

Federal Court



Cour fédérale

Date: 20100113

Docket: T-1078-08

Citation: 2010 FC 39

Ottawa, Ontario, January 13, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JOHN DETORAKIS

Applicant

and

**THE ATTORNEY GENERAL
OF CANADA**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 51.2 of the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 (PSDP Act) for judicial review of a decision dated June 4, 2008 (Decision) of the Public Sector Integrity Commission, which refused to register the Applicant's disclosure of wrongdoing and to provide him with legal assistance.

BACKGROUND

[2] The Applicant was an employee of the Canadian Nuclear Safety Commission (CNSC). He made access to information requests within the CNSC in 2003 and 2006.

[3] The Applicant became concerned that public records had been concealed and amputated in order to impede his disclosure request. He was also concerned that there had been a fabrication of evidence in order to affect the proceedings of a tribunal.

[4] The Applicant attempted to have his complaints investigated by the Office of the Information Commissioner. However, his complaint was submitted after the one-year complaint deadline, so the OIC found the matter was outside its jurisdiction. The Applicant was informed that he could resubmit his access to information request within the CNSC.

[5] The Applicant then wrote to the Public Sector Integrity Commissioner (PSIC), requesting that his complaints be heard by the PSIC, and expressing his concern that the OIC had not referred his complaint to another investigating authority with the jurisdiction to handle his complaint.

DECISION UNDER REVIEW

[6] Based on the documentation provided by the Applicant, the PSIC was satisfied that the Applicant's concerns pertained to access to information requests from within his own institution. She noted that the Applicant was also attempting to lodge a complaint against the OIC's response to his complaint.

[7] The PSIC was satisfied that the Applicant's complaints to the OIC had been investigated, and it was simply the results of the investigation that were unsatisfactory to him.

[8] The PSIC then applied section 24(1) of the Act and determined that the Applicant's complaints were part of a process provided for by another Act of Parliament.

[9] Further, the PSIC noted that the Applicant could approach his local police force with his allegations of indictable offenses, the concealment and amputation of public records, and also with his concerns about the fabrication of evidence.

ISSUES

[10] The self-represented Applicant has raised the following issues on this application:

1. What is the required content of Procedural Fairness when a public servant discloses wrongdoing in the Public Service and seeks legal consultation for reprisals related to the disclosures?

2. Was there a breach in the required content of procedural fairness and natural justice in this case?
3. Did the PSIC err in deciding that the disclosed offenses pertaining to section 67.1 of the Act had been dealt with?
4. If the PSIC did not err, was the Decision unreasonable because of the inference that the police are the appropriate authority to investigate the indictable offences of record concealment?

STATUTORY PROVISIONS

[11] The following sections of the Act are applicable in these proceedings:

15.1 In making a disclosure under this Act, a public servant must

(a) provide no more information than is reasonably necessary to make the disclosure; and

(b) follow established procedures or practices for the secure handling, storage, transportation and transmission of information or documents, including, but not limited to, information or documents that the Government of Canada or any portion of the public sector is taking measures to protect.

15.1 Le fonctionnaire qui fait une divulgation au titre de la présente loi :

a) ne communique que les renseignements qui sont raisonnablement nécessaires pour faire la divulgation;

b) se conforme aux règles et procédures relatives à la manipulation, la conservation, le transport et la transmission de renseignements ou documents, notamment ceux à l'égard desquels le gouvernement fédéral ou un élément du secteur public prend des mesures de protection.

...

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

(a) provide information and advice regarding the making of disclosures under this Act and the conduct of investigations by the Commissioner;

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

(c) conduct investigations of disclosures made in accordance with section 13, and investigations referred to in section 33, including to appoint persons to conduct the investigations on his or her behalf;

(d) ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;

(e) subject to any other Act of Parliament, protect, to the extent possible in accordance with the law, the identity of persons involved in the disclosure process, including

...

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

a) fournir des renseignements et des conseils relatifs aux divulgations faites en vertu de la présente loi et à la tenue des enquêtes menées par lui;

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

c) mener les enquêtes sur les divulgations visées à l'article 13 ou les enquêtes visées à l'article 33, notamment nommer des personnes pour les mener en son nom;

d) veiller à ce que les droits, en matière d'équité procédurale et de justice naturelle, des personnes mises en cause par une enquête soient protégés, notamment ceux du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;

e) sous réserve de toute autre loi fédérale applicable, veiller, dans toute la mesure du possible et en conformité avec les règles de droit en vigueur, à ce que l'identité des personnes

that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;

mises en cause par une divulgation ou une enquête soit protégée, notamment celle du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;

(f) establish procedures for processing disclosures and ensure the confidentiality of information collected in relation to disclosures and investigations;

f) établir des procédures à suivre pour le traitement des divulgations et assurer la confidentialité des renseignements recueillis relativement aux divulgations et aux enquêtes;

(g) review the results of investigations into disclosures and those commenced under section 33 and report his or her findings to the persons who made the disclosures and to the appropriate chief executives;

g) examiner les résultats des enquêtes menées sur une divulgation ou commencées au titre de l'article 33 et faire rapport de ses conclusions aux divulgateurs et aux administrateurs généraux concernés;

(h) make recommendations to chief executives concerning the measures to be taken to correct wrongdoings and review reports on measures taken by chief executives in response to those recommendations; and

h) présenter aux administrateurs généraux concernés des recommandations portant sur les mesures correctives à prendre et examiner les rapports faisant état des mesures correctives prises par les administrateurs généraux à la suite des recommandations;

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

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

...

...

Right to refuse

Refus d'intervenir

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

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

...

25.1 (1) The Commissioner may provide access to legal advice to

(a) any public servant who is considering making a disclosure of wrongdoing under this Act;

(b) any person who is not a public servant who is considering providing information to the Commissioner in relation to any act or omission that may constitute a wrongdoing under this Act;

(c) any public servant who has made a disclosure under this Act;

(d) any person who is or has been involved in any

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

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

...

25.1 (1) Le commissaire peut mettre des services de consultation juridique à la disposition des personnes suivantes :

a) tout fonctionnaire qui envisage de divulguer un acte répréhensible en vertu de la présente loi;

b) toute personne autre qu'un fonctionnaire qui envisage de communiquer des renseignements au commissaire concernant un acte ou une omission susceptible de constituer un acte répréhensible en vertu de la présente loi;

c) tout fonctionnaire qui a fait une divulgation en vertu de la présente loi;

d) toute personne qui participe ou a participé à une enquête

investigation conducted by a senior officer or by or on behalf of the Commissioner under this Act;

(e) any public servant who is considering making a complaint under this Act regarding an alleged reprisal taken against him or her; or

(f) any person who is or has been involved in a proceeding under this Act regarding an alleged reprisal.

(2) The Commissioner may provide the access to legal advice only if the public servant or person satisfies the Commissioner that they do not have other access to legal advice at no cost to them.

Additional condition

25. 1(3) In addition to the condition referred to in subsection (2), the PSIC may provide access to legal advice to a public servant referred to in paragraph (1)(a) or a person referred to in paragraph (1)(b) only if the PSIC is of the opinion that the act or omission to which the disclosure or the information relates, as the case may be, likely constitutes a wrongdoing under this Act and that the disclosure or the provision of the information is likely to lead to an investigation being conducted

menée par un agent supérieur ou le commissaire, ou en son nom, en vertu de la présente loi;

e) tout fonctionnaire qui envisage de présenter une plainte en vertu de la présente loi concernant les représailles dont il aurait été victime;

f) toute personne qui participe ou a participé dans une procédure visée par la présente loi concernant de prétendues représailles.

(2) Il ne peut mettre des services de consultation juridique à la disposition de l'intéressé que si celui-ci le convainc qu'il ne peut autrement obtenir gratuitement des conseils juridiques.

Condition supplémentaire

25. 1(3) Il ne peut non plus mettre des services de consultation juridique à la disposition du fonctionnaire visé à l'alinéa (1)a) ou de la personne visée à l'alinéa (1)b) que s'il est d'avis que la divulgation ou les renseignements portent sur un acte ou une omission susceptible de constituer un acte répréhensible en vertu de la présente loi et qu'ils pourraient mener à la tenue d'une enquête en vertu de celle-ci.

under this Act.

STANDARD OF REVIEW

[12] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, “the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review” (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[13] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[14] The Respondent submits that in the present case the standard of review of the Decision under review has not been previously established by jurisprudence. Thus, the standard of review must be based on an examination of: 1) the existence or absence of a privative clause or a statutory right of appeal; 2) the expertise of the decision maker; 3) the purpose of the decision maker; and 4) the nature of the question at issue.

[15] The Respondent submits that even though no privative clause exists, Parliament has made the PSIC's decisions with regard to both sections 24(1) and 25(1)(3) discretionary in nature. The discretionary nature of this decision reflects the PSIC's expertise in addressing disclosures under the Act. Such expertise militates in favour of a deferential approach to review. Furthermore, this is an issue of mixed fact and law, and issues of mixed fact and law are generally considered on a reasonableness standard. See *Dunsmuir* at 164.

[16] I agree with the Respondent that a standard of reasonableness is appropriate for reviewing the PSIC's Decision as to whether the Applicant's complaint had been appropriately dealt with.

[17] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[18] The Applicant has also brought issues of procedural fairness before the Court. Issues of procedural fairness and natural justice are to be determined on a standard of correctness. See *Dunsmuir* at paragraphs 126 and 129.

ARGUMENTS

The Applicant

Duty of procedural fairness

[19] The Applicant submits that the factors in *Baker v. Canada (Minister of Citizenship and Immigration)*, 174 D.L.R. (4th) 193, [1999] S.C.J. No. 39 require a high threshold of procedural fairness in this instance. These factors include: a) the decision making process and the choice of procedure; b) the statutory scheme; c) the importance of the decision to the individual affected; and d) the legitimate expectations of the parties.

[20] The Applicant contends that the decision making process and the choice of procedure is framed by the duties of the PSIC, which are listed in the Act. The inclusion of procedural fairness in the duties of the PSIC in section 22(d) requires a high duty of procedural fairness.

[21] The Applicant submits that the statutory scheme also militates in favour of a high content of procedural fairness, since no appeal process exists within the Act. Rather, the PSIC's decisions on whether or not to accept a disclosure and provide legal representation are determinative. The Applicant further submits that an opportunity to be heard on the findings and recommendations put forth by the PSIC is required pursuant to the statutory scheme.

[22] The PSIC's decision on whether or not to accept a public servant's disclosure is important, especially when the public servant has experienced reprisals because of his disclosure. The PSIC's dismissal of the disclosure will affect the public servant's ability to protect his career, so that a high content of procedural fairness is required. A high content of procedural fairness in a similar context was recognized in *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105. The Applicant also made the importance of the decision clear to the PSIC when he sent her a letter in which he stated that he was seeking legal consultation for reprisals related to his disclosure.

[23] Finally, the Applicant submits that the letter he received from the PSIC Registrar on May 22, 2008, in which he was told that the analyst assigned to his disclosure would contact him, created a legitimate expectation that he would be heard in the decision making process. According to *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16, 61 D.L.R. (4th) 313:

[W]hen a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.

[24] The Applicant believes that he had a legitimate expectation to be heard before the decision on the receivability of his disclosure was made.

Breach of procedural fairness

[25] The Applicant submits that the duty of procedural fairness was breached because the process and procedure created by the PSIC to determine the receivability of disclosures was altered in a way that reduced procedural fairness and deprived him of the opportunity to address the findings of the analyst.

[26] The nature of the statutory scheme and the importance of the decision to the Applicant both require that he should have had an opportunity to be heard before the decision was made. Furthermore, a legitimate expectation was created through the letter received by the Applicant which promised that he would have the opportunity to communicate with the analyst assigned to his disclosure.

Erroneous findings of fact

[27] The Applicant's disclosure to the PSIC was concerned with the indictable offence of destroying, mutilating or concealing a record. He informed the PSIC that his disclosure did not pertain to the denial of access to information complaint that had been dealt with by the OIC.

[28] In her decision, the PSIC does not provide evidence of what she relied upon to conclude that the OIC had dealt with the issues of the disclosure of indictable offences pursuant to section 67.1 of the *Access to Information Act*, R.S.C., 1985, c. A-1. Moreover, the PSIC's decision made no reference to the Applicant's evidence that the OIC did not investigate the offences alleged under the

Access to Information Act. Such evidence completely contradicts the finding that the PSIC had dealt with the disclosure with regard to the offences of concealment and the mutilation of records.

[29] Although the PSIC's decision stated that she considered all the evidence, the Court may nonetheless infer an erroneous finding of fact from the tribunal's failure to mention the evidence before it that contradicted its finding. See *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R 35, [1998] F.C.J. No. 1425 (QL). As stated in *Ali v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 448, [2008] F.C.J. No. 528 (QL), while the decision maker may choose the evidence it prefers, it may commit a reviewable error if it fails to mention and analyze important evidence which is inconsistent with its conclusion.

Reference to police

[30] The Applicant also submits that it is unreasonable for the PSIC to dismiss a disclosure based on the fact that it will be better investigated by another authority that does not have the jurisdiction to investigate. This occurred in the case at hand, since the RCMP told the Applicant that it has no jurisdiction to investigate a disclosure under section 67.1 of the *Access to Information Act*.

[31] The Applicant submits that the PSIC's decision with regard to disclosure of the concealment offences was based on an erroneous finding of fact or, in the alternative, that it relied on an unreasonable application of her discretion.

Order Sought

[32] The Applicant requests that the Court issue an order of mandamus that PSIC register the Applicant's disclosures into offences pursuant to section 67.1 of the *Access to Information Act*, and also that the Applicant be provided with legal consultation with regard to the disclosures he made to the PSIC.

The Respondent

[33] The Respondent agrees that the *Baker* factors must be assessed to determine the content of the procedural fairness owed in this case. However, the Respondent distinguishes between the two different regimes in the Act, one of which is for wrongdoing and the other is for reprisal complaints. The Respondent contends that the former is based on a public servant coming forward as a witness to an act or omission of wrongdoing pursuant to section 8 of the Act. This regime is not a dispute between the discloser and his/her employer. The latter regime, however, is a complaint process where the rights of the complainant have been directly affected by a reprisal taken against him. Sections 12 and 13 of the Act set out the threshold of information that is expected of a public servant in his or her disclosure.

[34] The Respondent contends that the criteria in section 12 are equally applicable to a disclosure made to the PSIC under section 13. These criteria are subjective and impose a minimal burden on the discloser. The Respondent believes that this is qualified by section 15.1 of the Act which states that the public servant is not expected to have all the information to make a disclosure. It also limits the scope of the information that the public servant is expected to provide to the Commission.

[35] In this case, the Applicant made a disclosure pursuant to section 13 of the Act which confers a right on a public servant to disclose information of wrongdoing. The Respondent submits that the standard to be applied as a condition for commencing an investigation following a disclosure by a public servant is determined by the PSIC in accordance with paragraph 22(b) of the Act.

[36] To determine whether sufficient grounds exist for further action, the PSIC must determine if the issue of the disclosure concerns a wrongdoing related to the public sector, as defined in section 8 of the Act. In subsection 24(1), the Act provides a discretionary right to refuse to deal with a disclosure. Furthermore, restrictions in sections 23(1) and 24(2) may also determine whether disclosure should be refused.

[37] Pursuant to the Act, the PSIC is not required to hear from the discloser before making a decision on the basis of sections 23 and 24. The PSIC may seek more information or clarifications necessary from the discloser if required. However, in this case, the analyst determined that the Applicant had taken his claim to the OIC and suggested that the PSIC take no further action on this basis. The PSIC accepted this recommendation.

Nature of the decision making process

[38] The Respondent submits that the PSIC's role is advisory rather than judicial. Furthermore, her recommendations are not enforceable by the Court. Although she is an agent of Parliament, her role is simply to make Parliament aware of wrongdoings in the public sector.

[39] The process followed to make a disclosure under the Act is intended to be both informal and expeditious, and is not similar to the trial process. Furthermore, the investigators and the PSIC have much flexibility in how they analyze and reach conclusions. The Respondent submits that these factors militate in favour of a low standard of procedural fairness.

[40] The Act sets minimal obligations with regard to *audi alteram partem*. These include:

1. The obligation to give notice – The PSIC must inform the discloser if she refuses to deal with the disclosure or to begin an investigation (subsection 24(3)). The Respondent contends that this was done by letter on June 12, 2008;
2. The right to be heard – The PSIC is not required to hold a hearing or hear anyone unless it seems that a report or a recommendation might adversely affect an individual (subsection 27(3)). In such a situation, the person will be given a full opportunity to answer any allegation made. A right to counsel in this situation also

exists. However, the opportunity to answer occurs only during an investigation, not when determining whether or not a disclosure is admissible;

3. Duty to communicate the findings – The PSIC is required to report on her findings to the discloser pursuant to paragraph 22(g). However, the Respondent contends that the recommendations made with regard to measures to be taken to correct wrongdoings are not necessarily part of this report on findings;
4. The right to counsel – The right to counsel exists where an individual may be adversely affected during an investigation, either by a report of findings or a recommendation (subsection 27(3)).

Nature of the Statutory Scheme

[41] According to the Act’s preamble, the Act is intended to enhance confidence in public institutions by “establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings.”

[42] The PSIC is granted a discretionary power under subsection 24(1) of the Act in which she can refuse to deal with a disclosure or choose to begin an investigation. This decision is final and cannot be appealed.

[43] In order to allow her to decide whether it is in the public’s interest for an investigation to occur based on the listed grounds, the discretion given to the PSIC by subsection 24(1) is wide. She

may also decide that the matter could be better dealt with by another office. The Respondent submits that the PSIC's office has expertise in determining whether the information given by a discloser could constitute a wrongdoing, and whether an investigation is appropriate.

Importance of the decision to the individual

[44] Subsection 51.2 of the Act creates a presumption in favour of the discloser in allowing them to obtain a judicial review.

[45] The Respondent contends that the existence of subsection 51.2 requires that the discloser have access to some information in order to be able to bring his case before the Court. Thus, the discloser would have access to all of the material before the decision maker in making a determination on judicial review. The Respondent submits that this ensures transparency and accountability in the decision-making process.

Legitimate Expectations

[46] The Respondent submits that the factors of the case at hand are determinative of the issue of legitimate expectations. After the discussion with the analyst in April of 2008, the Applicant submitted the documentation to support his allegation of wrongdoing. The information provided by the Applicant was deemed sufficient to determine the issues of admissibility. The Respondent says that, on the facts of this case, no legitimate expectation of an oral hearing existed.

Choice of Procedure

[47] The PSIC is required to determine whether or not there are sufficient grounds for action based on the information received. In this case, the decision was made following a phone call and after consideration of all of the Applicant's documentation. This was enough information for the analyst to make a recommendation to the PSIC. In this case, the PSIC's office followed its usual procedures which included a multi-disciplinary approach and multiple levels in the review of the file by the analyst/investigator, the registrar, Legal Services, Deputy PSIC and the PSIC.

[48] The PSIC may also authorize funding to pay for the provision of legal advice pursuant to section 25.1. She may also choose to have legal advice provided thorough legal counsel employed in her office.

[49] Section 25.1 lays out the admissibility criteria to qualify for such legal advice. These criteria include:

1. If the public servant satisfies the PSIC that they do not have other access to legal advice at no cost. See subsection 25.1(2); and
2. The public servant is considering providing information to the PSIC in relation to any act or omission that:
 - a. Likely constitutes a wrongdoing under the Act;

- b. The disclosure of which is likely to lead to an investigation being conducted under the Act. See subsection 25.1(3).

Other considerations include:

3. The degree to which the public interest may be affected by the subject-matter of the disclosure of the information provided; and
4. The degree to which the public servant would be adversely affected as a result of making the disclosure.

[50] The Respondent suggests that the principle arising from paragraph 25.1(7)(b) is also relevant in determining the overall admissibility of legal advice, since the Act is intended to encourage public servants to come forward with information regarding possible wrongdoing and to protect them against reprisals for disclosure. Although a discloser may be disappointed with the PSIC's decision not to investigate, that person will not suffer prejudice or be adversely affected by the decision. Nor should a finding of wrongdoing or a finding to not investigate further cause a prejudice to the discloser.

[51] In this case, the disclosure did not lead to an investigation. On the basis of the Act and the principles contained in the Act, the Applicant's rights were deemed to be minimally affected by the PSIC's decision under section 24(1). Accordingly, he did not qualify for legal advice under section 25.1.

[52] The Respondent also draws a distinction between the provision of general advice and a formal request to receive legal advice under section 25.1. While the former is a routine occurrence, the latter is intended to give specific legal advice to those who are considering making a disclosure of wrongdoing with regard to their rights and obligations, and to help them determine their best course of action.

Low threshold of procedural fairness

[53] The Respondent contends that the threshold for procedural fairness in this instance is minimal, based on an examination of both the *Baker* factors and the Act itself.

[54] The analyst spoke with the Applicant and explained the process to him. The Applicant was then permitted to provide supporting documents, which were considered by the PSIC's office before the decision was made. Accordingly, the Respondent submits that the Applicant was afforded the appropriate level of procedural fairness.

Commissioner's Decision was reasonable

[55] Much of the Applicant's record in this application is material that was not before the decision maker at the time the decision was made. In determining the reasonableness of the PSIC's decision, the Court must limit its analysis to consideration of the material that was before the

decision maker at the time the decision was made. See *Beci v. Canada*, 130 F.T.R. 267, [1997] F.C.J. No. 584.

[56] The PSIC decided that disclosure could not be accepted by her office because it had already been addressed by the OIC. This decision was reasonable given both the PSIC's discretion under the Act and the facts before her at the time the decision was made.

[57] The information provided by the Applicant contained issues that had been previously raised before, and dismissed by, the OIC. The PSIC reasonably exercised her discretion under paragraph 24(1)(a) in this instance.

[58] The OIC's November 7, 2007 letter to the Applicant stated that it lacked jurisdiction because the Applicant was out of time to file his complaint. It is unreasonable for the Applicant, having missed the time limitation, to now argue that the PSIC must step in to conduct an investigation under a different legislative scheme. The Respondent submits that this is tantamount to advancing the same issue collaterally in a different forum simply because the Applicant missed the original body's time limitation.

ANALYSIS

The Basic Situation

[59] The underlying application is for judicial review of a decision by the PSIC, Mme Christiane Ouimet, in which she declined to exercise her jurisdiction to investigate the Applicant's disclosure of alleged wrongdoing by public officials and declined to provide him with funding to obtain legal advice.

[60] The disclosure was submitted by the Applicant on April 16, 2008 pursuant to section 13 of the PSDP Act and relates to alleged actions taken by his employer, CNSC, in response to his request for information concerning staff relations issues.

[61] The Applicant initially filed a complaint with CNSC management in 2003. Dissatisfied with the response, in 2006 he then sought the intervention of the Office of the Privacy Commissioner of Canada which referred his complaint to the OIC as an access issue. The OIC advised the Applicant in November 2006 that he was out of time to bring his complaint but that he could make a fresh access application to CNSC and file a new complaint with OIC should the application be refused.

[62] The Applicant contested this assessment arguing in his subsequent correspondence with the OIC and in his April 16, 2008 disclosure to the PSIC that the issue was not the refusal of an access request but, rather, the concealment of records and fabrication of evidence in order to deny him access to the requested information.

[63] The Applicant asserts that the OIC maintains an open file but has failed to investigate his allegations of criminal wrongdoing. This prompted his disclosure to PSIC. On this and other

complaints, he has sought the intervention of the Minister of Labour and also the Minister of Justice and Attorney General of Canada. In their replies, the former indicated he could not intervene and the latter's office suggested that if the Applicant has evidence of criminal acts, he should contact his local police.

[64] The PSIC's decision was communicated to the Applicant in a letter signed by Mr. Wayne Watson, then Deputy PSIC, on June 12, 2008. The letter referred to paragraph 24(1)(a) of the PSDP Act which provides that the PSIC may refuse to deal with a disclosure if he or she is of the opinion that the subject matter has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament. The letter referred to the assessment conducted by the OIC under the *Access to Information Act* as the basis for declining to act on the disclosure. The Applicant was again advised that he could address his allegations of criminal misconduct to his local police service.

[65] In his notice of application under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, filed on July 11, 2008, the Applicant seeks a writ of mandamus to compel the PSIC to accept his disclosures of wrongdoing and approve funding for legal consultation.

The Decision

[66] Section 22(d) of the PSDP Act imposes upon the PSIC a duty to:

(d) ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected,	d) veiller à ce que les droits, en matière d'équité procédurale et de justice naturelle, des personnes mises en cause par
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including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;

une enquête soient protégés, notamment ceux du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;

[67] The Applicant's letter of April 16, 2008 to the PSIC Registry made disclosures related to:

1. Indictable offences of concealment and amputations of public reasons to impede disclosure of information requested under the *Access to Information Act*; and
2. Fabrication of evidence to affect the proceedings of tribunals.

This was a complaint under section 13 of the PSDP Act, and not a complaint relating to reprisals under section 19.1 or 19.2 of the PSDP Act.

[68] This disclosure reflected the telephone discussion the Applicant had with Mr. Ronald Calvert, the analyst for the PSIC, on April 16, 2008 as set out in Mr. Calvert's affidavit of July 10, 2009, as well as the materials submitted by the Applicant with his faxed letter of April 16, 2006.

[69] Section 13 of the PSDP Act allows a public servant to disclose information to the PSIC that could show a wrongdoing.

[70] When making disclosure under section 13, the public servant is bound by section 15.1:

15.1 In making a disclosure under this Act, a public servant must

(a) provide no more

information than is reasonably necessary to make the disclosure; and

(b) follow established procedures or practices for the secure handling, storage, transportation and transmission of information or documents, including, but not limited to, information or documents that the Government of Canada or any portion of the public sector is taking measures to protect.

15.1 Le fonctionnaire qui fait une divulgation au titre de la présente loi :

a) ne communique que les

renseignements qui sont raisonnablement nécessaires pour faire la divulgation;

b) se conforme aux règles et procédures relatives à la manipulation, la conservation, le transport et la transmission de renseignements ou documents, notamment ceux à l'égard desquels le gouvernement fédéral ou un élément du secteur public prend des mesures de protection.

[71] In dealing with complaints under the PSDP Act, the PSIC is subject to the general duties set out in section 22 :

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

(a) provide information and advice regarding the making of disclosures under this Act and the conduct of investigations by the Commissioner;

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

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

a) fournir des renseignements et des conseils relatifs aux divulgations faites en vertu de la présente loi et à la tenue des enquêtes menées par lui;

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

further action;

(c) conduct investigations of disclosures made in accordance with section 13, and investigations referred to in section 33, including to appoint persons to conduct the investigations on his or her behalf;

(d) ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;

(e) subject to any other Act of Parliament, protect, to the extent possible in accordance with the law, the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;

(f) establish procedures for processing disclosures and ensure the confidentiality of information collected in relation to disclosures and investigations;

(g) review the results of investigations into disclosures

c) mener les enquêtes sur les divulgations visées à l'article 13 ou les enquêtes visées à l'article 33, notamment nommer des personnes pour les mener en son nom;

d) veiller à ce que les droits, en matière d'équité procédurale et de justice naturelle, des personnes mises en cause par une enquête soient protégés, notamment ceux du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;

e) sous réserve de toute autre loi fédérale applicable, veiller, dans toute la mesure du possible et en conformité avec les règles de droit en vigueur, à ce que l'identité des personnes mises en cause par une divulgation ou une enquête soit protégée, notamment celle du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;

f) établir des procédures à suivre pour le traitement des divulgations et assurer la confidentialité des renseignements recueillis relativement aux divulgations et aux enquêtes;

g) examiner les résultats des enquêtes menées sur une

and those commenced under section 33 and report his or her findings to the persons who made the disclosures and to the appropriate chief executives;	divulgation ou commencées au titre de l'article 33 et faire rapport de ses conclusions aux divulgateurs et aux administrateurs généraux concernés;
(h) make recommendations to chief executives concerning the measures to be taken to correct wrongdoings and review reports on measures taken by chief executives in response to those recommendations; and	h) présenter aux administrateurs généraux concernés des recommandations portant sur les mesures correctives à prendre et examiner les rapports faisant état des mesures correctives prises par les administrateurs généraux à la suite des recommandations;
(i) receive, review, investigate and otherwise deal with complaints made in respect of reprisals.	i) recevoir et examiner les plaintes à l'égard des représailles, enquêter sur celles-ci et y donner suite.

[72] In addition to these general duties, the PSIC is also subject to the restrictions found in section 23 and is given the discretionary powers found in section 24. The relevant restrictions and powers for the purposes of this application are as follows:

23. (1) The Commissioner may not deal with a disclosure under this Act or commence an investigation under section 33 if a person or body acting under another Act of Parliament is dealing with the subject-matter of the disclosure or the investigation other than as a law enforcement authority.	23. (1) Le commissaire ne peut donner suite à une divulgation faite en vertu de la présente loi ou enquêter au titre de l'article 33 si une personne ou un organisme — exception faite d'un organisme chargé de l'application de la loi — est saisi de l'objet de celle-ci au titre d'une autre loi fédérale.
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...

...

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

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

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

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

[73] On April 16, 2008 when the Applicant spoke with Mr. Calvert on the phone, he was provided with information on how to make his complaint. The restrictions contained in subsection 24(1)(a) of the Act were also read to him over the phone. The Applicant then faxed his complaint to the PSIC's Office.

[74] In his disclosure letter of April 16, 2008 the Applicant summarized the nature of his complaint and drew attention to the fact that he had already attempted to have his complaints dealt with by the OIC:

I have tried unsuccessfully to have my complaints investigated by the Office of the Information Commissioner (OIC). The OIC informed me that the Commissioner lacks the jurisdiction to investigate. My request to be heard by the Information Commissioner has not been answered.

[75] This information relates to several requests the Applicant made to the OIC to investigate and address his complaints. In particular, it is connected to the letter of Louise Gale, an investigator for OIC, who wrote to the Applicant on November 7, 2007 with regard to files A-2003-0005/pd and A-2006-0038. Referring to the limitation provisions contained in section 31 of the *Access to Information Act*, Ms. Gale informed the Applicant as follows:

CNSC received your request on July 24, 2003 and responded to you on August 11. The deadline for making a complaint was August 11, 2004. We received your complaint on February 27, 2007, almost 2 ½ years after the expiration of this deadline.

Since the Information Commissioner does not have the legislative power to extend this deadline, he no longer has the jurisdiction to conduct a formal investigation of your complaint.

[76] Notwithstanding this jurisdiction issue, Ms. Gale then went on to advise the Applicant on how to manoeuvre around this problem:

Of course, you may wish to resubmit your request to CNSC along with the mandatory \$5 application fee. Should you then be refused access to any information requested, you will have the right to complain to the Information Commissioner within sixty day (emphasis in original) from the time you received the response.

[77] The OIC did not simply wash its hands of the Applicant on the basis of jurisdiction. Rather, it presented him with a solution and advice on how he could re-submit his complaint.

[78] The Applicant now argues that the complaint he made to the PSIC related to indictable offences regarding the destruction, mutilation, concealment and fabrication of records, and did not pertain to the denial of access to information.

[79] There is some confusion in the record regarding how many files the OIC has opened in relation to the Applicant's complaints, the nature of those complaints, and the present status of all files. Ms. Gale's letter of November 7, 2007 only refers to A-2003-0005/pd and A-2006-0038. The Applicant alleges that the OIC has remained silent on other matters.

[80] However, this problem has no relevance to the PSIC's Decision before me, because I have to assess this decision on the basis of what the Applicant told the PSIC and the materials the Applicant placed before the PSIC. The Applicant may well still have outstanding business with the OIC and he may still have recourse for his complaints through the OIC. Regardless, that matter is not before me because instead of persisting with the OIC, the Applicant decided to approach the PSIC and begin afresh with a new investigative agency.

[81] After reviewing the Applicant's letter of complaint to the PSIC and the enclosures thereof of April 16, 2008, it is clear that the Applicant himself informed the PSIC that the OIC had considered the very complaints he was now placing before the PSIC, and that the OIC had declined jurisdiction because the complaints were out-of-time. The OIC advised the Applicant that he could re-submit to CNSC and, if denied access, could re-submit his request to the OIC within 60 days.

[82] The Applicant's letter to the PSIC of April 16, 2008 makes it clear that the reason he approached the PSIC is because he had previously approached the OIC with the same complaints

and had been told that the OIC lacked the jurisdiction to deal with them because the Applicant had missed the deadline.

[83] In the Decision, the PSIC's office makes it clear that it informed the Applicant it had received his complaint containing "information in reference to an alleged indictable offence of concealment and amputation of public records to impede disclosure of information requested under *Access to Information Act*" and "fabrication of evidence to affect the proceedings of tribunals" and that the "applicant complains that he/she have (sic) tried to have his/her complaints investigated by the Office of the Information Commissioner (OIC)."

[84] The Decision of the PSIC also goes over the history of the Applicant's dealings with the OIC and the several files that have been opened at the OIC to address his complaints.

[85] The PSIC comes to the following conclusions:

Based on the documentation provided, it is clear that the PS's concerns are in relation with access to (sic) information requests within his/her institution. The PS is also complaining about the OIC's response to his/her complaints. The documentation in this file demonstrates that the PS's complaints to the OIC were investigated and that the result of these investigations does not satisfy the PS.

[86] It is not entirely clear what the PSIC means by saying that the "PS's complaints to the OIC were investigated" There is nothing on the record to show what has happened with all of the Applicant's files before the OIC, and all we know is that the OIC declined jurisdiction on

A-2003-0005/pd, but advised the Applicant that he could re-submit his request to CNSC and then, if refused, that he could bring his complaint to the OIC within 60 days.

[87] In the PSIC's letter of June 12, 2008 notifying him of its Decision, the Applicant is told that "we have determined that the concerns you are bringing forward to our Officer were investigated by the Information Commissioner's Officer in the above cited files. Those files are "A-2003-005/pd, A-2006-0038 and A-2003-0004/pd."

[88] In the context of the evidence as a whole, the PSIC appears to mean by "investigation," not that the OIC has conducted an investigation into the merits of the complaints, but that the OIC has dealt with – or is dealing with – the Applicant's complaints: "We understand that the Office of the Information Commissioner initiated three investigations concerning your complaints." We know that, as regards one of those investigations (A-2003-0005/pd) the OIC had to decline jurisdiction but advised the Applicant that he could re-submit. We do not know the status of A-2006-0038 or A-2003-0004/pd.

[89] The PSIC appears to mean that the Applicant's complaints have been placed before the OIC and the files are either still outstanding or, in the case of A-2003-0005/pd, the Applicant was advised that he was out-of-time but that there was an opportunity for him to re-submit. This appears clear from the letter of June 12, 2008 in which the Applicant was advised that "Pursuant to section 24(1)(a) of the Act, we consider that your disclosure cannot be accepted by our Office given that they (sic) were addressed by the Office of the Information Commissioner." The word

“addressed” is not entirely satisfactory, but it suggests that the PSIC is not alleging that investigations of the complaints have already been undertaken by the OIC.

[90] The legal basis for the PSIC’s Decision also makes this clear. After quoting section 24(1) of the PSDP Act, and emphasizing that the PSIC may refuse to deal with a disclosure if he or she is of the opinion that “a) the subject-matter of the disclosure or investigation has been dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament” (emphasis in original), the PSIC then concluded that the “documented evidence shows that the PS’s complaints were part of a process provided for by an Act of Parliament. Subection 24(1)(a) should apply here.”

[91] So the PSIC declined to deal with the Applicant’s complaints either because “they had been dealt with” or “could more appropriately be dealt with” by the OIC. The Applicant was informed of these grounds for refusal in the letter of June 12, 2008 in the letter from the Office of the PSIC signed by the Deputy PSIC, Mr. Wayne Watson.

Issues Raised

Procedural Fairness

[92] The Applicant says that, in making its Decision, the PSIC breached the duty of procedural fairness owed to him in this situation because:

- a. He was advised that the analyst would be contacting him before a decision was made and this did not occur;
- b. He should have been given an opportunity to submit supplementary information when the analyst had identified missing information;
- c. He should have been given an opportunity to review and comment upon the analyst's recommendations before they went before the Deputy PSIC for approval and the decision was made.

[93] Before examining the jurisprudence on procedural fairness, it is important to keep in mind the extremely narrow basis for the PSIC's Decision and the specific facts surrounding the making of that Decision.

[94] As the documentation makes clear, in refusing to deal with the merits of the Applicant's complaints, the PSIC relied upon the discretion granted by subsection 24(1)(a) of the PSDP Act and refused to deal with the Applicant's disclosures because the subject matter of the disclosure either had been dealt with, or could be more appropriately dealt with, under the *Access to Information Act* and the OIC.

[95] As the Decision also makes clear, the Applicant was fully aware that the subsection 24(1)(a) discretion to refuse was the issue he faced before he made his written submissions to the office of the PSIC:

After hearing his/her disclosure, the PS was informed of the *Public Servants Disclosure Protection Act* (the Act) specifications on

disclosures that had already been dealt with by another mechanism. To that effect, section 24(1)(a) was read to him/her over the phone.

The Applicant does not dispute these facts.

[96] This is also confirmed by the letter of June 12, 2008 from the PSIC:

On April 16, 2008, Mr. Ronald Calvert, the investigator assigned to your disclosure informed you that the *Public Servants Disclosure Protection Act* (the Act) states that a public servant may disclose information to the PSIC when he/she believes it could show that a serious wrongdoing has been committed or is about to be committed. Mr. Calvert also informed you that the Act gives the right to the PSIC to refuse to deal with a disclosure in specific cases as stated below.

The Applicant has not taken issue with the accuracy of this statement.

[97] In his affidavit for this application, Mr. Calvert describes his telephone conversation with the Applicant on April 16, 2008 and how, after the Applicant “provided several details about the subject matter of his intended disclosure to this Officer,” Mr. Calvert provided the Applicant with “information about the *Public Servants Disclosure Protection Act* (the Act) and how the Officer of the Public sector Integrity Commission would deal with his disclosure if he was to make one.” The telephone discussion lasted for 15-20 minutes. The Applicant does not take issue with Mr. Calvert’s account of what happened prior to the making of his disclosure submissions to the Office of the PSIC.

[98] Mr. Calvert made detailed notes of his telephone conversation with the Applicant on the Case Management System of the PSIC’s Office. Those notes provide, in relevant part, as follows:

L’applicant m’a mentionné avoir déposé une plainte au BIFP il y a de cela 3 ans et que la réponse était que son institution n’était pas

assujettie à la Politique, donc que le BIFP n'avait pas juridiction dans son cas. L'applicant demande si on peut l'aider présentement étant donné que la Loi a été adoptée dernièrement.

Bien que je lui ai posé des questions sur ses demandes exactes, l'applicant préfère nous faire parvenir sa divulgation par télécopieur. Je lui ai cependant fait comprendre qu'il avait déjà utilisé des mécanismes existants et j'ai tenté de lui expliquer 24(1) (a) de la LPFDAR. De plus, comme il mentionnait une possibilité d'accusations criminelles pour fabrication de preuve dans un processus judiciaire, je lui ai mentionné entre autre qu'il serait probablement préférable d'avoir recours à son corps policier local.

The Applicant has not taken issue with the accuracy of these notes and has confirmed that Mr. Calvert's account of their telephone conversation is an accurate record of what took place.

[99] From all of this, it is clear that, before he made his submissions, the Applicant was given full notice of what he faced and that, in particular, there was a problem under subsection 24(1)(a) that had to be addressed.

[100] The Applicant is self-represented, and he is a highly intelligent and articulate person. His written and oral submissions before me reveal that he has no problem understanding legal concepts and procedures and that he is well-versed in addressing legislative provisions. It cannot be doubted that, before he faxed his submissions to the Office of the PSIC, he was fully aware that subsection 24(1)(a) was the primary threshold issue that he needed to address and that his complaint could be refused based upon the discretion contained in subsection 24(1)(a).

[101] It was the Applicant who chose to immediately fax his disclosure, and it was the Applicant who chose the arguments and materials to place before the Office of the PSIC on this threshold issue.

[102] There is nothing in the record to suggest that the Applicant was led to believe, or might reasonably conclude, that he would be permitted to submit supplementary information or that he would be given an opportunity to review and comment upon the analyst's report before a decision was made. In fact, the evidence is clear that it was necessary for the Applicant to address the immediate threshold issue of subsection 24(1)(d) in his written submissions.

[103] The Applicant points to the letter of May 22, 2008 from the Registrar at the PSIC's office that confirms receipt of his April 16, 2008 fax and informs the Applicant that "Mr. Calvert is the analyst assigned to your file and will contact you directly." The Applicant says that this letter gave rise to a legitimate expectation that he would be contacted and would be given a further opportunity to make submissions before a decision was made.

[104] In my view, in the full context of this case, the letter cannot have that effect. To begin with, the Applicant had already had quite detailed discussions with Mr. Calvert on April 16, 2008 prior to making his submissions in which the Applicant had been fully informed about how to make a complaint and in which he was told that subsection 24(1)(a) was the primary threshold issue. The Applicant made his submissions on the basis of that telephone discussion and before he received the

letter of May 22, 2008. Anything said in this letter could not have affected the submissions he had already decided to make on the primary threshold issue.

[105] Secondly, the letter is obviously a form letter. It merely says that any contact on the file will be between the Applicant and Mr. Calvert. It does not say that the Applicant should expect a further opportunity to make submissions. Furthermore, direct contact with Mr. Calvert had already taken place during which Mr. Calvert had explained the procedure and the subsection 24(1)(a) issue. It was the Applicant who chose to make his submissions immediately following that telephone conversation.

[106] It is clear, then, that if the PSIC's duty to ensure the right to procedural fairness under section 22(d) of the PSDP Act and the *Baker* factors are applied to the facts of this case, the following conclusions are warranted:

- a. Section 22(d) of the PSDP Act imposes a general obligation to ensure procedural fairness but the Act does not elaborate upon what may be required in any specific instance. In the present case we are dealing with someone who indicated that he wanted to submit a complaint under section 13 of the Act;
- b. The Applicant was made fully aware prior to making his submissions on April 16, 2008 that subsection 24(1)(a) was a threshold issue and that the PSIC might not proceed to investigate the complaint because of subsection 24(1)(a);

- c. There is nothing to suggest, when he made his submissions on April 16, 2008, that the Applicant expected, or might reasonably expect, before a decision was made on the threshold issue of 24(1)(a), that he would have an opportunity to submit further arguments or evidence or that the analyst would have further discussions with him on that issue;
- d. The PSDP Act does not require that someone making a disclosure under section 13 has a right to be heard or a right to make further submissions after the complaint has been made. And, on the facts of the present case, no further information was required for the PSIC to make a decision under subsection 24(1)(a);
- e. As Justice L’Heureux-Dubé made clear in *Baker*, “the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected”;
- f. The nature of the Decision that was made in this case did not resemble judicial decision-making. As the Applicant knew, the PSIC was going to make a decision on whether or not to exercise her discretion to proceed to investigate the complaints under the PSDP Act and, in particular, on whether the Applicant’s complaints had been adequately dealt with “or could be more appropriately dealt with” under another Act of Parliament. This was not a judicial decision; nor did it approach a judicial decision. Even a full investigation does not involve a judicial decision. The

PSIC's role under the PSDP Act is advisory. Her reports, findings and recommendations are not enforceable. She merely makes Parliament aware of findings and wrongdoings in the public sector;

- g. As section 26(2) of the PSDP Act makes clear "investigations are to be conducted as informally and expeditiously as possible." No investigation occurred in the present case, but there is no reason to conclude that decisions based upon subsection 24(1)(a) should not also be informal and expeditious;
- h. Section 27(3) of the PSDP Act makes it clear that the PSIC has no obligation to hold a hearing or to hear anyone unless "during the course of an investigation" it appears there may be sufficient grounds to make a report or recommendation "that may adversely affect any individual or any portion of the public sector" Nothing of this nature arose on the present facts and there was no evidence before the PSIC of any adverse affect upon the Applicant as a result of her exercising her discretion under subsection 24(1)(a);
- i. The discretionary power under section 24(1) is extremely wide. Its apparent objective is to allow the PSIC to decide whether it is in the public interest to investigate a complaint or to determine, on the basis of the information provided by a complainant, whether the matter could be better dealt with under another Act. The PSIC's office must be taken to have some expertise in this matter;

- j. Anyone who makes a complaint under section 13 is not necessarily a victim of any wrongdoing or likely to suffer adverse consequence. There was no evidence before the PSIC in this case that, as a result of a decision based 24(1)(a), anything of importance would happen to the Applicant. The Applicant is doing his duty admirably as a public servant in pursuing his complaints, but there was no evidence before the PSIC that the Decision would negatively impact him personally. This Decision does not fall under subsection 51.2(1)(a) or (b) of the PSDP Act;
- k. The PSIC is fixed with a specific duty under section 22(b) of the PSDP Act to review disclosures in order to determine “whether there are sufficient grounds for further action.” Hence, the PSIC was obliged in this case to consider and address the threshold issue that arose under subsection 24(1)(a). The choice of procedure adapted was to provide the Applicant with an account of how complaints are made, to specifically identify the subsection 24(1)(a) issue that he faced, and then to permit him to make written submissions;
- l. As I have already indicated, nothing occurred in this case to raise the Applicant’s legitimate expectations above the general scheme of the Act or the information and advice that was provided to him by Mr. Calvert in the phone call of April 16, 2008 on the basis of which the Applicant made his submissions.

[107] For the reasons given above, the degree of procedural fairness afforded to the Applicant was, in my view, entirely appropriate in terms of the *Baker* factors. Taking into account the context of this particular statute and the rights of the Applicant affected, the process was entirely fair. The Applicant was given adequate notice of the subsection 24(1)(a) threshold issue he faced and was given a full opportunity to make submissions on point.

Section 25.1

[108] The Applicant also applied for, and was refused, legal advice under section 25.1 of the PSDP Act. However, such advice is subject to the conditions imposed in subsections 25.1(2) and (3), neither of which were satisfied by the Applicant in this case. As the Applicant was advised in the letter of June 12, 2008:

On your request for legal advice, section 25.1(3) of the Act imposes conditions which must be met; one of which stipulates that the Commissioner must be of the opinion that the disclosure constitutes likely a wrongdoing under this Act. Since this matter falls under another Act of Parliament, it does not constitute a wrongdoing under this Act.

[109] This explanation is somewhat clumsily put. The conditions that must be met to obtain legal advice can be found in subsection 25.1(3):

(b) only if the PSIC is of the opinion that the act or omission to which the disclosure or the information relates, as the case may be, likely constitutes a wrongdoing under this Act and that the disclosure or the

b) que s'il est d'avis que la divulgation ou les renseignements portent sur un acte ou une omission susceptible de constituer un acte répréhensible en vertu de la présente loi et qu'ils pourraient

provision of the information is likely to lead to an investigation being conducted under this Act. mener à la tenue d'une enquête en vertu de celle-ci.

[110] It is clear, then, that if no investigation results because the PSIC refuses to hear the complaint under subsection 24(1)(a), there can be no assessment of whether the complaint “likely constitutes a wrongdoing” under the Act, and the disclosure is not “likely to lead to an investigation” under the Act.

[111] In my view, then, on the facts of this case, the refusal of the Applicant’s disclosure under subsection 24(1)(a) necessarily means he could not satisfy the criteria for legal advice under section 25.1. Provided the Decision under subsection 24(1)(a) is reasonable, there can be nothing incorrect or unreasonable about refusing the Applicant legal advice under section 25.1

Erroneous Findings of Fact

[112] In addition to the procedural unfairness ground, the Applicant also says that the Decision was unreasonable because it is based upon unreasonable findings of fact and overlooks the Applicant’s evidence.

[113] The Applicant’s point here is that his evidence “squarely contradicts a finding that the Information PSIC had dealt with the disclosure about offences of concealment and mutilation of records.”

[114] The Decision itself is broader in its reasons than the Applicant acknowledges. The Decision is based upon subsection 24(1)(a) of the PSDP Act and, after emphasizing the words “the subject-matter of the disclosure on the investigation has been dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament” it then goes on to say that the “documented evidence shows that the PS’s complaints were part of a process provided for by an act of Parliament. Section 24(1)(a) should apply here.”

[115] The Decision itself makes it clear that the PSIC is relying upon and applying the whole of subsection 24(1)(a) and is not just saying that the Applicant’s complaints have been dealt with by the OIC, but also that they are more appropriately dealt with by the OIC.

[116] The Applicant’s evidence was that file A-2003-0005 had been declined for jurisdictional reasons but the Applicant had been informed that, if he wanted to, he could re-submit his request to CNSC and then, if refused, he could complain to the OIC within 60 days.

[117] As regards the other files before the OIC, their status is unclear, but the general picture suggests that the Applicant had legal avenues available to him to have all of his complaints and files addressed by the OIC. He did not re-submit the file he was told he could submit and he did not follow-up and/or seek a legal solution with regard to his other files. Instead, he simply walked away from the OIC and approached the PSIC.

[118] The Decision of the PSIC makes it clear that the status of all of the Applicant's files and complaints before the OIC were acknowledged and taken into account before a decision was made based upon subsection 24(1)(a). I do not see that anything was overlooked or that the PSIC's Decision was based upon an erroneous finding of fact. The Decision is reasonable from this perspective.

The References to the Police

[119] The Decision says that, with regard to the Applicant's allegations of indictable offences and concealment and amputation of public records, along with fabrication of evidence to affect the proceedings of the tribunals, the Applicant "should be directed to his/her police force in this matter."

[120] The Applicant says it is "unreasonable for the Commissioner to dismiss a disclosure on the basis that the disclosure can be better investigated by an authority that does not have the jurisdiction to investigate. In this case as per the response given to the Applicant by the RCMP, the police has no jurisdiction to investigate a disclosure about an indictable offence under section 67.1 of the ITIA."

[121] The evidentiary basis for this assertion is that the Applicant contacted his local RCMP detachment in Saint George, New Brunswick and that:

Constable Isabelle Trudel, an investigator with the St. George RCMP detachment, informed me that the police had no jurisdiction to investigate indictable offences against the Access to Information Act and that this investigative responsibility rests exclusively with the office of the Information Commissioner.

[122] While I do not doubt that the Applicant made this inquiry of his local RCMP detachment, the Court would require significantly more factual information and legal authority before it could accept Constable Trudel's statement as an accurate and authoritative statement of the law on this issue.

[123] Regardless, advising the Applicant that he could try going to the police was not a basis for the PSIC's Decision. As the letter of June 12, 2008 makes clear, the Applicant's complaint was refused under subsection 24(1)(a) of the Act because his complaints have been addressed "by the Office of the Information Commissioner." The reference to the police is simply a further suggestion:

We also take this opportunity to inform you that the alleged criminal intent of fabrication of evidence you referred to in your correspondence to our Office should be addressed to your local police service.

[124] The Decision itself shows the same basis for the Decision and merely directs that the Applicant should be told to approach the police on this matter.

[125] I cannot say that the PSIC committed a reviewable error on this issue.

Falling Through the Cracks

[126] During the course of his extremely able presentation, the Applicant expressed an understandable sense of frustration. He has raised his complaints through the internal procedures of his employer, as well as through the OIC and the PSIC's office. So far, after a considerable period of time, the matters he raises have not been addressed.

[127] I have no reason to doubt that the Applicant is entirely sincere in his efforts to expose wrongdoing in the public service and I can do nothing but commend his principles and his stamina.

[128] In light of the difficulties he has faced in trying to force wrongdoing out of the shadows and into the light of public scrutiny, the Applicant argues that, surely, the PSIC should have stepped in to ensure that the Applicant's complaints and his efforts to do his public duty do not fall through the cracks and that the wrongdoing is dealt with.

[129] I have considerable sympathy for this argument. From a strictly legal perspective I can find no reviewable error in the PSIC's Decision. However, there is a lingering concern that the complaints raised by the Applicant have not been adequately addressed and that the alleged wrongdoing may go unexamined.

[130] Looking at the general picture, it seems to me that, instead of persisting with the OIC, the Applicant tried to resolve the difficulties he was facing by changing his tack and attempting to access the PSIC. However, as regards his A-2003-0005/pd file, the OIC made it clear in November

2007 that he could, in order to overcome the jurisdiction problem, re-submit his request to CNSC and then, if refused, complain to the OIC within the requisite 60-day period.

[131] As regards the Applicant's other complaints and files before the OIC, if the Applicant felt they had become stalled or had not been dealt with appropriately, he could have sought legal solutions, including the kind of application to this Court that he has resorted to in this application. Instead of pursuing matters with the OIC, the Applicant opted instead to try and involve the PSIC. Given the history of the Applicant's efforts, it is not surprising that the PSIC concluded that the OIC was the appropriate forum for his complaints. Whether the Applicant still may have recourse through the OIC is not clear on the evidence before me and is not a matter I have been asked to address in this application.

Conclusions

[132] After reviewing the record and hearing the submissions of the Applicant and counsel for the Respondent, I cannot say that the Applicant has established a reviewable error and/or grounds for the mandamus remedy he seeks.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed with costs to the Respondent.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1078-08

STYLE OF CAUSE: *JOHN DETORAKIS*
v.
THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Fredericton, New Brunswick

DATE OF HEARING: November 10, 2009

**REASONS FOR
Judgment and Judgment:** RUSSELL J.

DATED: January 13, 2010

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Richard Fader FOR THE RESPONDENT

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