Federal Court of Appeal | Cour d'appel fédérale

Date: 20150202

Docket: A-109-14

Citation: 2015 FCA 30

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: SCOTT J.A.

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

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REASONS FOR JUDGMENT

SCOTT J.A.

[1] Yacine Agnaou (the appellant) is appealing from a decision rendered by Justice Annis (the judge) on January 27, 2014, dismissing his application for judicial review of the decision made on September 6, 2012, by Joe Friday, the Deputy Commissioner of the Office of the Public Service Integrity Commissioner of Canada (Office of the PSICC), not to investigate the disclosure made by the appellant under section 8 of the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46, (the Act).

[2] For the following reasons it is my opinion that the appeal must be dismissed since the judge did not commit any errors that would call for this Court's intervention.

I. The facts

[3] The factual background of this case covers several years. Even though some of the facts are not directly relevant to the appeal, they help us understand the context and the questions submitted by the appellant to this Court.

[4] The appellant worked as a federal Crown prosecutor at the Quebec Regional Office (QRO) of the Public Prosecution Service of Canada (PPSC) from 2003 onwards.

[5] On January 24, 2006, the appellant was assigned a case concerning a multinational company (File A) on which he had worked previously and in respect of which he had recommended prosecution. The appellant reviewed the case again and concluded that proceedings should be instituted. At a meeting held on November 4, 2008, to discuss File A, attended by the QRO's general counsel and a deputy chief federal prosecutor, the deputy chief federal prosecutor insisted that it would be premature to institute criminal proceedings in this case since the Appeals Branch of the Canada Revenue Agency (the CRA) was already dealing with a notice of objection to reassessments issued with respect to A.

[6] On December 1, 2008, the appellant told a QRO manager that he had lost confidence in the management of the deputy chief prosecutors as a result of the decisions the deputy chief prosecutors had made since mid-September.

[7] On December 24, 2008, no longer trusting his supervisor, one of the deputy chief prosecutors, the appellant asked to be assigned to a different supervisor, a request that was granted on January 22, 2009.

[8] On January 27, 2009, the appellant's new supervisor, a deputy chief prosecutor, asked him to carefully consider whether it was in the public interest to prosecute in File A, knowing that the appellant had to finalize his prosecution report in the following weeks. The appellant inferred from this that QRO management's objective was to prevent the filing of criminal proceedings in this file.

[9] On February 10, 2009, the appellant informed the QRO's general counsel of his final recommendation to institute criminal proceedings in File A. A number of meetings involving the appellant's former supervisor (in her capacity as the head of the CRA portfolio), the appellant's new supervisor, and the general counsel followed on February 10, 12 and 24, 2009. One of the issues focussed on at these meetings was the CRA's objection to the relevance of filing criminal charges in File A, as recommended by the appellant.

[10] On March 4, 2009, the appellant was informed of his managers' decision not to institute criminal proceedings in File A. Once again, he told his superiors that if this position was final, he intended to appeal to the PPSC's senior levels.

[11] On March 24, 2009, the appellant learned that the General Counsel Committee had met on March 9 without inviting him to defend his point of view. Upon discussion, the Committee recommended not authorizing criminal proceedings in File A.

[12] On April 1, 2009, the chief prosecutor met with the appellant. The appellant reiterated his position and, for a last time, presented his written arguments against the Committee's opinion not to institute criminal proceedings in File A. The QRO's chief prosecutor upheld his decision, and the CRA was informed of it.

[13] The appellant argues that, on April 1, the chief prosecutor had not studied all his written arguments since it was not until April 4 that the chief prosecutor could have reviewed the appendices to his brief on why criminal proceedings should be instituted in File A.

[14] The appellant was removed from File A and was convened by his superiors, who were concerned about his health. They asked that he undergo medical tests in order to assess his fitness to work.

[15] On June 9, 2009, the appellant contacted the Office of the PSICC in order to inquire about the procedure to be followed and the criteria that had to be satisfied at the admissibility review stage for complaints filed under the Act.

[16] More than two years later, on October 13, 2011, the appellant filed a complaint with the Office of the PSICC under paragraphs 8(*a*) and 8(*c*) of the Act. He claimed that his superiors

prevented him from filing criminal charges in File A thus undermining the integrity of Canada's objective system of prosecution, as described in PPSC policies. He also argued that his superiors used the regulations made under the *Canada Labour Code*, R.S.C. 1985, c. L-2 (*Canada Labour Code*), concerning the prevention of violence in the workplace, to break down his resistance.

[17] On September 6, 2012, the appellant received the Deputy Commissioner's decision not to investigate. He then contacted PSICC employees, by telephone or email, on several occasions.

[18] However, it was not until January 2013 that the appellant filed a written complaint with the Office of the PSICC regarding the reprisals taken against him by numerous managers by reclassifying a position for which he claimed priority.

II. Deputy Commissioner Friday's September 6, 2012, decision

[19] Deputy Commissioner Friday made the decision in this case because Commissioner Dion recused himself because he knew some of the people mentioned in the appellant's allegations.

[20] The Deputy Commissioner first rejected the complaint made under paragraph 8(*a*) of the Act on the ground that violations of sections 231.2, 231.6 and 238 of the *Income Tax Act*, R.S.C. 1985, c. 1, (5th Supp.) (*Income Tax Act*), concern the obligation of taxpayers to provide documents or information or foreign-based information or documents and do not concern an obligation of the QRO management. He concluded as follows: [TRANSLATION] "Consequently, paragraph 8(*a*) cannot therefore be applied to potential wrongdoing committed by the managers

of the QRO for the purpose of an investigation initiated by the Office of the Public Service Integrity Commissioner".

[21] He based his refusal to investigate on the portion of the complaint made under paragraph 8(*c*) and paragraphs 24(1)(*e*) and (*f*) of the Act since the subject-matter of the appellant's disclosure related to a matter that resulted from a balanced and informed decision-making process on a public policy issue that did not suggest that any wrongdoing had been committed nor did it suggest that this was a case of gross mismanagement by the Director of the PPSC, by the Assistant Deputy Attorney General of the Tax Law Services Portfolio, Justice Canada, or by the counsel reporting directly to the Director of the PPSC, Mr. Dolhai and Ms. Proulx.

[22] The Deputy Commissioner also rejected the appellant's allegation that the QRO's actions and decisions constituted gross mismanagement because they violated the principle of equality before the law. Citing the *Federal Prosecution Service Deskbook*, the Deputy Commissioner noted that while Crown counsels enjoyed a large measure of independence, they did not have absolute discretion. He found that the QRO's chief prosecutor was authorized to decide not to institute criminal proceedings in File A because he had all of the necessary information on April 4, 2009, despite the appellant's opinion to the contrary.

[23] The Deputy Commissioner also concluded that the information provided by the appellant did not suggest that the QRO's practices, with respect to the decision not to involve him in the final decision as to whether or not to institute criminal proceedings in File A, constituted gross

mismanagement within the meaning of the Act. According to the Deputy Commissioner, the same applied to the interest taken by the appellant's immediate superiors in File A.

III. The judicial review decision dated January 27, 2014

[24] The judge rendered his decision on January 27, 2014. He dismissed the appellant's application for judicial review because he felt that the Deputy Commissioner did not err when he decided not to investigate on the ground that the subject-matter of the disclosure related to a matter that resulted from a balanced and informed decision-making process.

[25] The appellant argued that some aspects of the Deputy Commissioner's decision should be reviewed on a standard of correctness given the errors made in interpreting the Act. For the Deputy Commissioner's decision not to commence an investigation under paragraph 24(*a*) of the Act, the judge applied the standard of reasonableness, citing the Federal Court's decision in *Detorakis v Canada (Attorney General)*, 2010 FC 39, [2010] F.C.J. No. 19 [*Detorakis*]. Regarding the alleged breaches of procedural fairness and natural justice, the judge applied the standard of correctness.

[26] The judge rejected the appellant's arguments that the Deputy Commissioner breached procedural fairness by not giving him an opportunity to comment on the findings of the analysis of the admissibility of his disclosure before confirming the recommendation not to investigate. The appellant cited *El-Helou v Court Administration Service*, 2012 FC 1111, [2012] F.C.J. No. 1237 [*El-Helou*], to submit that, in the present proceeding, similar to the circumstances in *El-*

Helou, he was told that he would be able to comment on the report before the final decision on whether or not to commence an investigation was made.

[27] The appellant further claimed that given the quasi-constitutional nature of the Act, procedural fairness guarantees were raised. The respondent argued that little was required under the procedural fairness duty in this case and that the appellant could not demand that a hearing be held, a face-to-face meeting be convened or a preliminary investigation be conducted.

[28] The judge, however, even though he acknowledged that the human rights case law could provide guidance, did not find that *El-Helou* applied in this instance. The judge rejected this argument on the ground that no promise had been made to the appellant that he would be able to comment on the analyst's report.

[29] The judge did not consider the appellant's arguments, those being that the Deputy Commissioner failed to personally review all of the facts submitted, that his French was not good enough for him to understand the case and that he had failed to consider the entire factual framework submitted by the applicant, to be serious enough to analyse them (see paragraph 27 of the judge's reasons).

[30] Citing *Detoraki*, which stands for the principle that the scope of the Commissioner's discretionary power under paragraph 24(*a*) of the Act is extremely wide and calls for deference, the judge applied the standard of reasonableness to conclude that the case at bar was clearly the result of a difference of opinion between the applicant and his superiors and not of wrongdoing.

Thus, he refuted the appellant's position that the Deputy Commissioner had not provided adequate reasons in his decision in light of the facts presented since he had omitted whole sections of the factual background, particularly, PPSC managers' use of the *Canada Labour Code* regulations concerning the prevention of violence in the workplace. At paragraph 34 of his reasons, the judge, referring to *Détorakis*, also recognized that the Commissioner should only refuse to hold an investigation [TRANSLATION] "at this early stage if the case is plain and obvious".

[31] The judge therefore concluded that the appellant's application for judicial review should be dismissed.

IV. Analysis

A. *Applicable standard of review*

[32] In an appeal from a decision on an application for judicial review, this Court has to determine first whether the judge identified the proper standard of review and then whether he or she applied it correctly (see *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] F.C.J. No. 71, leave to appeal to the Supreme Court denied, 33095 (June 11, 2009), at paragraphs 18 and 19). If the judge did not identify the correct standard, the Court has to review the impugned decision and apply the proper standard of review (see *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19; [2003] 1 S.C.R. 226 at paragraph 43).

[33] This appeal raises four questions:

[1] Did the judge err in applying the reasonableness standard to the Deputy Commissioner's decision to reject the appellant's disclosure under paragraphs 24(1)(*e*) and (*f*) of the Act?

[2] Did the judge err in his determination of the procedural fairness guarantees owed to the appellant in the treatment of his disclosure?

[3] Did the judge err in his assessment of the factual background and the issues submitted by the appellant?

[4] Did the judge err in concluding that the Deputy Commissioner's decision was reasonable?

B. *Did the judge err in applying the reasonableness standard to the Deputy Commissioner's decision to reject the appellant's disclosure under paragraphs 24(1)(e) and (f) of the Act?*

[34] The appellant argues that this matter is reviewable on correctness as the appeal raises questions of law that are of general interest to the legal community and concerns public policy or quasi-constitutional issues. The appellant also points out that the Act does not contain a privative clause and that the Office of the PSICC does not have specialized experience even though it has to interpret its home statute. He further cites a previous report of the Auditor General of Canada to argue that the correctness standard must apply in order for the public to have confidence in the Office of the PSICC's decisions.

[35] In reply, the respondent claims that the judge chose the reasonableness standard in accordance with *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*], which holds that an exhaustive analysis is not required in every case to determine the proper standard of review if the case law has already established this standard. In the case at bar, the judge applied the standard of reasonableness in citing *Detorakis*. In our opinion, the judge did not err in citing this decision to review the Deputy Commissioner's decision and his findings of

fact against the reasonableness standard. The judge's decision is entirely consistent with the doctrine of the Supreme Court propounded at paragraphs 57 and 62 of *Dunsmuir*, as noted by the respondent.

[36] The judge applied the correctness standard to the issues raising natural justice and procedural fairness, and the respondent does not challenge this choice. I am satisfied that the judge did not err in choosing this standard as being the correct one in this case.

C. *Did the judge err in his determination of the procedural fairness guarantees owed to the appellant in the treatment of his disclosure?*

(1) Procedural fairness

[37] First, the appellant claims that the judge erred when he concluded that procedural fairness had not been breached. In his opinion, the procedural fairness duty cannot be minimalist under the Act given its public interest character and given the instructions in the Office of the PSICC's manual.

[38] He alleges that, at the complaint admissibility review stage, the procedural fairness requirement is the same for the Office of the PSICC as it is for the Canadian Human Rights Commission. He cites, *inter alia*, *El-Helou*, where Justice MacTavish of the Federal Court recognized that the case law developed in disputes brought before the Canadian Human Rights Commission can be very helpful when it comes to determining whether a party has been treated fairly.

[39] In addition, the appellant argues that, contrary to what the judge said, the fact that the Deputy Commissioner invited him to submit any additional information that might have an impact on the analysis that had been performed cannot make up for the breaches of procedural fairness that undermined the September 6, 2012, decision not to investigate the disclosure.

[40] According to the appellant, this practice places the discloser in a new decision-making process, being that of a reconsideration of an administrative decision, in other words does he intend to have the decision resulting from the additional information he would have submitted, subject to review.

[41] The appellant also argued before us that the employees of the Office of the PSICC had promised to afford him an opportunity to comment on their analysis of the complaint before a final decision was made. He therefore submits that he had a legitimate expectation. He relies mainly on his email dated September 10, 2012, in which he recounts a telephone conversation from late April 2012 with Ms. Harrison, the analyst from the Office of the PSICC assigned to his complaint (see Appeal Book, Volume 1, Exhibit R-12, affidavit of Yacine Agnaou).

[42] The appellant alleges that, as in *El-Helou*, he should have been allowed to comment on the analysis before the Deputy Commissioner made his decision given the promise made by the Office of the PSICC analyst.

[43] The respondent argues that the content of the procedural duty was minimal in this case and that the appellant could not require that a hearing be held, a face-to-face meeting be

convened or a preliminary investigation be conducted. In citing *Detorakis*, it submits that the procedural fairness duty under paragraphs 24(1)(*e*) and (*f*) of the Act does not require the holding of a hearing, for a number of reasons. First, the respondent agrees with the judge's position that *El-Helou* is distinguishable from the facts of the present case since, in that case, the Commissioner decided to move to the investigation stage during which third parties had provided information. This was not the situation here.

[44] The respondent also notes that the discretion under paragraph 22(*b*) of the Act does not require that the Commissioner convene a face-to-face meeting or conduct a preliminary investigation, as stated in *Detorakis*. According to the respondent, the Commissioner is not required to hear the discloser under the Act. Where necessary, he may request further information or clarifications, but that does not oblige him to share his analysis with the discloser before making his decision.

[45] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 [*Baker*], at paragraphs 21 and 22, the Supreme Court of Canada sets out the principle that the duty of procedural fairness is flexible and variable and depends on the context of the particular statute and the nature of the rights at issue. In *Detorakis*, the Federal Court judge analyzed the factors set out in *Baker* to conclude, at paragraph 106, that "[the 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". I see nothing in the present proceeding that would cause us to challenge this conclusion.

[46] It is important that we review certain facts given the appellant's argument that he was promised that he would be able to comment on the analyst's report.

A. On October 13, 2011, the appellant personally filed a very detailed complaint with Ms. Vienneau of the Office of the PSICC. The complaint included the following: his duly completed eight-page wrongdoing disclosure form (Exhibit R-6, Appeal Book, Volume 1, page 106); the affidavit of Yacine Agnaou *idem*, page 106); a 36-page brief of his allegations (Exhibit R-7, *idem*, page 114); and 86 appendices to the brief, submitted electronically (Exhibit R-8, *idem*, page 150).

B. When he filed his complaint, Ms. Vienneau confirmed to him that he would be given an opportunity to clarify the facts before the Commissioner made his decision and told him what would happen next (paragraphs 22 and 23 of the appellant's affidavit, Appeal Book, Volume 1, page 53), as follows:

    a. An initial assessment was to be performed to ensure that the disclosure was admissible;

    b. Where applicable, an analyst was to perform an in-depth review of the documents supporting the disclosure;

    c. The analyst's report together with his recommendation was to be submitted to legal counsel;

    d. Once considered, the legal counsel's opinions and the analyst's report and recommendation, be it amended or not, were to be submitted to the Operations Branch, which had to decide whether or not to agree with the analyst's recommendation;

    e. The entire disclosure file, including the analyst's report and recommendation and the Operations Branch's recommendation would be submitted to the Commissioner for a final decision.

C. Moreover, in his affidavit, at paragraph 25 (Appeal Book, Volume 1, page 54), the appellant stated as follows: [TRANSLATION] "Before Ms. Harrison began her review, we spoke on the telephone together, at which point I was able to again reassure myself that I would have an opportunity to provide clarifications if the decision not to commence an investigation was made".

[47] The appellant also filed Exhibits R-15 and R-17, obtained under Rule 317 of the *Federal Courts Rules* (SOR/98-106). The first of these internal Office of the PSICC documents lists in chronological order each intervention of the Office of the PSICC in the complaint file and each telephone call received from the appellant. The second document, Exhibit R-17, comes from Ms. Harrison, the analyst assigned to the case. The document is a summary of the appellant's concerns and allegations as confirmed and expressed in a 90-minute telephone conversation that took place on May 8, 2012.

[48] In reviewing the file, I note that both Ms. Harrison and Ms. Vienneau fulfilled the commitments they made to the appellant.

[49] Ms. Vienneau had promised him that he would be able to clarify any facts before a decision was made in his case (paragraph 22 of the appellant's affidavit, Appeal Book, Volume 1, page 53). In my opinion, the appellant had an opportunity to do so when he spoke with the analyst for 90 minutes on May 8, 2012 (Exhibits R-15 and R-17, Appeal Book, Volume 2, pages 243 and 250). The file reveals that, on this occasion, the appellant was able to

confirm his understanding of the essential facts and even clarify some additional items (Exhibit R-17, Appeal Book, Volume 2, page 251).

[50] Regarding the second commitment, the appellant alleges that the analyst, Ms. Harrison, had promised that it would be possible to make clarifications if the decision not to investigate was made. The file reveals that this conversation with the analyst took place in May and not in April as the appellant claims (Exhibit R-15, Appeal Book, Volume 2, page 243). In my opinion, what we have here is a misunderstanding. Ms. Harrison's commitment was limited to the appellant having the opportunity to provide new information once the decision not to investigate was made, *i.e.*, after the decision was made. The appellant understood that there was a commitment but before the decision was made.

[51] It should be noted that the appellant was afforded this opportunity in the decision letter dated September 6, he was told that he could request a reconsideration.

[52] The Office of the PSICC manual provides for the option of applying for reconsideration. The Commissioner has defined parameters for reconsideration that seem reasonable. The appellant explored this avenue upon receipt of the decision letter, but chose not to pursue it. It should also be noted that the Office of the PSICC manual does not provide for the option of commenting on an analyst's report recommending not to investigate before a decision is made.

[53] To give rise to a legitimate expectation, the promise must be clear, unambiguous and unqualified. In the light of this evidence, the judge could conclude that no promise had been

made to the appellant that he would be able to comment on the analyst's report before a decision was made, and, in any event, the Deputy Commissioner invited him to provide additional comments after informing him of the decision, which led the judge to reject the appellant's arguments. In short, the appellant was mistaken about what was said by his analyst, Ms. Harrison.

[54] Lastly, I cannot agree with the appellant's argument that the judge erred with respect to the scope of the Office of the PSICC's procedural fairness duty. As stated by the judge in this case, the Office of the PSICC did not receive any information from third parties. Even though the case law of the Canadian Human Rights Commission can sometimes provide guidance on procedural fairness at the complaint admissibility review stage in disclosure cases, the necessary adjustments must nonetheless be made. In my opinion, therefore, the judge correctly considered the absence of any third-party information in order to conclude that the appellant was not entitled to receive a copy of the analysis before the decision was made.

D. *Did the judge err in his assessment of the factual background and the issues submitted by the appellant?*

[55] The appellant argues that the trial judge made three fundamental errors in assessing the facts as he failed to consider the following in his decision:

- The abnormality of the process followed by the managers of the PPSC;
- The use by PPSC managers of the *Canada Labour Code* regulations aimed at preventing violence in the workplace; and
- The manipulation of the complaint process provided for in the Treasury Board policy on harassment in the workplace.

[56] The appellant specifically cites paragraph 35 of the judge's decision to maintain that the judge erred when he concluded to an honest difference of opinion between an employee and his supervisor, which he would have admitted. From his perspective, the judge ignored a number of facts suggesting that the decision not to institute criminal proceedings in File A constituted wrongdoing since the PPSC *modus operandi* violated sections 231.2, 231.6 and 238 of the *Income Tax Act* and chapters 4, 8, 11 and 15 of the *Federal Prosecution Service Deskbook*. The appellant also notes the constitutional principle that Crown counsels are free to exercise their prosecutorial discretion objectively and independently and the principle prohibiting the Crown from exempting a person from the operation of a statute.

[57] The respondent invokes the judge's analysis in paragraphs 36 and following of the decision to counter this position. In reply to the fact that the judge ignored PPSC managers' use of the *Canada Labour Code* regulations aimed at preventing violence in the workplace, counsel for the respondent pointed out at the hearing that the appellant had clearly stated at paragraph 10 of this complaint brief that [TRANSLATION] "[n]one of the allegations in this disclosure is meant to establish wrongdoing on the part of anyone against myself. This aspect of the facts has already been deal with in other forums". The respondent submits that, in the light of this admission, the appellant cannot criticize the judge for not commenting on this aspect of the facts.

[58] Having carefully reviewed the appeal record, the Deputy Commissioner's decision and the Court's decision, I cannot agree with the appellant's argument for the following reasons.

[59] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the Supreme Court of Canada, at paragraph 16, propounds the principle that "[a] decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion".

[60] Upon rereading the judge's decision, I find that he addressed the essential factors and that he did not have to review each element of the factual background and comment on it to reach his main conclusion that at issue was a difference of opinion. The judge noted at paragraph 36 that the applicant alleged gross misconduct on the part of his superiors, but he added "even if I accept this gross misconduct as being true". It can therefore not be said that the judge completely ignored the factual background as he accepts the misconduct alleged by the appellant as established. Even though the judge erred on the fact that the appellant acknowledged that the dispute was the result of a difference of opinion between an employee and his superiors, the evidence on file nonetheless allowed him to reach this conclusion.

[61] The appellant also criticizes the judge for ignoring the questions of law he presented at the hearing. More specifically, the judge did not address the lawfulness of the delegation of the Deputy Commissioner, who did not have the necessary language skills and who, in fact, sub-delegated the final decision to the analyst and to counsel. The appellant alleges that the judge did not address a further breach of procedural fairness, the Office of the PSICC's taking 11 months to render a decision in his case.

[62] On the face of the record, it is my opinion that the judge did not err given the absence of compelling evidence regarding the Deputy Commissioner's language skills. The judge did not have to consider vague, merit-less allegations.

[63] The same is true of the delay between the filing of the complaint and the decision, especially as Exhibit R-8 filed in support of the appellant's affidavit clearly establishes that the appellant was well informed about the delays incurred throughout the process.

[64] Lastly, as noted by the respondent, the Federal Court propounded the following principle in *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, 138 F.T.R. 176 at paragraph 18:

> The jurisprudence is clear, then, that a decision maker in the position of the Commissioner may use someone else to write reasons for his decision providing he retains control of the decision-making process and providing that such decision written by another "not . . . create an appearance of bias or lack of independence".

[65] In the present case, a review of Exhibit R-15 filed in support of the appellant's affidavit reveals that the Deputy Commissioner had the file before him when he made the decision, which he confirmed in his letter dated September 13 and in his email dated September 26 in response to the appellant's questions in this respect. The Deputy Commissioner was therefore able to review the analyst's conclusions while retaining control of the decision-making process.

[66] The appellant also argues that the Commissioner may exercise his discretion not to commence an investigation only "if the case is plain and obvious". The judge accepted that argument without explanation at paragraph 34 of his reasons (see also paragraph 25). I disagree.

[67] If I apply the modern rules of statutory interpretation (see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ontario: LexisNexis Canada Inc., 2008)), I am satisfied, following a careful reading of the words of section 24 of the Act in view of 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, that one cannot conclude that the Commissioner could refuse to investigate only if the case was plain and obvious, as is the case under section 41 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (Human Rights Act).

[68] In fact, a comparison of the language used in section 41 of the Human Rights Act and the wording of paragraphs 24(1)(*e*) and (*f*) of the Act reveals clear differences. The French version of section 41 states that "la commission statue", using the present tense, while the English version indicates that the Commission "shall deal", meaning that there is no discretion unless one of the exceptions described in paragraphs (*a*) to (*e*) applies.

[69] In the case of section 24 of the Act, Parliament provides as follows: "Le commissaire peut refuser de donner suite à une divulgation ou de commencer une enquête". The English version is just as clear, as it reads: "The Commissioner may refuse to deal". The comparison between the two statutory provisions leads me to conclude that the principle set out in section 41 of the Human Rights Act according to which the Canadian Human Rights Commission may only

refuse to intervene in plain and obvious cases cannot apply to the Integrity Commissioner who enjoys much broader discretion under subsection 24(1). Discretion cannot be compared with a statutory duty.

[70] Section 24 of the Act sets out a number of situations in which an investigation can be denied, as mentioned by Justice Gauthier at paragraph 59 of her reasons in appeal docket No. A-110-14, published under citation 2015 FCA 29. I fully agree with Justice Gauthier, who emphasizes the very broad discretion enjoyed by the Commissioner under section 24 of the Act in deciding whether or not to investigate a disclosure.

E. *Did the judge err in concluding that the Deputy Commissioner's decision was reasonable?*

[71] I have concluded above that the judge correctly applied the standard of reasonableness in the case at bar in the light of the doctrine of the Federal Court and in the absence of valid reasons for departing from this standard. It remains to be determined whether the appellant correctly argued that it was unreasonable not only for the judge but also for the Deputy Commissioner to conclude that the wrongdoing of which he accused his superiors merely constituted the application of a balanced and informed decision-making process.

[72] The judge considered the factual background and particularly the many exchanges regarding File A between the appellant and his superiors in order to conclude that the appellant was able to express his opinion; and he accepted the misconduct as being true. He did, however, focus on the fact that the discretion of Crown counsel to institute proceedings is not absolute, as

indicated in the *Federal Prosecution Service Deskbook* on which the Deputy Commissioner relied in part to reach his conclusion. Finding no fault with the procedure followed by the manager, the judge concluded that at issue was a difference of opinion on the outcome of File A between the appellant and his superiors.

[73] I must reject the appellant's position according to which the Deputy Commissioner required the appellant to establish that wrongdoing had been committed and that both the Deputy Commissioner's decision and that of the judge were consequently unreasonable. Neither the Deputy Commissioner nor the judge required this. In fact, a close reading of the Court's decision and of the Deputy Commissioner's decision suggests that there truly was a difference of opinion between the appellant and his hierarchical superior on how File A should be dealt with.

[74] Similarly, it is undeniable that the appellant put in an impressive amount of work into File A, which would explain why his superiors also reviewed it, in order to ensure that he had remained objective. It is not unusual to take a step back and to seek the opinion of other experienced counsel before making a decision in such an important case.

[75] In the present case, the judge could conclude that the Commissioner's decision was reasonable given that the existence of an honest difference of opinion and the Deputy Commissioner's conclusion not to investigate under paragraph 24(1)(*e*) fall within a range of possible outcomes: "[r]easonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible

in respect of the facts and law" (*Dunsmuir*, paragraph 47). I conclude that the judge applied the reasonableness standard correctly.

[76] I therefore propose that the appeal be dismissed with costs.

"A.F. Scott"

J.A.

"I agree.
M. Nadon, J.A."

"I agree.
Johanne Gauthier, J.A."

Translation

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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DATE DES MOTIFS:	FEBRUARY 2, 2015

APPEARANCES:

Yacine Agnaou	FOR THE APPELLANT (Self-representing)
Kétia Calix Talitha Nabbali	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

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