



Office of the
Conflict of Interest and
Ethics Commissioner

Commissariat aux
conflits d'intérêts et
à l'éthique

**Report on alleged
wrongdoing by a
tribunal member**
Referral from the Public
Sector Integrity Commissioner

2020

July 2020



Mario Dion

Conflict of Interest and
Ethics Commissioner

Report on alleged wrongdoing by a tribunal member
made under the *CONFLICT OF INTEREST ACT*

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PREFACE

The *Conflict of Interest Act*, S.C. 2006, c.9, s. 2 (Act) came into force on July 9, 2007.

Pursuant to section 68 of the Act, if a matter is referred to the Conflict of Interest and Ethics Commissioner by the Public Sector Integrity Commissioner under subsection 24(2.1) of the *Public Servants Disclosure Protection Act*, the Conflict of Interest and Ethics Commissioner must provide a report to the Prime Minister setting out the facts in question as well as the Commissioner's analysis and conclusions in relation to the referral. A copy is provided to the public office holder or former public office holder who is the subject of the report and to the Public Sector Integrity Commissioner. The report is also made public.

01 Referral

03 Process

04 Facts and Analysis

07 Conclusion

REFERRAL

[1] Pursuant to the *Public Servants Disclosure Protection Act*, the Public Sector Integrity Commissioner is mandated to review and report on disclosures of wrongdoing by public servants. However, where the subject matter of any disclosure received is within my jurisdiction as Conflict of Interest and Ethics Commissioner, the Public Sector Integrity Commissioner must, under subsection 24(2.1) of the *Public Servants Disclosure Protection Act*, refer the matter to this Office.

[2] If, having received a referral in this manner, I have reason to believe that the public office holder who is the subject of the referral has contravened the *Conflict of Interest Act* (Act), I may commence an examination under section 45 of the Act. Even if I do not launch an examination under such circumstances, section 68 of the Act nevertheless requires that I issue a public report setting out the facts in question and my analysis and conclusions.

[3] In this case, in a letter dated January 21, 2020, the Public Sector Integrity Commissioner referred to me, under subsection 24(2.1) of the *Public Servants Disclosure Protection Act*, allegations of a conflict of interest contained in disclosures made by two members of a federal administrative tribunal against another member of the same tribunal. This administrative tribunal is referred to as the “Tribunal” in this report.

[4] During the period relevant to the case, the Tribunal member who was the subject of the conflict-of-interest allegations was assuming managerial duties with respect to other members in the same division, including the two disclosers, and is referred to as the Acting Manager (A/M) in this report.

[5] According to the disclosers, the A/M sought expressions of interest in an opportunity to work on an occasional basis for another division of the Tribunal from members under the A/M’s administrative responsibility and received several such expressions of interest, including from the disclosers. Around the same time, the A/M was conducting performance evaluations of those same members. The A/M subsequently took part in training on the type of cases pertaining to the Tribunal’s other division and was appointed to that division shortly thereafter.

[6] The disclosers alleged that because the A/M was competing with other Tribunal members in a selection process where performance evaluations would be considered, the A/M was in a conflict of interest when conducting these performance evaluations. Additionally, the A/M knew which members had expressed interest in the opportunity to work with the other division, but had not disclosed being interested in the same opportunity to these members.

[7] One of the disclosers further alleged having intentionally been given an unfounded evaluation that increased the A/M’s own chances of being selected. According to the other discloser, the A/M had the opportunity to further not only her or his own private interests by virtue of being in a supervisory position, but also those of another Tribunal member, alleged to be

a personal friend of the A/M, based on the fact that this member was also selected to attend the same training.

[8] Finally, the disclosers claimed that the training the A/M received as a result of having acted while in a conflict of interest had provided an unfair advantage that eventually led to the A/M's appointment to the Tribunal's other division.

PROCESS

[9] Both disclosers contacted the Office of the Conflict of Interest and Ethics Commissioner separately on February 13, 2020, to provide further details regarding their allegations. The first discloser provided a memorandum accompanied by supporting documents in the form of written communications with the subject of the allegations and with others at the Tribunal. The second discloser provided a memorandum only.

[10] Having gained a better understanding of the allegations, I wrote to the subject of the allegations on March 4, 2020, that I had received a referral from the Public Sector Integrity Commissioner. In my letter, I summarized the allegations and invited comments on them. I also noted that I would consider the response provided in determining whether to commence an examination under section 45 of the Act or whether to proceed directly with the publication of the required report without the need to gather additional information.

[11] On March 27, 2020, the subject provided a detailed written response setting out an extensive chronology of events. The subject denied having been in a conflict of interest.

[12] On April 1 and 2, 2020, I wrote to the second discloser and to the subject of the allegations, respectively, to ask them to provide certain documents in support of the information contained in their written submissions. I received the requested supporting documents and further submissions from this discloser and from the subject on April 3 and 10, 2020, respectively.

[13] I also received additional written comments and documents from the second discloser on May 4 and 5, 2020.

[14] After having considered all of the information received from the disclosers and the subject relating to the allegations set out in the referral, I determined that I did not have any reason to believe that the subject of the allegations may have contravened the Act. Therefore, I did not commence an examination under the Act and proceeded to prepare this report.

[15] Having considered a number of factors including the lack of any prior public attention to this matter, I have determined that there would be no benefit in identifying anyone involved in the matter and have drafted the report in a way that strives to preserve anonymity and avoid any reputational harm.

FACTS AND ANALYSIS

Facts

[16] The subject of the allegations has served as a member of the Tribunal since 2017. In 2019, the subject was asked to take on a managerial role on a temporary basis.

[17] In May 2019, the subject of the allegations, now Acting Manager (A/M), was directed to conduct the performance evaluations of other Tribunal members in the same division. These evaluations would consist of a self-assessment by each Tribunal member, which the A/M would then comment on in writing and discuss with each one at a bilateral meeting. In addition to strengths and areas for improvement, performance evaluations also addressed members' collegiality.

[18] On June 17, 2019, the second discloser provided the A/M with a self-assessment. In the evaluation form, on the issue of collegiality, the second discloser noted having a good working relationship with other Tribunal members as well as having made positive adjustments with regard to appreciating the different communication styles that exist at the Tribunal.

[19] Documents provided by the second discloser showed that two weeks later, this member communicated by email with staff of the Tribunal regarding an internal issue. These exchanges were brought to the A/M's attention because the tone of the member's messages to the staff had raised some concerns. According to the documents, these concerns were then raised by the A/M with the second discloser.

[20] By the end of July 2019, the A/M had completed final comments on all performance evaluations and sent them back to the individual members. The second discloser stated in a written submission to me that the A/M's comments included a negative comment about collegiality. The second discloser disagreed with that comment and intended to raise it at the subsequent discussion with the A/M, which ultimately occurred on August 22, 2019.

[21] On August 15, 2019, the A/M's assistant sent an email seeking expressions of interest from members "interested in working on an as needed basis" for the Tribunal's other division and asking members to respond directly to the A/M. Over the next two days, five members expressed their interest by sending an email to the A/M. These interested members included the two disclosers as well as the member alleged by the first discloser to be the A/M's friend.

[22] On August 17, 2019, the A/M sent an email to the Tribunal's Chair, listing the names of the five members who had expressed an interest in working for the other division and adding: "Subsequent to our conversation, I offer my services as well." In written submissions, the subject of the allegations explained that, not being interested in working for the other division, the list communicated initially contained only the five names. However, the Chair had called to ask the

A/M to reconsider, since those in a managerial role are generally trained to hear cases in that other division should the need arise.

[23] In September 2019, an email was sent by Tribunal staff to four members, including the two disclosers, to notify them that they had not been selected to attend the upcoming training.

[24] The training took place in the following weeks and was attended by five members from various divisions of the Tribunal, including the subject of the allegations and the member referred to by the first discloser as the subject's friend.

[25] Subsequently, the subject of the allegations was appointed to the Tribunal's other division by the Governor in Council. According to the subject, as a result of an organizational need, the subject was approached a few weeks earlier by the Tribunal's administration regarding the possibility of an appointment to that division. The subject had indicated at the time a willingness to be appointed to the other division should that better serve the needs of the Tribunal.

Analysis

[26] The central allegation by the disclosers is that the subject was in a conflict of interest by entering a competitive process while at the same time having the opportunity to influence that process. Then, instead of resolving that conflict, the subject is alleged to have acted improperly to further her or his own interest, as well as that of a friend, by failing to be transparent about her or his own expression of interest for training and by identifying unfounded issues in a performance evaluation that would have been expected to determine the selection of participants in the training.

[27] However, in light of the information contained in the subject's response, it appears that these allegations were not based on an appreciation of all relevant facts, some of which were likely unknown to the disclosers.

[28] To begin, the performance evaluations were self-assessments—a fact omitted by both disclosers—to which the subject, as the A/M, appended a few paragraphs of general comments. Having reviewed the second discloser's performance evaluation, I did not find that the subject's comments deviated in substance from the member's own self-assessment. More importantly, the subject wrote those comments sometime in July 2019, at least two weeks before the call for expressions of interest in work for the other division was issued. Therefore, the subject did not have any knowledge of an upcoming opportunity for training at the time the comments to the evaluation were added. Then, once the call for expressions of interest was issued, the subject expressed such interest only after having been encouraged to do so by the Chair.

[29] In my view, a review of the timeline of events does not support the allegation that the subject acted in any way to increase the chances of being selected or to similarly further the private interests of another Tribunal member alleged to be a personal friend.

[30] Regarding the discussion that occurred on August 22, 2019, between the subject of the allegations and the second discloser, there was no indication that the written comments were modified following the call for expressions of interest. Any further examination of this discussion would fall outside my mandate.

[31] On the broader issue of the conflict of interest perceived by the disclosers, I found no reason to believe that the call for expressions of interest in working on cases pertaining to another division should have been viewed as a process in which members were competing against one another. According to the Tribunal's own statutory authority, the Chair has the discretion to assign members to work on cases pertaining to any division. It therefore seems reasonable for the Chair to seek to inform the exercise of that discretion with the knowledge of which members are interested in taking on that sort of work.

[32] Finally, all rank and file members of the Tribunal are remunerated on the same pay scale, regardless of their assigned division. As a result, it is far from obvious to me that the opportunity for a member to attend in-house training indeed constitutes a private interest within the meaning of the *Conflict of Interest Act*, even if this training could increase the member's chances of being later appointed to another division.

CONCLUSION

[33] Based on the information I received from the disclosers and from the subject of the allegations, I have no reason to believe that the subject may have contravened the Act. I will, therefore, not initiate an examination under section 45 of the Act and consider the matter closed.

A handwritten signature in black ink, appearing to read "Mario Dion". The signature is fluid and cursive, with the first name "Mario" and the last name "Dion" clearly distinguishable.

Mario Dion
Conflict of Interest and Ethics Commissioner

July 9, 2020