lucille Lemire and Guy McKenzie