Federal Court of Appeal | Cour d'appel fédérale

Date: 20150202

Docket: A-110-14

Citation: 2015 FCA 29

CORAM : **NADON J.A.**
GAUTHIER J.A.
SCOTT J.A.

BETWEEN:

YACINE AGNAOU

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montréal, Quebec, on October 9 and 22, 2014.

Judgment delivered at Ottawa, Ontario, on February 2, 2015.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: NADON J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] This is an appeal from a decision of Justice Annis of the Federal Court dismissing the application for judicial review filed by Yacine Agnaou (the appellant) against a decision of the Deputy Public Sector Integrity Commissioner (DPSIC) declaring her reprisal complaint inadmissible because it was beyond his jurisdiction. According to the DPSIC, the appellant had not established that her employer was aware of a protected disclosure before it took the action at

issue in the complaint before him: see paragraph 19.3(1)(*c*) of the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 (the Act).

[2] For the reasons that follow, I would allow the appeal and declare the appellant's reprisal complaint to be admissible.

I. Facts

[3] On October 13, 2011, the appellant filed a disclosure dated October 12, 2011, (section 13 of the Act) with the Office of the Public Sector Integrity Commissioner of Canada (the Office) alleging that several managers in the Public Prosecution Service of Canada (PPSC) had committed wrongdoings, more specifically, a gross mismanagement in the public sector within the meaning of paragraph 8(*c*) of the Act.

[4] The relevant facts of this disclosure are summarized in the reasons of my colleague Justice Scott in docket A-109-14, published under neutral citation 2015 FCA 30 (Agnaou #1) and heard at the same time as this appeal.

[5] There is no need for me to address these facts in detail. It is enough to state that the appellant was, at the relevant time, a Crown prosecutor. He was in charge of a file described simply as File A (a tax case involving a multinational corporation). He submits that after some third parties intervened, certain PPSC managers decided to close the file before he had even completed his prosecution report. As he had recommended filing criminal proceedings, these same public servants then allegedly tried to [TRANSLATION] "legitimize" their decision through

an unusual procedure. In the end, they disregarded his opinion that the public interest demanded instituting criminal proceedings against A, thereby violating the PPSC's internal policy. According to the appellant, that policy reflects a constitutional principle, recognized by the Supreme Court of Canada, to the effect that the decision whether to institute criminal proceedings is up to the Crown prosecutor, who must make this decision objectively and independently (see Appeal Book [A.B.] at pages 132-167).

[6] After June 29, 2009, the appellant no longer worked as a Crown prosecutor. In July 2009, he was placed in a pool of candidates, and as of November 2010, he had a priority entitlement to a position at the LA-2B level.

[7] In his reprisal complaint dated January 5, 2013, and filed with the Office on January 7, 2013, the appellant alleges that senior officials at the PPSC refused to appoint him to an LA-2B position because he had made a protected disclosure within the meaning of the Act.

[8] Among other things, the appellant states in his complaint that the PPSC reclassified two advertised positions that had to be staffed from the same candidate pool he was in, after being informed that the appellant intended to exercise his priority entitlement. According to the appellant, the PPSC confirmed that it intended to reclassify the positions on the first working day after the DPSIC refused to investigate his disclosure dated October 13, 2011. In fact, according to the DPSIC, the decision not to prosecute resulted from a balanced and informed decision-making process, so it would be inappropriate to commence an investigation (paragraphs 24(1)(*e*) and (*f*) of the Act).

[9] The complaint was initially assigned to an analyst responsible for ensuring that the Commission had all the necessary information to determine whether the complaint could be dealt with under the Act (section 19 of the Act). It should be noted that it is only after such a review has been completed that a complaint is considered to be accepted for filing and that the time limit provided under the Act (15 days) for determining whether it may be dealt with begins to run.

[10] Since the appellant's complaint relies on extensive documentation filed in support of his disclosure dated October 13, 2011 (a 36-page memorandum with 86 appendices), the analyst asked him to state at what time and how he made the protected disclosure that in his view prompted the measures described in his complaint.

[11] It is appropriate to note at this point that the protected disclosure dated October 13, 2011 (section 18 of the Act), was confidential, and since the Commissioner had decided not to investigate, the Office did not notify the PPSC of the disclosure.

[12] That said, the appellant was well aware that the Act provided for an internal disclosure process under section 12 of the Act.

[13] In a letter dated January 21, 2013, following a conversation with the appellant, the analyst

(i) stated that because the Commissioner knew several of the managers involved, it would be the DPSIC, who did not know the managers, and not the Commissioner who would decide whether the complaint was admissible;

(ii) confirmed that his role at that stage was not to review all the documentation in the file, and that the appellant had to list and provide all the supporting documents required to analyze his complaint;

(iii) confirmed that the appellant can be protected from reprisals if they relate to an internal disclosure under section 12 of the Act rather than to one under section 13; and

(iv) explained the process to be followed and clearly stated that the appellant would not be asked to comment on the analyst's admissibility report until a decision had been made.

[14] In his response to the January 21 letter, the appellant told the analyst that he needed to read paragraphs 54 and 55 of his 36-page memorandum, as well as appendices 42 and 43 (emails dated April 1 and 2, 2009, sent to his immediate supervisor), which in his view could constitute a disclosure within the meaning of section 12 of the Act.

[15] After the analyst confirmed that the information provided was sufficient to review whether the complaint could be dealt with, he sent the file to another analyst to conduct this review. In accordance with the Office's usual procedure, the in-house legal counsel assigned to this complaint was also involved before submitting an analysis report and a recommendation to the DPSIC.

[16] On February 12, 2013, the DPSIC informed the appellant that he would not be initiating an investigation because in his view, as I have already mentioned, the complaint was beyond his jurisdiction. Indeed, the DPSIC explained that the events described in the complaint did not meet the definition of "reprisal" under section 2 of the Act, which contains two conditions, namely:

(i) that the public servant was subjected to a disciplinary measure, a demotion, a termination of employment or anything that adversely affects his or her employment or working conditions; and

> (ii) that those measures were taken against the public servant because he or she made a protected disclosure within the meaning of the Act.

[17] The DPSIC concluded that the complaint concerns measures that could [TRANSLATION] "constitute a reprisal measure, as defined in section 2 of the *Act*" (first condition).

[18] However, with regard to the second condition, the DPSIC stated that the email dated April 2, 2009, made [TRANSLATION] "no mention of a disclosure, of wrongdoings as defined in section 8 of the *Act*, of the Act itself or of any organization whatsoever. Everything remains to be determined and decided. Accordingly, the contents of this email could not constitute an internal disclosure within the meaning of section 12 of the *Act*" (A.B., page 729).

[19] The DPSIC also noted that the Office had not notified the PPSC of the disclosure filed on October 13, 2011, and that the appellant [TRANSLATION] "has not shown how [his] managers could have been aware of its existence" [emphasis added].

[20] In light of the preceding, the DPSIC concluded as follows:

> [TRANSLATION]
> As you have not shown that the reprisal measure allegedly taken against you stemmed from a protected disclosure, I conclude that the second condition under section 2 of the Act has not been met.

[21] He therefore refused [TRANSLATION] "to deal with [the] complaint under paragraph 19.3(1)(c) of the Act because there is no connection between your protected disclosure and the reprisal measure allegedly taken against you" (see A.B., pages 729 to 730).

II. Federal Court decision

[22] The judge's reasons for decision are brief. The judge had already dismissed the application for judicial review of the decision not to initiate an investigation as a result of the disclosure of wrongdoing filed on October 13, 2011 (docket T-1823-12). He relied on the reasons in that case, published under neutral citation 2014 FC 86 (Agnaou #1 FC), and rejected the appellant's arguments to the effect that there had been a breach of procedural fairness, as the arguments were essentially the same.

[23] The judge agreed with the DPSIC's interpretation of the email dated April 2, 2009, and found that the email did not constitute an internal disclosure of wrongdoing. He added that the emails from April 1, 3 and 7, 2009, which the appellant had emphasized in court, added nothing on this point.

[24] The judge essentially concluded as follows at paragraph 17 of his reasons:

> Given that there was no wrongdoing or disclosure, I find that the OPSIC's decision to refuse to deal with the applicant's complaint was completely reasonable.

III. Statutory provisions

[25] I will reproduce below the most relevant definitions in the Act. Other provisions to which I refer are also reproduced in Appendix A:

2. (1) The following definitions apply in this Act.	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
"protected disclosure"	« divulgation protégée »
means a disclosure that is made in good faith and that is made by a public servant	Divulgation qui est faite de bonne foi par un fonctionnaire, selon le cas :
(*a*) in accordance with this Act;	a) en vertu de la présente loi;
(*b*) in the course of a parliamentary proceeding;	b) dans le cadre d'une procédure parlementaire;
(*c*) in the course of a procedure established under any other Act of Parliament; or	c) sous le régime d'une autre loi fédérale;
(*d*) when lawfully required to do so.	d) lorsque la loi l'y oblige.
"reprisal"	« représailles »
means <u>any of the following measures taken against a public servant because the public servant has made a protected disclosure</u> or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33:	<u>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</u> 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 :
[Emphasis added]	[Mon souligné]
(*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	e) toute menace à cet égard.

(*d*).

. . .	[…]
Disclosure to supervisor or senior officer	Divulgation au supérieur hiérarchique ou à l'agent supérieur
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.	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.
[My emphasis]	[Mon souligné]

IV. Analysis

A. *Standards of review*

[26] In an appeal from a Federal Court decision on an application for judicial review, this Court must determine whether the judge applied the appropriate standard of review to each issue and whether the judge applied it correctly. As the Supreme Court of Canada stated in *Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraph 46, what this means in practice is that this Court "'[steps] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision". Accordingly, there is no need to discuss the errors that the judge allegedly made, as outlined in the appellant's own analysis of the facts relevant to the complaint (Appellant's Memorandum, Questions 2 and 3, pages 2 and 8 to 19).

[27] In addition to the applicable standard of review, the other issues raised by the appellant (Appellant's Memorandum, Questions 4, 5 and 6, pages 2 and 19 to 28) may be grouped together as follows:

(i) Was there a breach of procedural fairness?

(ii) Did the administrative decision-maker err in applying subsection 19.3(1) of the Act?

[28] In his memorandum at paragraphs 41(b) and (c), the appellant raises issues that he describes as jurisdictional issues:

[TRANSLATION]

(i) That the DPSIC was biased because the PPSC managers were former colleagues with whom he associated;

(ii) That the DPSIC was not sufficiently proficient in French;

(iii) That under paragraph 25(1)(*g*) of the Act and the general principles of administrative law, it was illegal to subdelegate the determination of whether his complaint could be dealt with to one of the Office's lawyers or analysts.

[29] The second issue had been presented to the judge as a breach of procedural fairness (see paragraph 27 of the reasons in Agnaou #1 FC). None of these issues is, in my view, a true jurisdictional issue; for the purpose of my analysis, I would categorize them as alleged breaches of procedural fairness. As I do not agree with any of the arguments presented, the applicable standard has little importance, since I have applied the stricter standard.

[30] Whether a decision-maker has breached procedural fairness or broken a rule of natural justice is a question that is subject to the correctness standard of review (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235) [*Housen*]. I note that no procedural fairness issues are analyzed in the DPSIC's decision. What the appellant is challenging, rather, is the process that was adopted to decide his complaint and the way in which the complaint was handled.

[31] On the same grounds as those described in paragraph 34 of the reasons of Justice Scott in Agnaou #1, the appellant alleges that the respective interpretations of sections 12 and 19.3 of the Act are questions of law subject to the correctness standard of review. In my view, a decision to refuse to deal with a complaint under paragraph 19.3(1)(*c*) is a question of mixed fact and law to which the reasonableness standard applies.

[32] In this respect, there is no distinction between such a decision and the one made under section 24 of the Act to not investigate the wrongdoings disclosed on October 13 (see our reasons in Agnaou #1). As in Agnaou #1, I am satisfied that the Federal Court's finding in *Detorakis v. Canada (Attorney General)*, 2010 FC 39, [2010], 358 F.T.R. 266 [*Detorakis*] is consistent with the more recent teachings of the Supreme Court of Canada regarding the standard of review applicable to such questions.

[33] Even if I agreed with the appellant's argument that the interpretation of section 12 and the applicable test under subsection 19.3(1) are pure questions of law that may be derived from what was originally a question of mixed fact and law (which seems doubtful to me in this case), I

do not think that these questions are such that they would displace the presumption that an administrative decision-maker, whose purpose is to apply its home statute, is entitled to deference when it interprets that statute (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*] at paragraph 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraph 34; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] S.C.R. 895 [*McLean*] at paragraph 21; and *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, 371 D.L.R. (4th) 219 at paragraph 55).

[34] Moreover, in *Keith v. Canada (Correctional Service)*, 2012 FCA 117 at paragraph 48 [*Keith*], this Court decided that a reviewing court must defer to the findings of law that the Canadian Human Rights Commission (Commission) makes within its mandate when it dismisses a complaint. Given the similarities between the reprisal complaint process and the complaint process under the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [CHRA], the same conclusion must be reached here.

[35] The judge therefore chose the appropriate standard of review for all the issues before him.

V. Breach of procedural fairness

[36] The appellant argues, as he already did in Agnaou #1, that the DPSIC should have given him the opportunity to comment on the analyst's report that was given to him.

[37] As in Agnaou #1, at this preliminary stage, no one other than the complainant takes part in the process. Both parties agree that the analyst's report does not refer to any evidence or commentary from external sources or third parties. Neither the Act nor the Office's established process offers a complainant such an opportunity at this stage. Moreover, in this appeal, the first analyst clearly notified the appellant in his letter dated January 21, 2013, that he would have to wait for the DPSIC to make a decision before he could comment on the analyst's admissibility report (A.B., page 735). Accordingly, there could not have been any legitimate expectation based on any promise whatsoever.

[38] The appellant was aware of the essential conditions that needed to be met, as the complaint form contains a definition of "reprisal" (A.B., page 670) and identifies the different types of protected disclosures (A.B., page 674). He had an opportunity to make representations in this regard when he filed his complaint and during his exchanges with the first analyst.

[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)*, [1999] 2 S.C.R. 817, 174 D.L.R. [*Baker*] 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 (Agnaou #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.

[40] I agree with Justice Mactavish that the case law on complaints to the Commission is helpful (*El-Helou v. Courts Administration Service*, 2012 FC 1111, [2012] F.C.J. No. 1237 [*El-Helou*]). However, I also agree with the judge who states in Agnaou #1 FC that the final conclusion at which Justice Mactavish arrived cannot be adopted, given the specific facts of the case, which are very different from those in *El-Helou* (promise and decision after investigation).

[41] In his arguments under this heading, the appellant raises two other questions. He submits that the decision does not provide sufficient reasons, since it does not address several important facts, such as the appellant's supervisors' subsequent use of workplace violence prevention regulations in the *Canada Labour Code*, R.S.C., 1985, c. L-2, against him (see paragraph 45 of the appellant's memorandum). He also states that the DPSIC breached procedural fairness in approving the decision not to conduct an investigation without personally reviewing all the key facts submitted by the appellant.

[42] Subsection 19.4(3) of the Act provides that DPSIC must give reasons for his decision. I am satisfied that the DPSIC fulfilled his obligations in this regard. The DPSIC's reasons are sufficient to allow the judge or this Court to exercise its review jurisdiction. I note, as my colleague Justice Scott did at paragraph 59 of his reasons in Agnaou #1, that the Supreme Court of Canada has held that a "decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion": *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at paragraph 16 [*Newfoundland and Labrador Nurses' Union*].

[43] As was mentioned, interpreting the Act and applying it to the facts of the case are matters that are subject to the reasonableness standard of review. When it applies this standard, the Court takes into account the justification for and transparency of the decision. In such cases, the quality of the decision-maker's reasons is therefore not a separate ground of review from the analysis that must be done to determine whether the decision is valid (see *Newfoundland and Labrador Nurses' Union* at paragraph 21, *Dunsmuir* at paragraph 47, and *McLean* at paragraphs 71 and 72).

[44] As to whether the DPSIC had to review the case personally, it suffices to note that administrative decision-makers can always rely on their staff in exercising their jurisdiction and that the mere fact that the decision-maker uses the services of legal counsel or analysts does not constitute a breach of procedural fairness (see *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879 at page 898 [*Syndicat*]).

[45] I agree with the judge when he states at paragraph 33 of his reasons in Agnaou #1 FC, ". . . I am satisfied that he followed the usual procedure, which involves a multi-disciplinary approach and various levels of review of the case by a Legal Services analyst and himself".

[46] It is entirely normal and appropriate for administrative decision-makers to use the services of their staff, including when preparing their reasons (*Persons Seeking to Use the Pseudonyms of John Witness and Jane Dependant v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [1998] 2 F.C. 252 at paragraph 18).

[47] What is important here is that the final decision be made by the DPSIC. There is nothing in the evidence submitted by the appellant that in my view casts doubt on the fact that it was indeed the DPSIC who ultimately made the decision to reject the complaint under paragraph 19.3(1)(*c*) of the Act. This conclusion also allows me to summarily dispose of the argument that there was an unlawful subdelegation of authority to legal counsel or an analyst (see subsection 39.3(1.2) of the Act).

[48] The DPSIC stated that when he made his decision, he had before him not only the analyst's report, reviewed by Legal Services, but also the entire file (A.B., pages 728 and 729). In *Syndicat*, the Supreme Court of Canada noted at page 902 that the administrative decision-maker (the Commission) "was entitled to consider the investigator's report [and] such other underlying material as it, in its discretion, considered necessary". [Emphasis added.]

[49] In any event, when analyzing the reasonableness of a decision, the Court takes into account what was in the record. Therefore, if the DPSIC's decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, it will be set aside on this ground.

[50] Finally, there is no need to discuss at length the appellant's argument that the DPSIC was biased, because the individuals in the PPSC who were involved in the file were former colleagues with whom he associated at Justice Canada. This allegation is not supported by sufficient evidence to warrant my attention. If he wanted to contradict what the first analyst states in his letter dated January 21, 2013 (i.e., that the DPSIC did not personally know any of

the individuals involved), it was up to the appellant to file sufficient evidence of this to support his application for judicial review.

[51] For these same reasons, I will not deal with the doubts of the appellant, who questions whether the DPSIC was sufficiently proficient in French in February 2013 to properly understand the case.

[52] I am therefore satisfied that the judge correctly concluded that the appellant had not established a breach of procedural fairness in the handling of his case.

VI. Paragraph 19.3(1)(*c*) of the Act

[53] The appellant submits that the judge and the DPSIC erred in applying paragraph 19.3(1)(*c*) of the Act because (i) they misinterpreted section 12 of the Act, which defines what constitutes a protected disclosure; (ii) they failed to read his emails dated April 1 and 2 in their context, particularly the context of the email dated April 4, 2009; and (iii) they failed to consider fundamental facts in the record (see the appellant's memorandum at paragraph 45).

[54] The appellant also notes that if the DPSIC had interpreted section 12 of the Act correctly, he would not have been able to conclude that this was one of the most obvious cases [in French, "un des cas les plus évidents"] where there was no protected disclosure. The respondent disagrees that subsection 19.3(1) applies only to the most obvious cases, making the same

distinctions between the wording of this provision and that of section 41 of the CHRA as those proposed in Agnaou #1 (see paragraphs 68 and 69 the reasons).

[55] I note right away that, in my view, the correct phrase to be used in French is a "cas évident et manifeste", since this is the usual translation of "plain and obvious". This is the phrase used in the case law of the Supreme Court of Canada setting out the test applicable to motions to strike out pleadings, and it was this test that was later used to summarily reject a complaint under section 41 of the CHRA (see *Canada Post Corporation v. Canadian Human Rights Commission* (1997), 130 F.T.R. 241, [1997] F.C.J. No. 578 [*Canada Post Corporation*] and *El Helou. v. Canada (Courts Administration Service)*, October 19, 2011, 2011-PT-02).

[56] Applying modern rules of statutory interpretation, this Court concluded in Agnaou #1 that the terms used in section 24 of the Act, read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, do not support the conclusion that the Commissioner could reject only plain and obvious cases, unlike the terms used in section 41 of the CHRA.

[57] If we apply this same methodology, I think it is beyond doubt that Parliament chose to adopt a different approach to reprisal complaints and that, as is the case under section 41 of the CHRA, only plain and obvious cases must be rejected summarily because they cannot be dealt with. Allow me to explain.

[58] I will first examine the process for handling disclosures and then turn to the reprisal complaint process under the Act to show why this conclusion is inevitable.

[59] The Commissioner clearly has very broad discretion to decide not to deal with a disclosure or not to investigate under section 24 of the Act. This stems not only from the grammatical and ordinary sense of the terms used, but also from the context, such as the type of reasons that the Commissioner may rely on to justify his decision. For example, under paragraph 24(1)(*b*), the Commissioner may decide not to commence an investigation because the subject-matter of the disclosure or the investigation is not sufficiently important, and under paragraph 24(1)(*f*), he or she may decide that there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation. This suggests a considered analysis rather than a summary review. The Act sets no time limit for deciding this question, or for filing a disclosure after a wrongdoing has been committed.

[60] It is also clear that although the person making a disclosure has a certain interest in the case, the purpose of the Act is to denounce and punish wrongdoings in the public sector and, ultimately, build public confidence in the integrity of federal public servants. The public interest comes first, and it is the Commissioner's responsibility to protect it. This explains why, for example, the Commissioner may decide that the subject-matter of the disclosure is not sufficiently important; conversely, he or she may expand an investigation and consider wrongdoings uncovered in the course of that investigation without the need for any disclosure to have been made (section 33 of the Act).

[61] The role of the Commissioner is crucial. The Commissioner is the sole decision-maker throughout the process. He or she has the power not only to refuse to investigate, but also to recommend disciplinary action against public servants who engage in wrongdoings. Among other things, the Commissioner may also report on "any matter that arises out of an investigation to the Minister responsible for the portion of the public sector concerned or, if the matter relates to a Crown corporation, to its board or governing council" (section 37 of the Act).

[62] Parliament has established a very different process for reprisal complaints. In fact, this process is similar to the one provided for in the CHRA. There too, the public interest is a major concern. The disclosure of wrongdoings must be promoted while protecting the persons making disclosures and other persons taking part in an investigation into wrongdoings. However, as is often the case for complaints filed under the CHRA, reprisals complained of have a direct impact on the careers and working conditions of the public servants involved. The Act provides that a specific tribunal shall be established to deal with such matters, and that the Tribunal will be able to grant remedies to complainants, as well as impose disciplinary action against public servants who commit wrongdoings, where the Commissioner recommends it.

[63] In the process applicable to these complaints, the role of the Commissioner is similar to that of the Commission. Like the Commission, he or she handles complaints and ensures that they are dealt with appropriately. To do so, the Commission reviews complaints at two stages in the process before deciding whether an application to the Tribunal is warranted to protect the public servants making disclosures.

[64] The Commissioner must decide whether or not to deal with a reprisal complaint within 15 days after receiving it. The grounds on which a complaint may be summarily dismissed are far more limited than those provided under section 24 (disclosures). They are in the same nature as those set out in section 41 of the CHRA and are even more limited than the latter, since subsection 19.3(1) does not allow the Commissioner to refuse to deal with a complaint if it is found to be frivolous or abusive.

[65] After investigating, the Commissioner re-examines the complaint in light of the factors described in subsection 20.4(3) of the Act, which include, among others, whether "there are reasonable grounds for believing that a reprisal was taken", and whether the complaint should be dismissed for one of the reasons set out in paragraphs 19.3(1)(*a*) to (*d*). He or she will dismiss the complaint if an application to the Tribunal is not warranted (section 20.5). These provisions of the Act are substantially the same as those found in subsections 44(1) and 44(3) of the CHRA, as interpreted by the case law.

[66] Like Justice Rothstein (then of the Federal Court) in *Canada Post Corporation*, who had before him a decision dismissing a complaint under section 41 of the CHRA, I find that at the admissibility stage, the Commissioner must not summarily dismiss a reprisal complaint unless it is plain and obvious that it cannot be dealt with for one of the reasons described in subsection 19.1(3) of the Act. This interpretation respects Parliament's intention that complaints be dealt with in a particularly expeditious manner (within 15 days) at this first stage in the process. It is also consistent with the principle generally applied when a proceeding is summarily dismissed, thereby depriving the complainant of his or her right to a remedy. Finally, a cursory

review of the complaint at this preliminary stage also avoids duplicating the investigation and repeating the exercise set out in subsection 20.4(3) of the Act.

[67] The DPSIC does not address this issue directly in his decision. However, regarding the first condition, he states that [TRANSLATION] "the analysis of your file indicates that it is possible that the alleged reclassifications may constitute a reprisal measure. . . . I therefore conclude that the first condition, set out under section 2 of the *Act*, has been met" [emphasis added]. Regarding the second condition, the DPSIC says, as I have mentioned, that [TRANSLATION] "the wording [of the email dated April 2, 2009] cannot constitute an internal disclosure within the meaning of section 12 of the Act". This language is consistent with my finding that he had to determine whether it was plain and obvious that the complaint could not fall within his jurisdiction.

[68] The admissibility report prepared by the analyst (A.B., page 747 at paragraphs 19 to 23) confirms that there was no in-depth study at this stage and that the recommendation accepted by the DPSIC was based on his reading of the emails dated April 1 and 2, 2009.

[69] The question is therefore whether the DPSIC could reasonably conclude that it was plain and obvious that the emails mentioned by the appellant could not constitute an internal disclosure within the meaning of section 12. This is what I will now discuss.

VII. Was the decision reasonable?

[70] It is important to begin my analysis by pointing out that the definition of "reprisal" clearly indicates that Parliament wants to protect persons who make disclosures or who, in good faith, cooperate in investigations from measures (as described in the Act) that are taken against them simply because they made a protected disclosure or participated in an investigation under the Act.

[71] Therefore, whether a protected disclosure gives rise to an investigation or not and whether the Commission decided to act on it or not (section 24 of the Act) are not relevant questions at this stage of the review of whether a reprisal complaint should be dealt with.

[72] This is the only interpretation that meets Parliament's objective and gives effect to the language of section 12 ("that the public servant believes could . . ", see paragraph 25, page 9, above). If a public servant believes in good faith that a wrongdoing is about to be committed, he or she must be able to disclose it under section 12, without fear of reprisals, even if in the end the Commissioner is of the opinion that there is no need to act upon it because, in his or her opinion, it is not a gross mismanagement.

[73] Denying 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.

[74] On this point, the respondent confirmed at the hearing that it was necessary to clear up the impression that the judge may have given in the finding at paragraph 17 of his reasons (see paragraph 24 above). I agree that the judge's finding is inaccurate if it implies that the DPSIC's decision in Agnaou #1 is relevant to determining whether the Commissioner has jurisdiction to deal with a reprisal complaint.

[75] Similarly, a person who makes a disclosure does not have to refer to the Act in a communication with one of his or her supervisors, nor does he or she have to mention the definition of "wrongdoing", section 12, the Commissioner or any other agency, to permit a finding that he or she made an internal disclosure within the meaning of section 12. This provision does not require a public servant to convey the fact that he or she is in the process of making a disclosure within the meaning of the Act.

[76] Clearly, when a communication includes such mentions, it is easier to conclude at the stage of determining whether to deal with a complaint that the public servant may have made an internal disclosure. However, I must reiterate that this is not a condition *sine qua non*. Therefore, it cannot reasonably be concluded that it is plain and obvious that a communication is not an internal disclosure simply because it does not use any of the key words described in the DPSIC's decision (see the excerpt from the DPSIC's decision, reproduced at paragraph 18 above).

[77] In this case, it also appears that the DPSIC stressed the fact that in his email dated April 2, 2009, the appellant, having been advised by his supervisor that the decision he was trying to prevent had already been reported externally, stated as follows:

> [TRANSLATION]
>
> . . .
>
> In the weeks to come, I will focus on my active files and reflect on what action to take with regard to this serious matter. My decisions will be guided by my responsibilities as a Crown prosecutor as set out in our legislation and policies. If necessary, our Chief Prosecutor will be notified by the relevant authorities.
>
> . . .

[78] In my opinion, this aspect of the email is not particularly relevant, although it does confirm that, according to the appellant, what he described in his email dated April 1 was indeed a gross mismanagement. This is why, in his view, the Director of Public Prosecutions needed to be involved.

[79] I will use an example here to illustrate what I mean.

[80] Imagine that a public servant contacts his supervisor and informs her that he must speak to the big boss to stop a major contract being awarded to the spouse of the manager responsible for a case that was not put up for tender, contrary to the applicable rules. The next day, he is told that the contract has already been signed and that the parties have been notified, so he writes to that same supervisor, "I will have to reflect in the weeks to come on whether I should take action with regard to this serious matter". Would it be reasonable to conclude that it is plain and obvious that this public servant did not disclose to his supervisor that a major contract had been awarded without solicitation to a non-arm's length person because he did not include any express mentions such as those described in the decision, and because everything remained to be decided? Obviously, the only answer to this question is "no".

[81] Can the DPSIC's decision be based on the only other justification raised, which I have not yet discussed specifically, namely, that there was no mention [TRANSLATION] "of wrongdoings as defined in section 8 of the Act" (see paragraph 18 above)?

[82] Given the list included in that paragraph and the context, this excerpt may be understood as suggesting that the DPSIC was of the view that there had to be a mention of one of the terms used in the definition in section 8 of the Act. This reading appears to be the correct one if one examines the admissibility report from which this justification originated (A.B., page 750 at paragraph 32). As I have already said, the lack of such a mention is not in itself determinative for the purposes of applying section 12 and consequently does not lead to the conclusion that paragraph 19.3(1)(*c*) precludes dealing with the complaint.

[83] The other approach is to read this passage as a finding by the DPSIC that the allegations against the managers involved simply cannot constitute a wrongdoing—in this case, a serious mismanagement (paragraph 8(1)(*c*))—and that it is therefore plain and obvious that the emails do not contain any information that could show that a wrongdoing within the meaning of section 8 was committed.

[84] If this conclusion is based on his decision on January 6, 2012, not to commence an investigation, as I have already mentioned, this seems to me to be contrary to Parliament's intent. Moreover, as I stated in paragraph 82 above, reading the passage in the light of the analyst's report does not support this approach. The analyst does not address this question. She states that it is reasonable to conclude that the appellant did not make a disclosure. This conclusion is

clearly based on a lack of an express mention, as discussed above, and on the fact that the appellant stated that he was going to consider the potential action he might take, without saying with whom. The analyst very briefly described what the appellant objected to and why. She did not say that, in the appellant's view, the decision in question involved the public interest or that the appellant claimed that there had been undue interference by a third party (A.B., page 747, paragraphs 19 and 20, and page 750, paragraph 32).

[85] That being said, to conclude my analysis of the reasonableness of the decision, I must determine whether a cursory review, that is, a review of the emails exchanged on April 1 and 2, 2009, could support the DPSIC's conclusion that these exchanges could not constitute an internal disclosure within the meaning of section 12.

[86] According to that provision, the disclosure had to be made to a supervisor. Although the analyst stated that Sylvie Boileau's title was not specified, this was not challenged. In fact, Ms. Boileau was the Assistant Chief Prosecutor (see for example A.B., page 207).

[87] In his email to Sylvie Boileau dated April 1, 2009, the appellant alleged that the managers involved had decided to close the file before a prosecution report had even been drafted, owing to a third party's interference. Given his conclusion as Crown prosecutor responsible for the file that the public interest and internal policies demanded that criminal charges be filed, those managers then interfered by using an unusual process to [TRANSLATION] "legitimize" the decision that they had already made.

[88] The phrase "gross mismanagement" used in section 8 of the Act is not defined and depends, of course, on the organization involved. Here, given the very nature of the PPSC's mandate, the file is on the whole rather unusual, and it is difficult to determine the exact parameters of what could constitute such a wrongdoing. The public interest is often an important consideration when deciding whether to institute criminal proceedings, and it is true that this decision should not be subject to undue interference. The analyst also concluded that there was no evidence of bad faith on the appellant's part. In such circumstances, the appellant could believe that he was disclosing evidence of gross mismanagement to his supervisor.

[89] I therefore cannot conclude that one of the possible outcomes was that it was plain and obvious that the appellant did not make an internal disclosure within the meaning of section 12 and, consequently, that the complaint was beyond the jurisdiction of the Commissioner (and therefore of the DPSIC).

VIII. Remedy

[90] The appellant asks the Court for a [TRANSLATION] "directed verdict", for two reasons: the involvement of the Commissioner or the DPSIC is likely to [TRANSLATION] "give rise to a reasonable apprehension of bias should the final decision be referred back to them", and [TRANSLATION] "[t]he time that has elapsed since the complaint was filed is excessive". In his view, the Court should direct the Commissioner to commence an investigation and to retain the services of a person that the Commissioner will appoint, upon the recommendation of the Auditor General of Canada, to conduct the investigation.

[91] In light of my findings under the heading "Breach of procedural fairness", there is no reasonable apprehension of bias in this case.

[92] However, as the other grounds set out in subsection 19.1(1) do not apply in this case, and since the time elapsed (nearly two years) since the complaint was accepted for filing, I do indeed believe that this is an exceptional case where it is necessary to declare this complaint admissible (see *D'Errico v. Canada (Attorney General),* 2014 FCA 95, 459 N.R. 167, at paragraphs 16-20). I am satisfied that this approach is the only one that will afford the expeditious (within 15 days) treatment intended by Parliament at the first stage of the process provided for in the Act.

[93] In the circumstances, I would allow the appeal and declare the reprisal complaint to be admissible at this stage. The matter should be referred back to a new commissioner to be dealt with appropriately, as prescribed by the Act.

[94] Finally, the appellant sought costs. I note, however, that even though he is a lawyer, the appellant was self-represented. Normally, he is therefore not entitled to costs as per Tariff B of the *Federal Courts Rules,* SOR/98-106. The parties made no submissions allowing me to quantify the disbursements or other amounts that could be awarded to him. I would therefore give the appellant five days to serve and file his submissions on costs (maximum four pages). The respondent may serve and file its response (maximum four pages) within five days after service of the appellant's submissions. If necessary, the appellant may serve and file a reply

(maximum two pages) within two days after service of the respondent's response. The Court will then be able to dispose of the question of costs on the basis of these written submissions.

"Johanne Gauthier"

J.A.

"I agree
M. Nadon"

"I agree
A.F. Scott"

ANNEX A

DISCLOSURE

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*).

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

DIVULGATION

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*).

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-

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 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.

Jurisdiction of the Conflict of Interest and Ethics Commissioner

(2.1) 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 is within the jurisdiction of the Conflict of Interest and Ethics Commissioner under the Conflict of Interest Act and must

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.

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.

Compétence du commissaire aux conflits d'intérêts et à l'éthique

(2.1) Dans le cas où il estime que l'objet d'une divulgation ou d'une éventuelle enquête porte sur une question relevant de la compétence du commissaire aux conflits d'intérêts et à l'éthique au titre de la Loi sur les conflits d'intérêts, le commissaire est tenu de refuser de donner suite à la divulgation ou de

refer the matter to the Conflict of Interest and Ethics Commissioner.

commencer l'enquête et d'en saisir le commissaire aux conflits d'intérêts et à l'éthique.

Notice of refusal

(3) If the Commissioner refuses to deal with a disclosure or to commence an investigation, he or she must inform the person who made the disclosure, or who provided the information referred to in section 33, as the case may be, and give reasons why he or she did so.

Avis

(3) En cas de refus de donner suite à une divulgation ou de commencer une enquête, le commissaire en donne un avis motivé au divulgateur ou à la personne qui lui a communiqué les renseignements visés à l'article 33.

Purpose of investigations

26. (1) Investigations into disclosures and investigations commenced under section 33 are for the purpose of bringing the existence of wrongdoings to the attention of chief executives and making recommendations concerning corrective measures to be taken by them.

Objet des enquêtes

26. (1) Les enquêtes menées sur une divulgation ou commencées au titre de l'article 33 ont pour objet de porter l'existence d'actes répréhensibles à l'attention des administrateurs généraux et de leur recommander des mesures correctives.

Informality

(2) The investigations are to be conducted as informally and expeditiously as possible.

Absence de formalisme

(2) Les enquêtes sont menées, dans la mesure du possible, sans formalisme et avec célérité.

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.

Notice to others

(2) The Commissioner, or the person conducting an investigation, may also notify any other person he or she considers appropriate, including every person whose acts or conduct are called into question by the disclosure to which the investigation relates, and inform that person of the substance of the disclosure.

Avis aux autres personnes

(2) Le commissaire ou la personne qui mène l'enquête peut aussi informer toute personne, notamment l'auteur présumé des actes répréhensibles visés par la divulgation, de la tenue de l'enquête et lui faire connaître l'objet de la divulgation en cause.

Opportunity to answer allegations

(3) It is not necessary for the Commissioner to hold any hearing and no person is entitled as of right to be heard by the Commissioner, but if at any time 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 or any portion of the public sector, the Commissioner must, before completing the investigation, take every reasonable measure to give to that individual or the chief executive responsible for that portion of the public sector a full and ample opportunity to answer any allegation, and to be assisted or represented by counsel, or by any person, for that purpose.

Droit de réponse

(3) Le commissaire n'est pas obligé de tenir d'audience, et nul n'est en droit d'exiger d'être entendu par lui. Toutefois, si au cours de l'enquête, il estime qu'il peut y avoir des motifs suffisants pour faire un rapport ou une recommandation susceptibles de nuire à un particulier ou à un élément du secteur public, il prend, avant de clore l'enquête, les mesures indiquées pour leur donner toute possibilité de répondre aux allégations dont ils font l'objet et, à cette fin, de se faire représenter par un conseiller juridique ou par toute autre personne.

Power to investigate other wrongdoings

33. (1) If, during the course of an investigation or as a result of any information provided to the Commissioner by a person who is not a public servant, the Commissioner has reason to believe that another wrongdoing, or a wrongdoing, as the case may be, has been committed, he or she may, subject to sections 23 and 24, commence an investigation into the wrongdoing if he or she believes on reasonable grounds that the public interest requires an investigation. The provisions of this Act applicable to investigations commenced as the result of a disclosure apply to investigations commenced under this section.

Enquête sur un autre acte répréhensible

33. (1) Si, dans le cadre d'une enquête ou après avoir pris connaissance de renseignements lui ayant été communiqués par une personne autre qu'un fonctionnaire, le commissaire a des motifs de croire qu'un acte répréhensible — ou, dans le cas d'une enquête déjà en cours, un autre acte répréhensible — a été commis, il peut, s'il est d'avis sur le fondement de motifs raisonnables, que l'intérêt public le commande, faire enquête sur celui-ci, sous réserve des articles 23 et 24; les dispositions de la présente loi applicables aux enquêtes qui font suite à une divulgation s'appliquent aux enquêtes menées en vertu du présent article.

Disciplinary action

9. In addition to, and apart from, any penalty provided for by law, a public servant is subject to appropriate disciplinary action, including termination of employment, if he or she commits a wrongdoing.

Sanction disciplinaire

9. Indépendamment de toute autre peine prévue par la loi, le fonctionnaire qui commet un acte répréhensible s'expose à des sanctions disciplinaires pouvant aller jusqu'au licenciement.

Request for notice of action

36. In making a report to a chief executive in

Avis au commissaire

36. Lorsqu'il fait un rapport à l'égard d'une

respect of an investigation, the Commissioner may, if he or she considers it appropriate to do so, request that the chief executive provide the Commissioner, within a time specified in the report, with notice of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken.

enquête, le commissaire peut, s'il le juge à propos, demander à l'administrateur général concerné de lui donner avis, dans un délai déterminé, soit des mesures prises ou envisagées pour la mise en œuvre de ses recommandations, soit des motifs invoqués pour ne pas y donner suite.

Report to appropriate Minister of governing council

37. If the Commissioner considers it necessary, he or she may report any matter that arises out of an investigation to the Minister responsible for the portion of the public sector concerned or, if the matter relates to a Crown corporation, to its board or governing council, including, but not limited to, when the Commissioner is of the opinion that

(*a*) action has not been taken within a reasonable time in respect of one of his or her recommendations; and

(*b*) a situation that has come to his or her attention in the course of carrying out his or her duties exists that constitutes an imminent risk of a substantial and specific danger to the life, health or safety of persons, or to the environment.

Rapport au ministre ou à l'organe de direction

37. S'il l'estime nécessaire, le commissaire peut faire rapport sur toute question découlant d'une enquête au ministre responsable de l'élément du secteur public en cause ou au conseil d'administration ou autre organe de direction de la société d'État intéressée, selon le cas, notamment dans les cas suivants :

a) à son avis, il n'a pas été donné suite dans un délai raisonnable à une recommandation qu'il a faite;

b) il a pris connaissance, dans l'exercice de ses attributions, d'une situation qui, à son avis, présente un risque imminent, grave et précis pour la vie, la santé ou la sécurité humaines ou pour l'environnement.

REPRISALS

Prohibition against reprisal

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

Prohibition-employer

42.1 (1) No employer shall take any of the following measures against an employee by reason only that the employee has, in good faith and on the basis of reasonable belief, provided

REPRÉSAILLES

Interdiction

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

Interdiction-employeur

42.1 (1) Il est interdit à tout employeur de prendre l'une ou l'autre des mesures ci-après à l'encontre d'un de ses employés, au seul motif que l'employé, agissant de bonne foi et se

information concerning an alleged wrongdoing in the public sector to the Commissioner or, if the alleged wrongdoing relates to the Office of the Public Sector Integrity Commissioner, to the Auditor General of Canada — or by reason only that the employer believes that the employee will do so:

[My emphasis]

fondant sur des motifs raisonnables, a communiqué des renseignements concernant un acte répréhensible censé avoir été commis au sein du secteur public au commissaire ou, si l'acte répréhensible concerne le Commissariat à l'intégrité du secteur public, au vérificateur général du Canada — ou que l'employeur croit que l'employé accomplira l'un ou l'autre de ces actes :

[Mon souligné]

(*a*) take a disciplinary measure against the employee;

(*b*) demote the employee;

(*c*) terminate the employment of the employee;

(*d*) take any measure that adversely affects the employment or working conditions of the employee; or

(*e*) threaten to take any measure referred to in paragraphs (a) to (d).

a) toute sanction disciplinaire;

b) la rétrogradation de l'employé;

c) son licenciement;

d) toute mesure portant atteinte à son emploi ou à ses conditions de travail;

e) toute menace à cet égard.

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.

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.

Time for making complaint

(2) The complaint must be filed not later than 60 days after the day on which the complainant knew, or in the Commissioner's opinion ought to have known, that the reprisal was taken.

Delai relatif à la plainte

2) La plainte est déposée dans les soixante jours suivant la date où le plaignant a connaissance — ou, selon le commissaire, aurait dû avoir connaissance — des représailles y ayant donné lieu.

Time extended

(3) The complaint may be filed after the period referred to in subsection (2) if the Commissioner feels it is appropriate considering the circumstances of the complaint.

Délai réserve

(3) Toutefois, elle peut être déposée après l'expiration du délai si le commissaire l'estime approprié dans les circonstances.

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:

(*a*) the subject-matter of the complaint has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under an Act of Parliament, other than this Act, or a collective agreement;

(*b*) if the complainant is a member or former member of the Royal Canadian Mounted Police, the subject-matter of the complaint has been adequately dealt with by the procedures referred to in subsection 19.1(5);

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

(*d*) the complaint was not made in good faith.

Irrecevabilité

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

a) l'objet de la plainte a été instruit comme il se doit dans le cadre d'une procédure prévue par toute autre loi fédérale ou toute convention collective ou aurait avantage à l'être;

b) en ce qui concerne tout membre ou ancien membre de la Gendarmerie royale du Canada, l'objet de la plainte a été instruit comme il se doit dans le cadre des recours visés au paragraphe 19.1(5);

c) la plainte déborde sa compétence;

d) elle n'est pas faite de bonne foi.

Time limit

19.4 (1) The Commissioner must decide whether or not to deal with a complaint within 15 days after it is filed.

Délai

19.4 (1) Le commissaire statue sur la recevabilité de la plainte dans les quinze jours suivant son dépôt.

Notice – decision to deal with complaint

(2) If the Commissioner decides to deal with a complaint, he or she must send a written notice of his or her decision to the complainant and to the person or entity that has the authority to take disciplinary action against each person who participated in the taking of a measure alleged by the complainant to constitute a reprisal.

Avis

(2) Dans le cas où il décide que la plainte est recevable et où il y donne suite, le commissaire envoie par écrit sa décision au plaignant et à la personne ou à l'entité qui a le pouvoir d'infliger les sanctions disciplinaires à chaque personne qui a participé à l'exercice des prétendues représailles faisant l'objet de la plainte.

Reasons-decision not to deal with complaint

(3) If the Commissioner decides not to deal with a complaint, he or she must send a written notice of his or her decision to the complainant and set out the reasons for the decision.

Effect of not dealing with complaint

(4) If the Commissioner decides not to deal with a complaint and sends the complainant a written notice setting out the reasons for that decision,

(*a*) subsection 19.1(4) ceases to apply; and

(*b*) the period of time that begins on the day on which the complaint was filed and ends on the day on which the notice is sent is not to be included in the calculation of any time the complainant has to avail himself or herself of any procedure under any other Act of Parliament or collective agreement in respect of the measure alleged to constitute the reprisal.

Exception

(5) Subsection (4) does not apply if the Commissioner has decided not to deal with the complaint for the reason that it was not made in good faith.

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 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

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

(*b*) an order respecting a remedy in favour of the complainant and an order respecting

Motifs

(3) Dans le cas où il décide que la plainte est irrecevable, le commissaire envoie par écrit sa décision motivée au plaignant.

Effet de l'irrecevabilité

(4) Dans le cas prévu au paragraphe (3) :

a) le paragraphe 19.1(4) cesse de s'appliquer;

b) la période qui commence le jour où la plainte a été déposée et qui se termine le jour où la décision motivée est envoyée au plaignant n'est pas prise en compte dans le calcul du délai dont dispose le plaignant pour intenter tout recours prévu par toute autre loi fédérale ou toute convention collective à l'égard des prétendues représailles.

Exception

5) Le paragraphe (4) ne s'applique pas dans le cas où le commissaire a décidé que la plainte est irrecevable au motif qu'elle n'est pas faite de bonne foi.

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

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

b) soit d'ordonner la prise des mesures de réparation à l'égard du plaignant et la prise de

disciplinary action against any person or persons identified by the Commissioner in the application as being the person or persons who took the reprisal.

Exception

(2) The order respecting disciplinary action referred in paragraph (1)(*b*) may not be applied for in relation to a complaint the filing of which is permitted by section 19.2.

Factors

(3) In considering whether making an application to the Tribunal is warranted, the Commissioner must take into account whether

(*a*) there are reasonable grounds for believing that a reprisal was taken against the complainant;

(*b*) the investigation into the complaint could not be completed because of lack of cooperation on the part of one or more chief executives or public servants;

(*c*) the complaint should be dismissed on any ground mentioned in paragraphs 19.3(1)(*a*) to (*d*); and

(*d*) having regard to all the circumstances relating to the complaint, it is in the public interest to make an application to the Tribunal.

Dismissal of complaint

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.

Establishment

20.7 (1) There is established a tribunal to be known as the Public Servants Disclosure

sanctions disciplinaires à l'encontre de la personne ou des personnes identifiées dans la demande comme étant celles qui ont exercé les représailles.

Exception

(2) Le commissaire ne peut demander au Tribunal d'ordonner la prise de sanctions disciplinaires visée à l'alinéa (1)*b*) à l'égard de la plainte dont le dépôt est autorisé par l'article 19.2.

Facteurs à considérer

(3) Dans l'exercice du pouvoir visé au paragraphe (1), le commissaire tient compte des facteurs suivants :

a) il y a des motifs raisonnables de croire que des représailles ont été exercées à l'égard du plaignant;

b) l'enquête relative à la plainte ne peut être terminée faute de collaboration d'un administrateur général ou de fonctionnaires;

c) la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 19.3(1)*a*) à *d*);

d) il est dans l'intérêt public de présenter une demande au Tribunal compte tenu des circonstances relatives à la plainte.

Rejet de la plainte

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.

Constitution du Tribunal

20.7 (1) Est constitué le Tribunal de la protection des fonctionnaires divulgateurs

Protection Tribunal consisting of a Chairperson and not less than two and not more than six other members to be appointed by the Governor in Council. All of the members must be judges of the Federal Court or a superior court of a province.

d'actes répréhensibles, composé d'un président et de deux à six autres membres nommés par le gouverneur en conseil. Les membres sont des juges de la Cour fédérale ou d'une cour supérieure d'une province.

Conduct of proceedings

21. (1) Proceedings before the Tribunal are to be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

Fonctionnement

21. (1) L'instruction des plaintes se fait sans formalisme et avec célérité dans le respect des principes de justice naturelle et des règles de pratique.

Rights of 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.

Droits des parties

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.

Determination-paragraph 20.4(1)(a)

21.4 (1) On application made by the Commissioner for an order referred to in paragraph 20.4(1)(*a*) the Tribunal must determine whether the complainant has been subject to a reprisal and, if it so determines, the Tribunal may make an order granting a remedy to the complainant.

Décision : alinéa 20.4(1)a)

21.4 (1) S'agissant d'une demande visant la prise de l'ordonnance prévue à l'alinéa 20.4(1)*a*), le Tribunal décide si des représailles ont été exercées à l'égard du plaignant et, s'il décide qu'elles l'ont été, peut ordonner la prise de mesures de réparation à l'égard du plaignant.

Parties

(2) The parties in respect of the application are the Commissioner and

(*a*) the complainant;

(*b*) if the complainant is a public servant, the complainant's employer; and

(*c*) if the complainant is a former public servant, the person or entity who was the complainant's employer at the time the alleged

Parties

(2) Outre le commissaire, sont parties à la procédure :

a) le plaignant;

b) s'agissant d'un fonctionnaire, son employeur;

c) s'agissant d'un ancien fonctionnaire, la personne ou l'entité qui était son employeur à l'époque où des représailles auraient été

reprisal was taken.

Determination: paragraph 20.4(1)(b)

21.5 (1) On application made by the Commissioner for the orders referred to in paragraph 20.4(1)(*b*) the Tribunal must determine whether the complainant has been subject to a reprisal and whether the person or persons identified by the Commissioner in the application as having taken the alleged reprisal actually took it. If it determines that a reprisal was taken, the Tribunal may, regardless of whether or not it has determined that the reprisal was taken by the person or persons named in the application, make an order granting a remedy to the complainant.

Parties

(2) The parties in respect of proceedings held for the purpose of subsection (1) are the Commissioner and

(*a*) the complainant;

(*b*) if the complainant is a public servant, the complainant's employer;

(*c*) if the complainant is a former public servant, the person or entity who was the complainant's employer at the time the alleged reprisal was taken; and

(*d*) the person or persons identified in the application as being the person or persons who may have taken the alleged reprisal.

Reasons

(3) The Tribunal must issue written reasons for its decisions under subsection (1) as soon as possible.

Remedies

21.7 (1) To provide an appropriate remedy to the complainant, the Tribunal may, by order,

exercées.

Décision : alinéa 20.4(1)b)

21.5 (1) S'agissant d'une demande visant la prise des ordonnances prévues à l'alinéa 20.4(1)*b*), le Tribunal décide si des représailles ont été exercées à l'égard du plaignant et si la personne ou les personnes identifiées dans la demande comme étant celles qui les auraient exercées les ont effectivement exercées. S'il décide que des représailles ont été exercées, le Tribunal peut ordonner — indépendamment de la question de savoir si ces personnes ont exercé les représailles — la prise de mesures de réparation à l'égard du plaignant.

Parties

(2) Outre le commissaire, sont parties à la procédure :

a) le plaignant;

b) s'agissant d'un fonctionnaire, son employeur;

c) s'agissant d'un ancien fonctionnaire, la personne ou l'entité qui était son employeur à l'époque où les représailles auraient été exercées;

d) la personne ou les personnes identifiées dans la demande comme étant celles qui auraient exercé les représailles.

Motifs de la décision

(3) Le Tribunal motive par écrit sa décision dans les meilleurs délais.

Mesures de réparation

21.7 (1) Afin que soient prises les mesures de réparation indiquées, le Tribunal peut, par

require the employer or the appropriate chief executive, or any person acting on their behalf, to take all necessary measures to

ordonnance, enjoindre à l'employeur, à l'administrateur général compétent ou à toute personne agissant en leur nom de prendre toutes les mesures nécessaires pour :

(*a*) permit the complainant to return to his or her duties;

a) permettre au plaignant de reprendre son travail;

(*b*) reinstate the complainant or pay compensation to the complainant in lieu of reinstatement if, in the Tribunal's opinion, the relationship of trust between the parties cannot be restored;

b) le réintégrer ou lui verser une indemnité, s'il estime que le lien de confiance qui existait entre les parties ne peut être rétabli;

(*c*) pay to the complainant compensation in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to the remuneration that would, but for the reprisal, have been paid to the complainant;

c) lui verser une indemnité équivalant au plus, à son avis, à la rémunération qui lui aurait été payée s'il n'y avait pas eu de représailles;

(*d*) rescind any measure or action, including any disciplinary action, and pay compensation to the complainant in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to any financial or other penalty imposed on the complainant;

d) annuler toute sanction disciplinaire ou autre prise à son endroit et lui payer une indemnité équivalant au plus, à son avis, à la sanction pécuniaire ou autre qui lui a été imposée;

(*e*) pay to the complainant an amount equal to any expenses and any other financial losses incurred by the complainant as a direct result of the reprisal; or

e) lui accorder le remboursement des dépenses et des pertes financières qui découlent directement des représailles;

(*f*) compensate the complainant, by an amount of not more than $10,000, for any pain and suffering that the complainant experienced as a result of the reprisal.

f) l'indemniser, jusqu'à concurrence de 10 000 $, pour les souffrances et douleurs découlant des représailles dont il a été victime.

Staff

Personnel

39.3 (1) The Deputy Commissioner and the officers and employees that are necessary to enable the Commissioner to perform his or her duties and functions are to be appointed in accordance with the *Public Service Employment Act*.

39.3 (1) Le sous-commissaire et les autres membres du personnel dont le commissaire a besoin pour l'exercice des attributions que lui confère la présente loi sont nommés conformément à la *Loi sur l'emploi dans la fonction publique*.

Duties and powers of Deputy Commissioner

(1.1) The Deputy Commissioner exercises any of the powers and performs any of the duties and functions that the Commissioner may assign.

Scope of assigned duties and functions

(1.2) The assignment of powers, duties and functions by the Commissioner to the Deputy Commissioner may include the delegation to the Deputy Commissioner of any of the Commissioner's powers, duties and functions, including those referred to in paragraphs 25(1)(*a*) to (*k*) and the powers in sections 36 and 37, but it may not include the delegation of the Commissioner's power or any of his or her duties in section 38.

Attributions du sous-commissaire

Le sous-commissaire exerce les attributions que peut lui confier le commissaire

Portée des attributions

(1.2) Les attributions que peut confier le commissaire au sous-commissaire comprennent celles de ses propres attributions qu'il lui délègue — y compris celles énumérées aux alinéas 25(1)*a*) à *k*) ainsi que les pouvoirs prévus aux articles 36 et 37 — sauf le pouvoir ou les obligations prévus à l'article 38.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

SELF-REPRESENTED	FOR THE APPELLANT YACINE AGNAOU
Kétia Calix	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

YACINE AGNAOU	FOR THE APPELLANT SELF-REPRESENTED
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA