How a Reprisal Complaint Comes Before the Tribunal

Public Servants Disclosure Protection Tribunal

October 2012

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Introduction

The purpose of this guide is to give an overview of how a reprisal complaint by a public servant makes its way to the Public Servants Disclosure Protection Tribunal (the Tribunal) and how the Tribunal generally conducts its hearings. This guide will refer to the *Public Servants Disclosure Protection Act*[1] (the Act), the *Public Servants Disclosure Protection Tribunal Rules of Procedure*[2] (the Tribunal Rules) and relevant cases.

Overview of the Act

The Act established the Tribunal as part of a broad system of protection within the public service for the disclosure of wrongdoing. Specifically, the Tribunal was created to protect public servants who report wrongdoing from reprisals. The Tribunal is an independent quasi-judicial body, and therefore its proceedings are conducted similarly to a court of law. The Tribunal consists of a Chairperson and between two and six other members (subsection 20.7(1)). All members are appointed by the Governor in Council and must be judges of the Federal Court of Canada or the superior court of a province. The Tribunal has broad powers to hear evidence, grant remedies in favour of complainants and order disciplinary action against persons who take reprisals because of the disclosure of a wrongdoing.

[1] SC 2005, c 46. Unless stated otherwise, all references to sections are to those in the Act.
[2] SOR/2011-170 [the "Rules"].

The Tribunal is not a "direct access" Tribunal. A complaint of reprisal due to the disclosure of wrongdoing must be referred to it through an application made by the Public Sector Integrity Commissioner (the Commissioner).

The Act outlines the stages of the process for protecting public servants who make a disclosure of wrongdoing. A public servant has the option of using either an internal or external process for disclosing wrongdoing.[3] In this way, it departs from the traditional approach to the disclosure of wrongdoing, which is hierarchal and is sometimes called the "up the ladder" approach. It creates a broader system for disclosure protection within the public service at several junctures and at different levels.

There are three options available to public servants for making a protected disclosure:

- internally to a supervisor or the departmental Senior Officer of a department or agency (section 12);
- externally to the Commissioner (subsection 13(1)); or
- to the public if there is not enough time to disclose a serious offence under Canadian legislation or an imminent risk of a substantial and specific danger (subsection 16(1)).

Internal Process: If the internal process is chosen, the public servant may disclose to his or her supervisor or to a designated senior officer (i.e., an officer appointed under the Act to receive these disclosures) any information that could show that a wrongdoing was committed or is

[3] When making a disclosure under the Act, a public servant must provide only the information that is reasonably necessary to make the disclosure and follow established procedures for securely handling, storing, transporting and transmitting information and documents (see section 15.1).

about to be committed or any information that could show he or she was asked to commit a wrongdoing (section 12).

External Process: A public servant may also choose the external process in order to disclose wrongdoing by going to the Commissioner (subsection 13(1)). If the public servant believes he or she has suffered a reprisal as a result of making a disclosure (after using either the external or internal processes for the disclosure of wrongdoing), the public servant may bring a reprisal complaint to the Commissioner (section 19.1).

When there is an issue of reprisal due to the disclosure of wrongdoing, the external process has two stages. The first stage is the reprisal complaint to the Commissioner. The second stage is the referral of an application by the Commissioner to the Tribunal, but this will only happen if the Commissioner believes that an application is warranted.

Only the Commissioner can initiate the application before the Tribunal. He or she can do so only after deciding to deal with the complaint and completing an investigation. The investigation will be conducted by the Office of the Public Sector Integrity Commissioner (OPSIC). If, after the investigator receives the report, the Commissioner considers that an application to the Tribunal is warranted, he or she may apply to the Tribunal for a determination on whether a reprisal was taken against the complainant.

Public Disclosure: In some situations, a disclosure may also be made to the public. For example, if there is not enough time to make the disclosure to a designated senior officer, supervisor or

Commissioner, and if the act or omission constitutes a serious offence or an imminent risk to life, health and safety of persons or to the environment (subsection 16(1)).

How does a reprisal complaint come before the Tribunal?

A complaint cannot be directly referred to the Tribunal. The Tribunal begins its proceedings once it has received an application made by the Commissioner. The application made by the Commissioner gives the Tribunal its jurisdiction to deal with a reprisal complaint (*El-Helou v Courts Administration Service* (2011-PT-01; and (2011-PT-04 at paragraph 43).

The two-stage proceeding is similar to another statutory framework, the *Canadian Human Rights Act* (**CHRA comparison chart**). In both statutes, Parliament has created a commission to perform a "gate-keeping" function for both receiving and screening complaints. These commissions determine whether allegations in a complaint can be referred to an adjudicative body. Under both regimes, there is no direct access to the tribunal that makes the decision.

In *El-Helou v Courts Administration Servic*e (2011-PT-01)**,** the Tribunal outlined the steps to follow before an application may be filed with the Tribunal. The process begins when a public servant makes a reprisal complaint to the OPSIC. OPSIC is an independent agency of Parliament with exclusive jurisdiction to investigate reprisal complaints. The public servant must show that the reprisal was taken against him or her after a protected disclosure of wrongdoing.

What is a protected disclosure?

A "protected disclosure" is a disclosure of wrongdoing.

The Act expands on the definition of wrongdoing previously discussed in decisions made by judges, or judge-made law, to include the following: a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act; [4] a misuse of public funds or a public asset; a gross mismanagement in the public sector; an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment; a serious breach of a code of conduct established under the Act; and knowingly directing or counselling a person to commit any of these wrongdoings (section 8).

A protected disclosure is defined as follows in section 2 of the Act:

> disclosure that is made in good faith and that is made by a public servant
>
> (a) in accordance with [the] Act;
>
> (b) in the course of a parliamentary proceeding;
>
> (c) in the course of a procedure established under any other Act of Parliament; or
>
> (d) when lawfully required to do so.

Therefore, if the public servant believes he or she is experiencing reprisal after making a protected disclosure, a complaint may be brought to the OPSIC. The complaint must be filed within 60 days of when the public servant knew or should have known that a reprisal was taken (subsection 19.1(2)). The Commissioner will then have 15 days to decide whether or not to deal with the complaint (subsection 19.4(1)).

[4] Unless the contravention relates to a contravention of the general prohibition against reprisal under the Act itself.

What is reprisal?

The Act includes a general prohibition against reprisals (section 19).

A reprisal is defined as any of the following measures taken against a current or former public servant because he or she has made a protected disclosure of wrongdoing or has, in good faith, cooperated in an investigation into a disclosure:

- a disciplinary measure;
- the demotion of the public servant;
- the termination of employment of the public servant including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;
- any measure that adversely affects the employment or working conditions of the public servant;
- a threat to take any of these measures or directing a person to do so.

In its reasons for dismissing a motion in *El-Helou v Courts Administration Service*, the Tribunal discussed the definition of reprisal. It noted that the definition is worded in a way that allows a series of subtle and incremental issues to be examined. It stated that the definition uses words that are action oriented such as “measures” and not merely decisions made by those authorized to make them (2011-PT-02 at paragraph 79).

A reprisal can occur only after a “protected disclosure” of wrongdoing is made either through the internal mechanisms available in a department or directly to OPSIC.

What factors are considered in referring an application to the Tribunal?

Before an application can be made to the Tribunal, the Commissioner will consider several factors:

- the admissibility of the complaint;
- whether the complaint should be investigated;
- whether an application to the Tribunal is warranted; and
- the proper scope of the application before the Tribunal (*El-Helou v Courts Administration Service* (2011-PT-01, paragraphs 73-80)).

How does the Commissioner determine that a complaint is admissible?

In determining the complaint's admissibility, the Commissioner will take into account such factors as the form of the complaint (subsection 19.1(1)), the time limits for filing a complaint (subsection 19.1(2)), the availability of other recourse in a federal law or collective agreement, the Commissioner's jurisdiction and whether the document was filed in good faith (subsection 19.3(1)).

The Commissioner will consider a number of factors before deciding to deal with the complaint. For example, the Commissioner *may* refuse to deal with a complaint if he or she considers that:

- the subject matter has been adequately dealt with or could more appropriately be dealt with under another Act or a collective agreement;
- if the complainant is a member of the Royal Canadian Mounted Police, the subject matter has been adequately dealt with under disciplinary or discharge proceedings of the RCMP referred to in subsection 19.1(5) of the Act;

- the complaint is beyond the Commissioner's jurisdiction ; or
- the complaint was not made in good faith.

If the Commissioner decides to deal with a complaint, he or she will send a written notice of that decision to the complainant and the employer's representative authorized to take disciplinary action regarding the alleged reprisal (subsection 19.4(2)).

If the Commissioner decides not to deal with a complaint, a written notice will be sent to the complainant. The written notice must give reasons for that decision (subsection 19.4(3)).

The Act includes certain provisions that suspend or restrict disciplinary action until the outcome of a reprisal complaint is known. These provisions relate only to those who allegedly participated in reprisals, not to the complainant.[5]

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[5] For example:

(a) If the Commissioner decides to deal with a complaint and no disciplinary action has yet been taken against a person because he or she participated in the taking of an alleged reprisal, there is a restriction on disciplinary action. See section 19.5 of the Act:

> (1) If the Commissioner decides to deal with a complaint and sends a written notice under subsection 19.4(2) and no disciplinary action has yet been taken against a person by reason of that person's participation in the taking of a measure alleged by the complainant to constitute a reprisal, no disciplinary action may be taken during the period referred to in subsection (3) in relation to the person's participation in the taking of the measure.

(b) If the Commissioner decides to deal with a complaint and sends a written notice under subsection 19.4(2) and a disciplinary action has already been taken against a person because he or she has taken an alleged reprisal, the implementation of that disciplinary action is suspended (unless the disciplinary measure has already been determined before a court or tribunal). See Section 19.6 of the Act:

> (1) If the Commissioner decides to deal with a complaint and sends a written notice under subsection 19.4(2) and disciplinary action has already been taken against a person by reason of the person's participation in the taking of a measure alleged by the complainant to constitute a reprisal
>
> (*a*) the implementation of the disciplinary action — and the commencement or continuation of any procedure in relation to the disciplinary action by the person under any other Act of Parliament or collective agreement — is suspended for the period referred to in subsection (3); and

The Act also gives chief executives the power to temporarily assign other duties to public servants involved in disclosures or reprisal complaints. However, chief executives are not obligated to do so.

What if the Commissioner decides to investigate the complaint?

When the Commissioner decides to investigate a reprisal complaint, he or she will assign an investigator. Investigations into complaints must be done as informally and expeditiously as possible (section 19.7). The Act gives the Commissioner broad discretion to investigate – or to continue to investigate – a reprisal complaint.

The investigator will notify the chief executive of the department of the substance of the complaint (subsection 19.8(1)). The chief executive must give the investigator full access to any assistance, information, facilities or offices that the investigator may need (subsection 19.9(1)).

If there is insufficient cooperation on the part of a chief executive or public servant, the investigator will make a report to the Commissioner (subsection 19.9(2)).

(*b*) the appropriate chief executive must take the measures necessary to put the person in the situation the person was in before the disciplinary action was implemented.

(2) If the disciplinary action already taken against a person by reason of the person's participation in the taking of a measure alleged by the complainant to constitute a reprisal has been the subject of a decision of a court, tribunal or arbitrator dealing with it on the merits, other than a decision made under the *Royal Canadian Mounted Police Act*,

(*a*) subsection (1) does not apply; and

(*b*) neither the Commissioner nor the Tribunal may deal with the issue of disciplinary action against that person.

The investigator may also notify any person whose conduct might be called into question by the complaint. That person should also be informed of the substance of the complaint (subsection 19.8(2)).

When conducting an investigation, the Commissioner has all the powers of a commissioner under Part II of the *Inquiries Act* (RSC, 1985, c I-11). This means that the Commissioner may issue a subpoena, summons or other request to a person and, with notice, enter the premises of any portion of the public sector in the exercise of his or her duties (section 29).

In addition, the Commissioner's powers do not include those that the Tribunal has under Part I of the *Inquiries Act.* Traditionally, these powers are related to adjudicative functions: where findings of fact and credibility can be made. These powers are granted to the Tribunal as the impartial adjudicator who must ultimately determine whether a reprisal has been taken against a public servant.

In some circumstances, the reprisal complaint may be settled during the investigation either through successful resolution with a senior departmental officer designated to receive and deal with disclosures or through conciliation offered by OPSIC (sections 20 to 20.2).

If the Commissioner thinks that an application is not warranted, he or she must dismiss the complaint (section 20.5). In other situations, the Commissioner may determine that an application to the Tribunal is warranted.

How does the Commissioner determine that an application to the Tribunal is warranted?

If a settlement is not reached during the investigation, the Commissioner will decide whether an application to the Tribunal is warranted (section 20.4). At this point, the Commissioner will consider the following (subsection 20.4(3)):

- Whether there are reasonable grounds to believe that a reprisal has taken place;
- Whether the investigation could not be completed because of a lack of cooperation;
- Whether it is in the public interest to make such an application; and
- Whether the complaint should be dismissed on the grounds that the Commissioner considered when dealing with the complaint.[6]

In addition, the Tribunal has stated that the Commissioner's threshold for referring an application is lower than the burden of proof applicable to Tribunal proceedings (*El-Helou v Courts Administration Service* (2011-PT-04 at paragraph 35)). As discussed below, the Tribunal determines whether a reprisal has been taken based on the "balance of probabilities". The Commissioner requires only "reasonable grounds" to make a referral, and they are "those that are not absurd, that demonstrate sound judgement or perhaps go beyond a mere bald

[6] Subsection 19.3(1) of the Act states that the Commissioner may refuse to deal with a complaint if he or she is of the opinion that

a) The subject-matter of the complaint has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under an Act of Parliament, other than this Act, or a collective agreement;
b) The complainant is a member or former member of the RCMP, the subject-matter of the complaint has been adequately dealt with by the procedures referred to in subsection 19.1(5) (these latter procedures deal with the disciplinary procedures under the RCMP Act.)
c) The complaint is beyond the jurisdiction of the Commissioner; or
d) The complaint was not made in good faith.

assertion or beyond a mere suspicion" (*El-Helou v Courts Administration Service* (2011-PT-04 at paragraph 37)).

The Commissioner is a distinct party, serving the public interest, when it makes an application for a determination of whether a reprisal was taken against a complainant.

Under Rule 5(*b*) of the Tribunal Rules, the Commissioner must provide a basis for his or her opinion that an application to the Tribunal regarding the complaint is warranted.

After an application has been filed, the Registrar of the Tribunal must provide each party with notice of the filing (Rule 6).

What is the scope of the application that the Commissioner may refer to the Tribunal?

If the Commissioner proceeds with an application, he or she decides on its scope. In deciding the scope of the application, the Commissioner considers the following:

- Whether to include some or all of the allegations in the complaint;
- Whether individual respondent(s) should be named or only the employer;
- Whether an order should be requested regarding a remedy in favour of the complainant, if a reprisal is found to have occurred; and
- Whether to seek only an order regarding a remedy in favour of the complainant or to also add an order regarding disciplinary action against a respondent or respondents named in the application, if reprisal is found to have occurred (*El-Helou v Courts Administration Service* (2011-PT-02, paragraph 28)).

The Tribunal receives jurisdiction to deal with a reprisal complaint only when it receives the Commissioner's application (*El-Helou v Courts Administration Service* (2011-PT-01); and (2011-PT-04 at paragraph 43)).

How does the Tribunal proceed once an application is referred to it?

In considering how the Tribunal will proceed, it is important to remember that its mandate is to determine whether a reprisal occurred in relation to an application that has been referred to it by the Commissioner (sections 21.4 and 21.5).

When the Commissioner refers an application to the Tribunal under section 20.4, the Chairperson of the Tribunal assigns one or three members to the application. The Chairperson assigns a panel of three members for more complex matters (subsection 21.1(1)).

The Tribunal is an independent quasi-judicial tribunal, and its proceedings are conducted as "informally and expeditiously as the requirements of natural justice and the rules of procedure allow" (subsection 21(1)). The Tribunal has broad powers over its rules of procedure (subsection 21(2)). It may also dispense with or vary a rule if doing so allows it to proceed informally and expeditiously while respecting the rights of the parties (Rule 3). Because of this, the Tribunal can develop approaches to ensure that the proceedings are as proactive as possible both before and during the hearing.

The Tribunal's proceedings also support the values and purposes of the Act by giving the parties ample opportunity to be heard. The Tribunal is subject to the constitutionally protected open-court principle, and, therefore, its proceedings and decisions are transparent (*El-Helou v Courts*

Administration Service (2012-PT-01)). The Tribunal's proceedings are conducted *in camera* only by exception when the circumstances require it.

The scope of the application determines the scope of the Tribunal's jurisdiction. For example, the application may include all or only some of the original allegations of a complaint received by OPSIC. In *El-Helou v Courts Administration Service* (2011-PT-01), the Tribunal states that its jurisdiction is restricted to making its determination regarding the allegation(s) in the application. The Tribunal does not have the power to amend an application by adding allegations to it (2011-PT-01, paragraph 89).

What happens before the actual hearing?

Discovery process at the Tribunal

Before the Tribunal holds a hearing, there is a process called "discovery". Similar to other civil adversarial proceedings, discovery is outlined in the Tribunal's procedures and allows each party to obtain information about the case that has to be answered. The process of discovery includes the production of documents and serves an important purpose in allowing the parties to focus more precisely on the issues. This also allows the Tribunal to conduct its proceedings, including the hearing, more effectively and efficiently.

The discovery process begins when each party files a statement of particulars. A statement of particulars must be submitted in ***each*** of the following scenarios:

- Application brought under paragraph 20.4(1)(*a*): The Commissioner refers an application requesting a determination of whether a reprisal was taken against the complainant and

requests that the Tribunal order a remedy should it find that a reprisal was taken (Rule 19(*a*) of the Tribunal Rules);

- Application brought under paragraph 20.4(1)(*b*): This application includes the request for a determination of whether a reprisal was taken against the complainant and an order respecting a remedy for the complainant. This application also includes named respondents and requests disciplinary action, should it be found that a reprisal was taken. In this case, the first statement of particulars addresses only the issue of reprisal, not the issue of disciplinary sanctions (Rule 19(*a*) of the Tribunal Rules);

- The Tribunal has determined that a reprisal was taken in an application under paragraph 20.4(1)(*b*). After the Tribunal has determined that a reprisal was taken in an application under paragraph 20.4(1)(*b*) and determined the remedy for the complainant, a second statement of particulars will address the part of the application that requests disciplinary action against the named respondents (Rule 19(*b*) of the Tribunal's Rules of Procedure).

More details about the discovery process for each of these scenarios are provided below.

Discovery: Application brought under paragraph 20.4(1)(a) of the Act

When the application is brought under paragraph 20.4(1)(*a*) of the Act, the parties are the Commissioner, the complainant and the employer. In this type of application, the Commissioner is not adding named respondents or seeking an order for disciplinary action.

Under subsection 21.4(3), however, the Tribunal may add a person as a party if that person might have taken the alleged reprisal and may be affected by a determination (*El-Helou v Courts Administrative Services* (2001-PT-03) paragraph 44).

The discovery process addresses the merits of the application. It also addresses the issue of remedy if the Tribunal finds that a reprisal has occurred.

Discovery: Application brought under paragraph 20.4(1)(b) of the Act

Where an application is brought under paragraph 20.4(1)(b) of the Act, the parties to the proceedings are the Commissioner, the complainant, the employer and one or more named respondents. This discovery process has two stages.

The first stage is discovery regarding whether a reprisal has occurred and whether an order of remedy should be made. In other words, this is discovery on the merits of the application: has a reprisal been taken against the complainant, and, if so, should the Tribunal order a remedy? If the Tribunal finds that a reprisal has occurred, the Registrar of the Tribunal must provide each party with reasons issued by the Tribunal and serve notice that all parties have been provided reasons (Rule 22(1)).

The second stage of the discovery process addresses disciplinary action and takes place only if the Tribunal finds that one or more of the named respondents has taken a reprisal against the complainant. Subsection 21.5(4) of the Act states that the Tribunal may make an order respecting the disciplinary action to be taken against any person who was determined to have taken the reprisal after issuing its reasons as to whether or not the complainant has been the subject of reprisal.

Rule 22(2) of the Tribunal Rules provides time limits for filing the statement of particulars relating to disciplinary action. The time limits begin only after the Tribunal has determined that a reprisal was taken against the complainant and the parties have been provided with reasons.

How does the Tribunal ensure that it conducts its proceedings proactively?

Like many other administrative tribunals, the Public Servants Disclosure Protection Tribunal has a statute that grants it a general power over its procedures. The Rules provide a procedural guidepost for parties before the Tribunal and must be interpreted liberally with the aim of conducting proceedings as informally and as expeditiously as possible while respecting the rights of the parties (Rule 2). If necessary, the Tribunal may vary a Rule or dispense with compliance with a Rule if doing so advances the aims of conducting informal and expeditious proceedings while respecting the rights of the parties (Rule 3).

As master of its own proceedings, the Tribunal has developed steps to ensure that its proceedings are fair, effective and efficient. They include the following:

- Using case conferences to ensure that the parties are prepared for the hearing;
- Using the Joint Book of Documents to streamline disclosure of documents where possible;
- Using an agreed statement of facts where possible;
- Access to non-mandatory approaches to alternate dispute resolution such as settlement conferences and mediation; and
- Addressing most if not all preliminary motions before the hearing is held.

***Case Conferences**:* The Tribunal typically requests a case conference early in the process, once the statements of particulars and the replies to the statements of particulars have been filed. As well, a party may request a case conference at various points to clarify matters.

A pre-hearing case conference is scheduled before the hearing to ensure that the hearing is conducted without unnecessary delays. The pre-hearing case conference will also be used to

outline the order in which the parties will present their evidence and to ensure that all issues pertaining to disclosure have been addressed.

For more information, please consult the Tribunal's statement on case management and pre-hearing conferences.

***Joint Book of Documents**:* Once all parties have had an opportunity to file their statements of particulars and to reply to other parties' statements of particulars, the Tribunal will require the parties to submit a Joint Book of Documents.

An additional Joint Book of Documents will be required for the two-stage discovery process described above, that is, when the application includes individual respondents and a request for disciplinary action. This will only happen if the Tribunal finds that a reprisal has been taken against the complainant.

A Joint Book of Documents should contain all the documents that the parties intend to provide as evidence as well as a list of all the documents.

In this list, the parties are asked to provide the following:

- Title of the document;
- Date of the document;
- Whether the document will be admitted as to authenticity;
- Whether the document will be admitted as to the truth of its content;
- Whether the document is subject to a previously issued confidentiality order;
- Whether there is an anticipated motion for a confidentiality order.

For more information, please consult the Tribunal's statement on the use of a Joint Book of Documents.

Agreed Statement of Facts: The parties may agree to put together an agreed statement of facts, but this is not mandatory.

Settlement Conferences and mediation: Although they are not mandatory, settlement conferences may be conducted by the Tribunal. In some instances, the Tribunal may also examine the possibility of other alternative approaches to resolving the dispute.

Motions*:* A motion is a formal request for a tribunal to do something at an intermediate stage of the proceedings. Throughout the lifespan of a case before the Tribunal, it is possible that a party will make certain requests related to the Act or to the Rules in the form of a motion.

When a party makes a preliminary motion, it requires a tribunal to address a procedural requirement related to fairness, to the admissibility of evidence or to statutes or rules. Normally, a tribunal will want to address these motions before the hearing to ensure greater efficiency and to prevent requests for last-minute adjournments of the hearing. Unless the motion is premature, this will generally ensure a fairer and more effective and efficient hearing process.

A wide variety of motions can be made in the course of a hearing. A motion should be brought as soon as possible once a party determines that there is a question that the Tribunal must address. For example, subsection 21.4(3) of the Act allows a party to be added if the Tribunal is of the opinion that a person who may have taken a reprisal could be directly affected by a

determination. Preliminary proceedings such as motions for the addition of parties (Rule 12) or other motions regarding procedure or evidence (Rules 13-18), may take place before a hearing. A motion might involve a party's request for an extension of time to fulfill a requirement under the Act or under the Tribunal Rules. In some cases, a motion may request the removal of a party in an application.

When the Tribunal issues its reasons for decision on a motion, they are considered interlocutory. The term "interlocutory" refers to the fact that the reasons for decision were issued at an intermediate stage of the proceedings and the decisions are not final.

The Tribunal commented on preliminary motions that may be premature or may pre-empt the hearing in three of its interlocutory decisions: *El-Helou v Courts Administration Service*, 2011-PT-02; 2011-PT-03; 2011-PT-04. In one of these decisions, it considered the nature of the Act, its mandate and the applications before it. The Tribunal stated that an "over-adherence to preliminary actions" (*El-Helou v Courts Administration Service* (2011-PT-02, paragraph 57)) such as motions for summary judgement could be premature. These types of motions could deprive the parties of having a full opportunity to present their evidence and arguments. Overuse of preliminary actions could also undermine the purposes of the Act thus reducing confidence in the legislation.

What are the general steps of a hearing?

As mentioned earlier, the Tribunal has broader powers of inquiry than the Commissioner in performing its adjudicative role. The Tribunal has the power to conduct hearings with the full

powers of inquiry of federally appointed judges. It may, for example, add parties as necessary (subsection 21.4(3)) either on its own motion or on the filing of a motion (*El-Helou v Courts Administration Service* [2011-PT-02, paragraphs 49-56)]. It also has the power to summon and enforce the attendance of witnesses and to compel them to give evidence on oath, to administer oaths, to receive and accept evidence on oath or by affidavit, and to rule on any procedural or evidentiary matter (subsection 21.2(1)).

The Tribunal can determine whether the complainant was the subject of a reprisal and whether the actions of a person identified in the Commissioner's application constituted a reprisal (subsection 21.5(1)). If the Tribunal determines that a reprisal was taken, it may grant a remedy to the complainant.

If it is found that a reprisal has been taken and the Commissioner has also made an application for an order of disciplinary action, a second hearing regarding disciplinary action is held.

The general steps in a hearing are discussed below. These include the following: (1) the opening statement, presentation of evidence and closing submissions; (2) the weight of evidence that must be attained to find that a reprisal has been taken.

Opening statement, presentation of the evidence and closing submissions

An opening statement allows each party to provide general comments on its case. It is an overview of the case that the party intends to present. The opening statement is not evidence and can never be considered as evidence. The opening statement simply allows the party to

identify the evidence that will be introduced and the issues and arguments that will be relied upon.

After making their opening statements, each party will present its case (sections 20.4 and 21.6).

While there is no mandatory sequence for parties to present their cases, the Tribunal has stated that, generally, it follows the order in which the parties are identified in section 20.6 of the Act, when the Commissioner gives notice of the application. Therefore, the first party to present would be the complainant, followed by the employer and then by any individual respondents (see paragraphs 20.6(*a*) to (*d*)). Interested parties will then be heard if they were previously added by the Tribunal.

When a party presents evidence, the general sequence for witnesses is as follows:

Examination in chief: Each witness is examined by the party who called him or her or by the party's representative if there is one.

Cross-examination: The other parties may then cross-examine each of the witnesses, subject to any restrictions that the Tribunal may impose.

Re-examination: The party who originally called the witness may then re-examine the witnesses who have been cross-examined if questions came up in cross-examination that could not have been expected during the examination in chief.

At the end of the hearing, each party is given an opportunity to present closing submissions. The closing submissions summarize the evidence and arguments of the party. The party may also refer to decisions made by the Tribunal or other decisions.

What is the weight of evidence required for the Tribunal to determine that a reprisal has occurred?

The standard of proof applicable to the Tribunal's determinations is the balance of probabilities, that is, the weight of the evidence must show that it is more likely than not that the facts alleged occurred. This is consistent with many other administrative proceedings and with civil proceedings. Note that this standard of proof is lower than that of criminal court proceedings, which places on the Crown a burden of proof beyond all reasonable doubt.

In *El-Helou v Courts Administration Service* (2011-PT-04), the Tribunal stated that the onus of proof rests with the complainant. It emphasized, however, that the nature of reprisals is such that, in certain situations, the Tribunal may determine that the possibility of dismissing an application before it will not turn solely on what evidence is presented in the complainant's case or with the evidence presented in the complainant's and the Commissioner's cases. The Tribunal may find it necessary to hear evidence from the respondent to decide whether an application will be dismissed or allowed.

It also stated that, in some situations, it is possible that the respondent, the employer or both decide to simply deny the complainant's arguments that reprisal occurred. The Tribunal examined the mandate of the Act and stated that, in these situations, the Tribunal may draw inferences in the absence of a response from the employer, the respondent(s) or both. In other

words, where the complainant or the Commissioner have made assertions regarding the reprisal, and they are not bald assertions, the Tribunal may draw negative inferences if these statements are not addressed by the respondent or by the employer in their arguments and evidence (at paragraphs 50 and 51).

Determination of whether a reprisal was taken

After the hearing, the Tribunal will weigh the evidence and arguments and determine whether or not a reprisal has occurred (section 21.5). If the application has one or more named respondents, the Tribunal will also determine whether the person(s) alleged to have taken the reprisal did in fact take the reprisal.

It may become evident over the course of the hearing that, although a reprisal occurred, the person named in the application did not commit it. The Tribunal may grant a remedy to the complainant regardless of whether the person(s) named in the application committed the reprisal.

Determination of remedy

Available remedies can be tailored to the measures necessary. The Tribunal may order the employer, former employer, chief executive or any person acting on their behalf to do any or a combination of the following:

- Permit the complainant to return to his or her duties;
- Reinstate the complainant or pay compensation in lieu of reinstatement (if a relationship of trust cannot be restored between parties);

- Pay to the complainant compensation equivalent to the remuneration that would have been paid if the reprisal had not occurred;
- Rescind any measure or action and pay compensation to the complainant in an amount equivalent to any penalty imposed on the complainant;
- Pay to the complainant amounts for expenses incurred as a result of the reprisal; or
- Compensate the complainant for pain and suffering as a result of the reprisal up to $10,000 (subsection 21.7(1)).

The Tribunal may limit the parties to a proceeding regarding remedy (subsection 21.6(3)), for example, by excluding the participation of a person found to have taken a reprisal.

Determination of disciplinary measures

If there are named respondents in the application and the Commissioner has requested disciplinary sanctions against them if they are found to have taken a reprisal, then an additional determination regarding discipline will be made. Only those who were named as respondents in the application can be subject to disciplinary measures. At this stage, the proceedings will include the Commissioner, the person(s) found to have taken the reprisal and any person designated by the Tribunal to make submissions on disciplinary action, which a person or entity would be required to implement (subsection 21.5(5)).

The Tribunal may order the Governor in Council, the employer, chief executive or representative to take disciplinary action against any person determined to have taken a reprisal. This includes termination or revocation of the person's appointment in the public service (subsection 21.8(1)).

When making an order regarding discipline, the Tribunal will take into consideration such factors as:

- The gravity of the reprisal;
- The level of the person's position;
- The person's previous employment record;
- Whether the incident was isolated;
- The person's rehabilitative potential; and
- The deterrent effect of disciplinary action (subsection 21.8(2)).

The Tribunal will also consider other factors that reflect the broad purposes of the Act such as encouraging integrity in the public service. The Tribunal must therefore also consider the following:

- The degree to which this reprisal discourages the disclosure of wrongdoing; and
- The extent to which inadequate disciplinary action would result in a detrimental effect on the confidence in public institutions (subsection 21.8(3)).

It is not possible for a person against who disciplinary action is taken to launch a grievance under federal legislation or a collective agreement (subsection 21.8(4)).

Availability of judicial review of the Commissioner's decisions and Tribunal orders and determinations

The Commissioner's decisions are final. A request to reconsider the Commissioner's decision regarding the way he or she has dealt with a complaint can be reviewed only through judicial review in Federal Court. Subsection 18.1(1) of the *Federal Courts Act* (RSC 1985, c-F-7) enables

anyone directly affected by a decision of a federal commission, board or tribunal to file an application for judicial review.

For example, an individual may be dissatisfied with the Commissioner's decision on a reprisal complaint regarding such matters as screening, admissibility, investigation, referral of an application to the Tribunal and the scope of such an application (e.g., if only some allegations of the complaint are referred in an application). In this case, a person who is directly affected by the decision may apply to the Federal Court for judicial review of the Commissioner's decision. The Tribunal's decision can also be subject to judicial review at the Federal Court of Appeal (section 51.2 of the Act, paragraph 28(1)(*q*) of the *Federal Court Act*).

The grounds for relief regarding decisions of the Commissioner or Tribunal are listed under subsection 18.1(4) of the *Federal Courts Act* and include:

- Acting without or beyond jurisdiction or refusing to exercise jurisdiction;
- Failing to observe a principle of natural justice or procedural fairness;
- Erring in law in making a decision or order;
- Erring in fact in a perverse or capricious manner or without regard for the material before it;
- Acting or failing to act by reason of fraud or perjured evidence; or
- Acting in a way contrary to law.