Public Servants Disclosure Protection Tribunal Canada

Tribunal de la protection des fonctionnaires divulgateurs Canada

Decision No.: 2013-PT-01

Issued at: Ottawa, Ontario
March 25, 2013

In the matter of an Application of the Public Sector Integrity Commissioner referred to the Public Servants Disclosure Protection Tribunal

BETWEEN:

GÉRARD LAMBERT
Complainant

-and-

HEALTH CANADA
Employer

AMENDED INTERLOCUTORY DECISION ON MOTION FOR ADJOURNMENT

I. INTRODUCTION

[1] This is an interlocutory decision disposing of a motion brought by Health Canada [employer], on February 7, 2013, in accordance with the *Public Servants Disclosure Protection Tribunal Rules of Procedure*, SOR/2011-170 [Tribunal Rules]. In same, the employer requests an order adjourning the hearing in this matter until at least August 1, 2013, or such additional period of time as the Tribunal may permit. This motion is denied.

II. BACKGROUND

[2] The application by the Public Service Integrity Commissioner [Commissioner] was filed on March 29, 2012. On March 30, 2012, the Registry provided a notice of the filing of the application of the Commissioner to the parties with set deadlines established in accordance with section 21 of the Tribunal Rules. The calculation of the deadlines for the discovery phase began on March 29, 2012. The timelines for filing particulars were as follows:

- The Commissioner's statement of particulars was to be filed by April 19, 2012;
- The complainant's statement of particulars was to be filed by May 3, 2012;
- The employer's statement of particulars was to be filed by May 18, 2012;
- The Commissioner's and the complainant's replies were to be filed by June 4, 2012.

[3] The Commissioner and complainant both filed their statement of particulars within the set timelines.

[4] On May 15, 2012, the employer requested an extension of time to file its statement of particulars given the employer's counsel's hearing schedule. On May 16, 2012, the Tribunal granted the employer's request to file the statement of particulars by June 11, 2012.

[5] On June 8, 2012, the employer requested a second extension until June 22, 2012 to file its statement of particulars because it needed additional time to draft and deliver the statement. On June 11, 2012, the complainant indicated that he did not oppose this request. The Tribunal did not receive the Commissioner's position on the employer's request.

[6] The Tribunal considered this second request and granted it on June 13, 2012. The employer was now to file its statement of particulars by June 22, 2012. The Commissioner and the complainant had until July 9, 2012 to file their replies. Additionally, parties were to indicate prior to a conference call scheduled for June 18, 2012, whether they expected to file any preliminary motions and, if so, indicate the nature of these motions. Given that the employer's second request for an extension of time was granted, the conference call scheduled for June 18, 2012 was postponed until September 7, 2012.

[7] The employer filed its statement of particulars on June 22, 2012. The Commissioner and complainant filed their replies on July 9, 2012.

[8] At the case management conference on September 7, 2012, the Tribunal asked the parties to provide, by September 14, 2012, possible hearing dates for April 2013. Furthermore, the Tribunal directed the parties to work with the Tribunal's counsel to prepare an agreed statement of facts and joint book of documents.

[9] On September 14, 2012, after consulting with the parties, they were advised that a meeting was scheduled with the Tribunal's counsel for November 5, 2012 and a case management conference was scheduled with the Chairperson for November 8, 2012.

[10] On October 19, 2012, the Tribunal was advised that the employer's counsel from the Treasury Board Secretariat had been appointed to the Public Service Labour Relations Board

[PSLRB] effective November 5, 2012, and that this matter was being reassigned to new counsel, again from the Treasury Board Secretariat. In light of this, the employer requested that the case management conference scheduled for November 8, 2012 be rescheduled to a later date. According to the employer, time was required for new counsel to familiarize herself with the background and materials of the case.

[11] On October 24, 2012, a notice of hearing was sent to the parties confirming that the hearing would be held from April 15, 2013 to April 19, 2013.

[12] On October 25, 2012, further to the correspondence of October 19, 2012 from the employer's counsel requesting that the November 8, 2012 conference be rescheduled, the Tribunal granted the request and confirmed that the case management conference had been rescheduled to January 22, 2013. On October 31, 2012, the meeting scheduled with the Tribunal's counsel for November 5, 2012 was cancelled.

[13] On November 16, 2012, notice was given to the parties that a new meeting with the Tribunal's counsel, which was initially set for November 5, 2012, was now scheduled for January 10, 2013 and January 11, 2013. The parties and the Tribunal's counsel met on those dates to work on an agreed statement of facts and other issues related to the hearing. The employer's counsel informed the Tribunal and the parties that she was being replaced by another counsel because of a family emergency. However, all parties agreed to provide any outstanding information by January 18, 2013, knowing fully that there would be a change in counsel.

[14] On January 14, 2013, considering the departure of counsel formerly assigned to the file, the employer requested a second postponement of the case management conference. As a result, the file was reassigned to counsel from the Department of Justice who required some time to review and become familiar with the file. The Commissioner and the complainant consented to this request. The Tribunal granted the employer's request and confirmed that the case management conference had been rescheduled to February 15, 2013.

[15] On January 17, 2013, the employer's counsel requested an extension of time for submitting additional documents. All parties consented to the employer's request to extend the timeline to January 30, 2013, which the Tribunal's counsel accepted.

[16] On February 7, 2012, the employer filed a motion for adjournment of the hearing set for April 15, 2013 to April 19, 2013, together with a request to extend the timelines to file preliminary motions.

[17] In a letter dated February 11, 2013, the complainant stated that it consented to the adjournment subject to some concerns. The Commissioner also consented to the motion for an adjournment.

[18] At the case management conference held on February 15, 2013, the employer's motion for adjournment, together with the request for extending the time to file preliminary motions, were discussed. The Tribunal gave the parties the opportunity to address the motion for adjournment by providing their positions on the motion and by providing other criteria that the

Tribunal should take into account. The Tribunal took the motion for an adjournment under advisement, while issuing directions with respect to the request for extending the time to file preliminary motions.

[19] At the same conference, the Tribunal reminded the parties of the procedural history concerning preliminary motions in this file. On September 7, 2012, the Tribunal had noted that the employer identified two preliminary issues in its statement of particulars, one with regards to documents and the other pertaining to the Tribunal's jurisdiction. The Tribunal gave some direction with regards to the motion on jurisdiction. The Tribunal also reminded the parties that on January 23, 2013, it had directed that any possible motions that the parties might consider filing should be filed by February 15, 2013. The Tribunal mentioned that, pursuant to Rule 13 of the Tribunal Rules, preliminary motions must be brought forward as soon as it is feasible after it is determined that there is a need to submit the question to the Tribunal.

[20] In particular, the Tribunal reminded the employer's counsel of its direction in September 2012, that the Tribunal had not been regularly seized of any motion to dismiss the application and therefore had jurisdiction to hear the matter. No motion on jurisdiction was filed at that time and no motion has been filed since. However, the employer maintained at the case management conference on February 15, 2013 that they were still considering the possibility of raising the issue of jurisdiction by way of a preliminary motion.

[21] In any event, the Tribunal gave a deadline of March 1, 2013 for the employer's counsel to file a full motion in writing on jurisdiction. The Tribunal was clear that no other extensions would be granted for filing a preliminary motion on jurisdiction.

[22] As of March 1, 2013, no motion on jurisdiction had been filed by the employer. However, the employer can argue a jurisdictional argument at the hearing on the merits if it wishes to do so.

[23] On the motion for production for documents, the Tribunal reminded the employer's counsel that the employer was to confirm this request by way of a motion. At the case management conference held on September 7, 2012, the following deadlines were set to file a motion for the production of documents:

- The employer is to serve and file its motion by Friday, September 14, 2012;
- The complainant and the Commissioner are to serve and file their response by Friday, September 21, 2012;
- The employer may serve and file a reply by Friday, September 28, 2012.

[24] No motion was filed within the timelines established by the Tribunal. Accordingly, the Tribunal considered this issue to be closed.

[25] At the case management conference, the Tribunal was informed for the first time that the employer may also wish to file a motion on particulars for remedy if the complainant does not provide it with the details requested. On March 1, 2013, the Tribunal was advised by the

employer that the complainant has provided further particulars orally on the remedy and that this satisfied their request.

[26] Finally, at the same conference, the Tribunal requested that the parties provide alternative dates of availability. On the same day, the Tribunal received the parties' availability for the possible rescheduling of the hearing. The next available dates for all of the parties are during the week of October 21, 2013.

III. ISSUE

[27] The issue to be determined is as follows:

Should the Tribunal grant the motion for adjournment?

IV. ARGUMENTS OF THE PARTIES

[28] The employer requests an adjournment of the hearing currently scheduled for April 2013. The employer submits that it has unavoidably had to change its counsel twice during the course of this proceeding.

[29] According to the employer, the first change of counsel in October 2012 was unforeseeable and unavoidable due to counsel's appointment to a federal quasi-judicial Tribunal.

[30] As for the second change of counsel in January 2013, it was unforeseeable and unavoidable due to a family emergency requiring counsel to take a leave of absence.

[31] The employer submits that the Tribunal's proceeding involves a voluminous joint book of documents which is expected to contain approximately 190 exhibits. Ten potential witnesses have been proposed by the parties. Further, the employer argues that use of hearing transcripts of approximately 150 days of testimony from a PSLRB proceeding involving the same parties is expected (see *Chopra et al v Treasury Board (Department of Health)*, 2011 PSLRB 99); the complainant testified approximately 20 days and the respondent's witness testified approximately 40 days. The complainant's counsel and the employer's former counsel were the counsels on record for that proceeding.

[32] Furthermore, the employer states that the matter before the Tribunal concerns events that occurred almost a decade ago and which have been the subject of multiple reviews. Other proceedings were also held involving similar issues and the same parties. The employer contends that, although the crux of the case is narrow, its counsel needs to understand the broader context.

[33] Thus, the employer requests an adjournment for an additional three months or such time as will permit the Tribunal to exercise its right to a full and ample opportunity to participate in the proceeding.

[34] The employer submits that it is in the interests of procedural fairness and the expeditious conduct of the hearing to adjourn the proceeding. The employer further submits that the other parties will not be prejudiced by an adjournment. The employer's counsel also added at the case management conference held on February 15, 2013 that the reputational interests of employees were involved.

[35] The complainant consents to this motion subject to concerns about rescheduling this matter, which may conflict with the pre-hearing preparation and hearing of the judicial review of the PSLRB decision involving the complainant. The complainant has since advised that this other case has been scheduled for February 2014. As a result, the complainant states that assuming this matter can be scheduled later this year, meaning in the fall of 2013, there should be no issue with a conflict.

[36] The Commissioner does not object to this motion for adjournment.

[37] At the case management conference held on February 15, 2013, the employer's counsel argued that the other parties have consented because they understand the breadth of the file. Although the complainant and Commissioner had consented to the motion, they both indicated that they would not want a hearing date in 2014. The complainant's counsel stated that it was not in the public's interest to delay. The Commissioner's counsel indicated that he would prefer the matter be heard as expeditiously as possible.

[38] The employer's counsel indicated that she did not want to delay the hearing to April 2014 and that she would be ready to proceed before August 2013. She would be content with a hearing date in June 2013 – but it turns out that, from a practical point of view, the next available dates for all parties are during the week of October 21, 2013.

V. ANALYSIS

[39] It is provided in Rule 40 of the Tribunal Rules that the Tribunal may adjourn a hearing. This Rule does not, however, provide criteria for adjournments. Nevertheless, as was stated at paragraph 85 in *El-Helou v Courts Administration Service et al*, 2011-PT-01 and paragraph 52 in *El-Helou v Courts Administration Service et al*, 2011-PT-02, the Tribunal is master of its proceedings and "has broad discretion as to how to administer its proceedings in a fair and impartial manner."

[40] Although there are no set criteria, the *Procedural Guide* provides guidance on adjournments. It states that, because of the difficulties in scheduling hearings, the Tribunal will only grant adjournments for serious reasons that are beyond the control of the parties. Even when parties consent to a motion for adjournment, it will not automatically be granted.

[41] In assessing this motion, the Tribunal is also guided by the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [Act] to balance the expeditious conduct of proceedings with the rights of parties. According to subsection 21(1) of the Act, "Proceedings before the Tribunal are to be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow." Subsection 21.6(1) of the Act also provides that "[e]very party must be given a full and ample opportunity to participate at any proceedings before the Tribunal – including, but not limited to, by appearing at any hearing, by representing evidence and by making representations – and to be assisted or represented by counsel, or by any person, for that purpose."

[42] To comply with the rules of natural justice, the Tribunal takes into account the nature and complexity of the issues relevant to the proceedings, the nature of the evidence to be presented, and the likelihood of causing an injustice to any party by proceeding in the absence of that evidence. Essentially, the Tribunal takes the parties' interests into account.

[43] To ensure the expeditious conduct of proceedings, the Tribunal takes into account relevant criteria such as the effect on the regime that protects public servants against reprisals, the number of previous adjournments granted, the length of time for which an adjournment has been sought, the other parties' consent, whether the adjournment would needlessly delay or impede the conduct of the proceedings, the amount of time already afforded the parties for preparation of the case, the efforts made by the parties to proceed expeditiously, the parties' conduct in being present and ready for the hearing, counsel's knowledge of, and experience with, similar proceedings, and specific factors to this Tribunal such as scheduling difficulties. These criteria are inspired by decisions such as *Sandy v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No 1770 (FCA) and *Toronto-Dominion Bank v Hylton,* [2010] ONCA 752. This list is not exhaustive and will vary from case to case. None of these criteria are decisive in and of themselves. The weight afforded to relevant criteria may change depending on the specific facts of a case.

Application of the Rules of Natural Justice

[44] The issue the Tribunal is seized with is whether there was a reprisal taken by the employer against the complainant for disclosing wrongdoing. This is a serious allegation against the employer and some of its employees' reputational interests are alleged to be at stake, which is also a serious matter. The Tribunal does not take allegations of reprisals and consequences on the reputation of employees lightly. This is why the Tribunal has thoroughly examined the issues raised by the employer regarding the representation of evidence and arguments.

[45] The employer submits that it cannot have a full and ample opportunity to participate in the hearing and present evidence as it contends that its new (third) legal counsel does not have sufficient time to prepare for the hearing considering the volume of documents, the number of witnesses, and the volume of transcripts from the PSLRB hearing. It is also of the view that it cannot have a full and ample opportunity to participate in the hearing because its new legal counsel needs to understand the broader context of other tribunal or court proceedings of the last decade related to the complainant.

[46] The Tribunal must ensure that the rules of natural justice are complied with. Practically speaking, this means the Tribunal must assess whether the employer has a full and ample opportunity to consider, challenge, or contradict any evidence, and whether it is fully aware of the nature of the allegations so as to have an ample opportunity to present its case to ensure that no injustice is caused to it. The Tribunal is satisfied that these requirements are fully met in this case.

[47] The Tribunal has established processes in order for the parties to have a fair hearing. To attain this, parties are to have the most complete information, in as much detail as possible, of both the allegations that are made and the evidence relied upon in support of those allegations. Where the evidence is documentary, parties are to have access to the documents. Where the evidence consists of oral testimony, parties are entitled to cross-examine the witnesses who testify and whose identities should be disclosed.

[48] Under subsection 21(2) of the Act, the Chairperson of the Tribunal may make rules of procedure governing the practice and procedure before the Tribunal, including, but not limited to notices to the parties, production of documents, discovery proceedings, and pre-hearing conferences. The Chairperson did in fact make the Tribunal Rules, which came into effect on August 29, 2011.

[49] In the Tribunal Rules, a discovery process has been established. Parties must file statements of particulars as per Rules 19 and 20 of the Tribunal Rules. The statements of particulars include the parties' positions regarding the legal issues raised in the application and regarding the remedy or disciplinary action sought, the material facts that the parties intend to prove, relevant documents that the parties intend to produce, the names of witnesses (other than expert witnesses) that the parties intend to call, and if the parties intend to call an expert witness, a summary of the issues that will be the subject of the witnesses' testimony.

[50] A statement of particulars filed by the Commissioner must also set out the remedy or disciplinary action requested, and the basis for that request. When an application for remedy has been filed, the complainant's employer or former employer (at the time of the events) must indicate in its statement of particulars whether it admits, denies, or has no knowledge of each material fact alleged by the complainant or Commissioner.

[51] The discovery process at Rules 23 to 25 of the Tribunal Rules also provides, replies by the Commissioner and complainant and the possibility of a supplementary statement of particulars by any party. The parties now have full particulars, including the remedy issue. Furthermore, the book of authorities must be filed 15 days before the day on which the hearing begins.

[52] In many quasi-judicial tribunal processes, no discovery process exists, which may create some uncertainty for parties as to the evidence to be produced and the arguments to be presented. The discovery process at the Tribunal ensures that there are no surprises for the parties. Parties are informed from the beginning of all the parties' positions and legal issues, the evidence to support these positions, and the remedy requested. Each party can have a general sense of the theory of case and how they may respond to it. In this case, as it will be in other cases, all parties have and will benefit from the discovery process.

[53] There are also safeguards in the Tribunal Rules so that parties are not taken by surprise. For instance, Rules 30 to 32 of the Tribunal Rules provide for case management conferences to resolve procedural or evidentiary matters. The Tribunal has made use of such conferences to

resolve procedural and evidentiary matters with the parties. At these conferences, which were held on September 7, 2012 and February 15, 2013, the Chairperson addressed the agreed statement of facts, the joint book of documents, witnesses, and issues pertaining to preliminary motions.

[54] Another safeguard is Rule 41 of the Tribunal Rules, which provides that at the hearing a party is not permitted to raise a position; seek to prove a material fact; or to introduce a document that was not disclosed in its statement of particulars; call a witness (other than an expert witness) who was not named in its statement of particulars, its reply, or its supplementary statement of particulars; introduce an expert report into evidence, or call the expert as a witness if the expert report was not provided in accordance with Rules 26 to 28 of the Tribunal Rules; and in the case of the Commissioner or the complainant, request any remedy or disciplinary action that was not raised in its statement of particulars. To be able to do so, a party must seek leave from the Tribunal.

[55] As it stands, the file has been ready to proceed since June 22, 2012, when discovery was completed by all parties. They were informed, through the statement of particulars and replies, of the general positions and arguments. At least since then, the parties have had knowledge of the case and the evidence, but there has been ample opportunity for the employer to obtain further particulars and additional documents, and this, months before the scheduled hearing in April 2013.

[56] It is not submitted that the employer is not fully aware of the allegations against it. However, the employer does take issue with the submission of evidence. The employer submits that the proceeding involves a joint book of documents that is expected to contain approximately 190 exhibits. It also submits that ten potential witnesses have been proposed by the parties. The employer argues that to have a full and ample opportunity to consider, challenge, or contradict any evidence, it must be aware of all the evidence submitted in support of the allegation of reprisal.

[57] The employer's new counsel has been assigned to the file since mid-January 2013 and argues that three months is insufficient to prepare the evidence for the hearing. The Tribunal notes that the employer's counsel has not argued that her schedule does not permit adequate preparation for this hearing. Apart from having other projects that she is completing, the employer's counsel stated at the case management conference held on February 15, 2013, that she will give her full attention to this matter in the upcoming weeks.

[58] The maximum has been done in this proceeding to accommodate all parties and reduce the length and complexity of the hearing. The Tribunal has been innovative and proactive in directing the parties, during the September 2012 case management conference and thereafter, to work with its staff to prepare neutral allegations for an agreed statement of facts and a list of documents to be included in a joint book of documents based on the parties' statements of particulars, replies, and the documents submitted.

[59] The 70 page agreed statement of facts, which includes approximately 270 allegations, and the list of the joint book of documents (191 documents) were submitted to the parties for comment. Extensive work was done to come to an agreement on the allegations and documents to be used. The parties are fully informed of the facts that are admitted and the ones that need to be proven as almost all of the allegations have been admitted by all parties at the time of this decision. These facts will no longer need to be proven by testimonies and will not require preparation for the hearing.

[60] The joint book of documents includes 191 documents. Of these 191 documents, the employer has provided 77 documents. This means that, in reality, the employer must review 114 documents. Furthermore, these documents are not unfamiliar to the employer; as the employer's counsel has stated, ten years have elapsed since the facts of this case. The employer's advisors, Ms. Kirkpatrick and Mr. Boettger, have been involved since the beginning of these proceedings and are fully aware of these 114 documents.

[61] The employer's second legal counsel did part of the work on the agreed statement of facts and the joint book of documents in conjunction with its advisors, Ms. Kirpatrick and Mr. Boettger, and the work was finalized by its present counsel.

[62] Ten witnesses were initially identified by the parties in the statements of particulars. The employer's counsel states that she needs time to meet with these witnesses and to prepare them. However, after admitting to a number of facts in the agreed statement of facts and after the new counsel has had the opportunity to review the list of witnesses, the employer's counsel advised

the Tribunal on February 22, 2013, that this list had been narrowed down to five witnesses. The employer's counsel now has four witnesses to prepare for examination and to prepare for the complainant's cross-examination.

[63] The employer's counsel was informed at the case management conference held on February 15, 2013, that the complainant would be the sole witness for the Commissioner and the complainant. At this conference, the Tribunal asked whether there was a need for witnesses' statements. The complainant's counsel indicated that there was no need. However, the employer's counsel stated that she would find a statement of the complainant's testimony useful and that it would help keep the hearing concise. Therefore, to the extent of the complainant's testimony, the employer's counsel will not be taken by surprise. The employer's request adds to its own burden as well as it will also be providing four witness statements to the complainant's counsel.

[64] The employer will have ample opportunity to introduce its evidence. If the hearing proceeds as scheduled on April 15, 2013 to April 19, 2013, the employer would not be impeded in any way in presenting evidence since the vast majority of the evidence has been submitted in the agreed statement of facts and the joint book of documents. A large part of the facts and documents are admitted by all of the parties, subject to the authenticity and relevance of certain documents and facts, and the witnesses have been identified.

[65] The Tribunal fails to understand why there is a need for three additional months to prepare for the hearing. This would provide the employer's counsel with six months to review

114 documents and prepare four witnesses for examination and cross-examination by the complainant. Considering that the employer's new counsel already has three months to prepare for the hearing and that she has advised that she will give her full attention to this matter over the next two months, the Tribunal is of the view that this is ample time to prepare for the hearing. The time she has is within her control and there are no indications that serious reasons will prevent her from preparing for the hearing.

[66] The employer also submits that the use of hearing transcripts of approximately 150 days of testimony from the PSLRB proceeding, involving the same parties, is expected; the complainant testified approximately 20 days and the respondent's witness testified approximately 40 days. Furthermore, the employer pointed out that the matter before the Tribunal concerns events that occurred almost a decade ago, have been the subject of multiple reviews, and that there have been other proceedings involving similar issues and the same parties.

[67] The employer's counsel submitted that the complainant wishes to use transcripts from the PSLRB proceeding, to which the complainant's counsel responded that he may use the transcripts "if something comes up during the hearing in relation to the events of spring 2002."

[68] At the case management conference held on February 15, 2013, the Tribunal indicated that if the parties consent to the use of transcripts and if it saves time, the parties may use transcripts. However, these transcripts should not be used to replace testimonies. The Tribunal

expressed its preference to have testimonies to determine the credibility of witnesses through examinations and cross-examinations.

[69] The complainant's counsel has since advised the Tribunal that he will not be using the excerpt of Ms. Kirkpatrick's testimony at the PSLRB hearing that he initially intended to use. Thus, the employer's counsel does not have to prepare or provide counter-evidence with regards to this excerpt. The employer has advised that it will be using 10 pages of transcripts from the complainant's testimony.

[70] One of the reasons for the motion for adjournment is to understand the broader context of the PSLRB matter scheduled to be heard for judicial review in February 2014, which the Tribunal has been told has no impact on this case.

[71] The PSLRB hearing pertains to the complainant being disciplined for insubordination in failing to complete work or hand in work that had long been completed, which is not the issue before this Tribunal. Indeed, the employer states at number 122 of its statement of particulars that the complainant was discharged from his position on July 14, 2004 for reasons unrelated to the matter involved in these proceedings.

[72] There is another matter that will be proceeding at the Federal Court in April 2013 involving the same parties; this is a judicial review of the Commissioner's decision concerning the allegations of wrongdoing. The employer has indicated that this matter is unrelated to the Tribunal's proceedings.

[73] The Tribunal has not yet assessed the evidence and thus, does not make any findings of fact at this step in the proceedings. The Tribunal notes, however, that although facts need to be put in context, the statements of particulars show that the crux of the case is relatively simple and is within a period ranging from April 2, 2002, when the complainant was appointed acting Team Leader, to May 17, 2002 when his acting appointment ended. The issue of reprisal was first raised with the Public Sector Integrity Officer in 2002. The events that transpired between April 2, 2002 and May 17, 2002 were raised again with the Commissioner in 2009 and 2011. Basically, witnesses will testify as to their interpretation of the events in April and May 2002 and their credibility will be assessed by the Tribunal. The parties will argue whether other facts not within the key period identified above may be relevant. The Tribunal will make its assessment of relevant facts once it has heard the parties, and as the case may be, considered the evidence proposed to be adduced.

[74] The fact that the PSLRB matter and these proceedings are not related is also reflected in the conduct of the Treasury Board Secretariat. Lead counsel in the PSLRB case had two other supporting counsels. When lead counsel was appointed to the PSLRB, the employer did not reassign the Tribunal file to either of the supporting counsels. Instead, it was assigned to another counsel not involved in the PSRLB case. Therefore, there did not seem to be a need for the Treasury Board Secretariat to have one of the counsels involved in the PSLRB matter. If the PSLRB matter had an impact on the Tribunal proceedings, surely parties would have asked that they be suspended in order for the PSLRB matter to be heard by the Federal Court before pursuing the matter at the Tribunal. Further, the employer’s counsel has explained that there is

no relationship between the change in counsel and the judicial review of the PSLRB decision by the Federal Court.

[75] Based on the employer's own admission that the proceedings before the Federal Court concerning the PSLRB matter and the Commissioner's decision on allegations of wrongdoing are not related to the matter before the Tribunal, there is no need to grant an adjournment to provide the employer's counsel with time to become familiar with the contents of these transcripts. This is not a serious reason that is beyond the control of the employer.

[76] The employer's new counsel was assigned the week of January 14, 2013 for a hearing to be held on April 15, 2013 to April 19, 2013. She has had one month to become familiar with the file and has two months to prepare for the hearing. Considering the length of time counsel has to prepare, and given that she can devote her full attention to this matter in the months ahead, lack of preparedness is no reason for an adjournment (see *Jouzichin v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1886).

[77] Considering the reasons outlined above, the Tribunal finds that the employer has ample opportunity to present its evidence and that proceeding with the hearing as scheduled will not result in any injustice. Natural justice is not to be confused with the greater experience of a counsel who has been involved in matters opposing the same parties for a long time. These are not exceptional circumstances.

Conduct of the parties and available resources

[78] As stated in the Tribunal's *Procedural Guide* (available on the Tribunal's website), due to the difficulties in scheduling hearings, the Tribunal will only grant adjournments for serious reasons that are beyond the control of the parties. To determine whether reasons are beyond the control of the parties, the Tribunal has reviewed the conduct of the parties and their efforts to proceed expeditiously.

[79] The Tribunal encourages responsible behaviour on the part of all parties. This supposes an overall assessment of the steps taken throughout the proceeding, as well as the resources at the disposal of the parties. Since the referral of the present application to the Tribunal by the Commissioner, every effort has been made by the Tribunal and the other parties to accommodate the employer's requests. The employer should in turn show some flexibility and be ready to proceed at the scheduled dates of hearing despite any inconvenience caused by the fact that there has been a change of counsel. On a balance, the employer should not profit from a further delay and must take the necessary steps to be ready at the hearing.

[80] There have been many delays in this file caused solely by the employer. Neither the Commissioner nor the complainant have requested any extensions in this matter. Although the complainant is represented by counsel, it is the Commissioner who brings the application before the Tribunal, and its counsels have not been involved in the decade of history involving the parties in other matters.

[81] The Tribunal has accommodated the employer five times by granting extensions for various reasons. The employer requested an extension to submit its statement of particulars twice (on May 15, 2012 and June 8, 2012). It also requested an extension for case management conferences because of changes in counsel (on October 19, 2012 and January 14, 2013).

[82] A further extension was required by the employer for the submission of documents. Being aware that there would be a change in the employer's counsel, at the meeting held on January 10, 2013 and January 11, 2013, all parties agreed to provide any outstanding information by January 18, 2013. However, on January 17, 2013, the employer's new counsel requested an extension of the timeline agreed to. Finally, on February 7, 2013, the employer requested an additional extension for preliminary motions and the adjournment of the hearing. Although this is the employer's first request to adjourn the hearing, many delays were created by the employer that resulted in the Registry being unable to schedule the hearing earlier.

[83] In contrast, the Commissioner's lead counsel has been unavailable to attend some of the case management conferences but has had other counsel attend on his behalf. Another counsel attended the working meeting held on January 10, 2013 and January 11, 2013, as well as the case management conference held on February 15, 2013. Of note, in rescheduling the working meeting with the Tribunal's counsel, which was to be held on November 5, 2012, lead counsel informed the Tribunal on November 7, 2012 that another counsel could stand in for him to move this file forward in a timely manner.

[84] Although the employer has provided reasons that it considers to be out of its control to support requests for extensions, it is surprising that the employer cannot proceed in two months considering it has more legal resources available than the complainant and the Commissioner.

[85] At the case management conference on February 15, 2013, the employer was represented by counsel from the Department of Justice, Civil Litigation Section. In support of its motion to adjourn, the employer filed an affidavit from a legal assistant. This legal assistant is with the Department of Justice, Civil Litigation Section, and is assigned to work with the employer's counsel.

[86] At the same conference, the employer's counsel was accompanied by a paralegal with the Treasury Board Secretariat who has been involved in this file since October 2007 as well as in other files involving the complainant, including the PSLRB case. This paralegal explained that she is a document manager who is, we can safely say, the file's corporate memory. After consulting with the paralegal, the employer's counsel informed the Tribunal that the Treasury Board Secretariat has fourteen litigators. The employer's counsel also stated that the Civil Litigation Section has about forty to fifty legal counsels.

[87] It was stated at the conference on February 15, 2013 that the employer is advised by Ms. Kirkpatrick who has been involved in this file since November 2001, and Mr. Boettger, whose involvement in this file goes back to the end of 2003. Both individuals have attended all case management conferences.

[88] The complainant's counsel informed the Tribunal at the conference on February 15, 2013 that he is handling the file by himself apart from some support from students and the complainant. He stated that there are eleven lawyers working in the firm with none of them involved in the file. As for the Commissioner, his representative advised that he is represented by a lead counsel and another counsel from an outside firm. Both the complainant and the Commissioner have made an effort to meet all of the deadlines despite having fewer resources.

[89] Although the employer states that there will only be a delay of three months, in reality, the hearing will be delayed at least six months given that the parties are not all available until October 2013. This hardly meets the objective of the Act to establish effective procedures to build confidence in the Tribunal's ability to hear cases, particularly in light of the fact that this case could have been heard earlier on. Delay is a serious concern.

[90] The employer's counsel is not raising factors that are unpredictable or unpreventable. There is no indication that she is not available or that the witnesses are not available on the set hearing dates. The Tribunal wishes to stress that the hearing dates were set months in advance in concurrence with the parties' respective counsels, with the notice of hearing dating back to October 23, 2012. The convenience of consulting the parties' respective counsels to fix hearing dates months in advance comes with a price, considering Tribunal and Federal Court resources. Parties before the Tribunal do not have to be available on short notice.

[91] Considering the reasoning outlined above, the Tribunal finds that no serious causes for delay exist that are beyond the control of the employer to proceed with the hearing set for April

15, 2013 to April 19, 2013. There are no exceptional circumstances here that warrant an adjournment.

Interest of the administration of justice in expeditious proceedings

[92] The Tribunal has given due consideration to the fact that the other parties have given their consent subject to certain conditions in terms of rescheduling the hearing. However, in the particular circumstances of this case, this is not a determinative factor. Public interest, which includes the administration of justice, must also be taken into account when deciding upon a motion to adjourn. An aspect of the public's interest is the cost of adjourning.

[93] Courts have sent clear messages to parties about delays being a serious public concern. For example, without saying that the parties are necessarily engaging in such behaviour, I note that the Federal Court of Appeal writes:

> The day has passed when courts could allow to litigants the luxury of being at their beck and call. Courts are public institutions for the resolution of disputes and cost substantial public money. Court congestion and delay is a serious public concern. Parties who launch proceedings at any level with the intention of putting them in a "holding pattern" for their own private purposes may be called to account for their waste and abuse of a public resource. They also risk having those proceedings dismissed. (*Adams v Canada (Royal Canadian Mounted Police)*, [1994] FCJ No 1480 at para 16 (FCA)).

This was subsequently endorsed by Chief Justice Isaac of the Federal Court in *Sidhu v Canada (Minister of National Revenue)*, [1994] FCJ No 2028.

[94] The same can be said about the realities of quasi-judicial tribunals such as this Tribunal. The Tribunal has previously expressed, at paragraph 73 in *El-Helou c Courts Administration*

Service et al, 2011-PT-04 that it would need to adopt a focused approach to its proceedings and the tendering of evidence to assure that its time and resources are utilized judiciously.

[95] In *Solomons v Canada*, [2003] TCJ No 22, the Tax Court made a statement concerning adjournments that is also applicable in the circumstances of this case:

> Some adjournments are necessary in the interests of justice by reason of factors that cannot be either predicted or prevented. People become ill; witnesses are justifiably unavailable; other litigation may prevent parties or counsel from being available at the time fixed. However, this is not such a case. I understand that there may have been some settlement negotiations that continued until late last week. That often happens, but it is up to litigants, and their counsel, to be prepared to proceed with cases on the dates that have been fixed. It is a great convenience to counsel and to the parties that this Court fixes dates for trial months in advance; they do not have to be available for trial on short notice, as in the case in some other Courts. That convenience comes at a price, however; they must do what is required in order to be ready on the day fixed. Litigants who decide to conduct their own cases without counsel, hoping to achieve a settlement before trial, run the risk that they will have to proceed to trial without counsel. They cannot expect that the Court will grant them an adjournment, and thereby waste the resources of the Court for the time that has been allotted to the matter, because their settlement discussions have failed.

[96] The Tribunal has also turned its mind to the issue of Tribunal and Federal Court resources and factors that cannot be predicted or prevented.

[97] Subsection 20.7(1) of the Act provides that all members of the Tribunal must be judges of the Federal Court or a provincial superior court. This creates particular challenges for the Tribunal as its members are also full-time Federal Court judges.

[98] During the case management conference held on February 15, 2013, the Chairperson explained to the parties the scheduling difficulties that are a reality of this Tribunal. In the Tribunal's Report on Plans and Priorities for 2012-2013, the Registry explains these difficulties as follows:

> The Tribunal is subject to the application of the *Official Languages Act* and its members must be able to hear cases in the parties' official language without using an interpreter. The three members of the Tribunal, all bilingual, already have a very heavy workload because they are full-time Federal Court judges. Moreover, over the past few years, many bilingual Federal Court judges have retired, resigned or become supernumerary. Moreover, the Federal Court judges' work schedule is established a year in advance for cases that require several days of hearings. Because the Federal Court is a national trial court, its judges are required to travel across Canada to hear cases. As a result, it can be difficult to make changes to the Chairperson's and Tribunal members' assignment schedules in the time required for the Tribunal to meet its objective of rendering a decision on merit in the 250 calendar days following the start of a case. This problem is more apparent when the three Tribunal members sit as a panel, namely in more complex cases.

[99] The schedules of the Federal Court judges are established long in advance. Accordingly, providing the parties with new dates would require that the judicial administrator reschedule or reassign the Tribunal member's duties and cases to other Federal Court judges. The consequences of rescheduling the hearing in this case would result in another delay of six months.

[100] The preamble of the Act states the following: "It is in the public interest to maintain and enhance public confidence in the integrity of public servants. Confidence in public institutions can be enhanced by establishing effective procedures for … protecting public servants who

disclose wrongdoings." The Tribunal is concerned about the motion for adjournment, its impact on the public interest, and its effect on the regime that protects public servants against reprisals.

[101] Confidence in the Tribunal's ability to establish effective procedures is crucial to attaining the goals established by the Act and weighs heavily in the Tribunal's assessment of the motion to adjourn. The Tribunal has also weighed the consequences of postponing the five day hearing, considering that the earliest time all counsel are collectively available is the week of October 21, 2013, and that this may suppose that the matter be re-affected by the Chair of the Tribunal to another member of the Tribunal who will also need time to familiarize himself or herself with the file.

VI. DECISION

[102] For all these reasons, the motion for adjournment is denied.

DATED this 25th day of March, 2013.

"Luc Martineau"
Chairperson

PUBLIC SERVANTS DISCLOSURE PROTECTION TRIBUNAL
PARTIES OF RECORD

DECISION NUMBER:	2013-PT-01
TRIBUNAL FILE:	T-2013-01
STYLE OF CAUSE:	Gérard Lambert v Health Canada
BEFORE:	The Honourable Mr. Justice Luc Martineau
DECISION OF THE TRIBUNAL DATED:	March 25, 2013

DECISION RENDERED ON THE BASIS OF THE WRITTEN ARGUMENTS, RECORDS FILED AND CASE CONFERENCE MANAGEMENT DISCUSSIONS

APPEARANCES:

Mr. Porter Heffernan Emond Harnden	For the Commissioner
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Ms. Zoe Oxaal Civil Litigation Section Department of Justice	For the Employer