Federal Court of Appeal | Cour d'appel fédérale

**Date: 20220119**

**Docket: A-407-19**

**Citation: 2022 FCA 10**

**CORAM:** **GAUTHIER J.A.**
**DE MONTIGNY J.A.**
**LEBLANC J.A.**

**BETWEEN:**

**ALEXANDRU-IOAN BURLACU**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on December 1, 2021.

Judgment delivered at Ottawa, Ontario, on January 19, 2022.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: GAUTHIER J.A.
DE MONTIGNY J.A.

Federal Court of Appeal  Cour d'appel fédérale

**Date: 20220119**

**Docket: A-407-19**

**Citation: 2022 FCA 10**

**CORAM:** **GAUTHIER J.A.**
**DE MONTIGNY J.A.**
**LEBLANC J.A.**

**BETWEEN:**

**ALEXANDRU-IOAN BURLACU**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## REASONS FOR JUDGMENT

**LEBLANC J.A.**

[1] The appellant, a Senior Program Officer with the Canada Border Services Agency (the CBSA), appeals from a judgment of Justice Gleeson of the Federal Court, reported at 2019 FC 1215, [2019] F.C.J. No. 1206 (QL/Lexis) (the Federal Court Decision), dismissing his application for judicial review of a decision of the Public Sector Integrity Commissioner (the Commissioner).

[2] In his decision, the Commissioner determined that he would not conduct an investigation into disclosures of wrongdoing made by the appellant under the *Public Servants Disclosure Protection Ac*t, S.C. 2005, c. 46 (the Act) in which the appellant alleged having witnessed wrongdoings by CBSA and Immigration, Refugee and Citizenship Canada (IRCC) officials as well as by a member of the Immigration and Refugee Board of Canada (the IRB), in the application of the *Immigration and Refugee Protection Ac*t, S.C. 2001, c. 27 (IRPA) and the *Citizenship Act*, R.S.C. 1985, c. C-29, as it read from April 17, 2009 to February 5, 2014 (the *Citizenship Act*).

## I. The Disclosures at Issue

[3] The appellant made three disclosures:

a) The first one concerns the decision of an IRB member to detain an individual found to have obtained Canadian citizenship by fraud, pending his removal from Canada (Disclosure 334). The alleged wrongdoing here is that detention was ordered while the individual's Canadian citizenship had yet to be revoked through the formal revocation process set out in the *Citizenship Act*. In the appellant's view, the decision to detain the individual in such context was contrary to IRPA, which only allows, for immigration purposes, the detention of foreign nationals or permanent residents;

b) The second disclosure concerns the actual removal of that individual through the combined efforts of IRCC and CBSA officials (Disclosure 335). The appellant claimed that that individual could not be removed from Canada because, again, his

Canadian citizenship needed first to be revoked through the formal revocation process set out in the *Citizenship Act*. He said that although that process had been initiated, these officials decided not to pursue it, opting instead to proceed with removal on the basis of an affidavit from an IRCC employee stating that that individual had never acquired a valid status in Canada and never was, therefore, a Canadian citizen;

c) The third disclosure involves a decision of IRCC officials to delay, due to inadmissibility concerns, the issuance of travel documents to two permanent residents having outstanding matters before the Immigration Appeal Division (the IAD) and wishing to travel back to Canada (Disclosure 336). According to the appellant, these individuals were entitled to these documents pursuant to IRPA and there was no legal justification for delaying their issuance nor, as they were abroad, was there any legal justification for requiring the IRB to look into the inadmissibility concerns and do so *in abstentia*, if needed.

[4] The appellant claimed that the officials involved in these decisions committed a wrongdoing within the meaning of paragraph 8(*a*) of the Act by contravening an Act of Parliament. Except for Disclosure 334, he further claimed that these officials, by their conduct, seriously breached the *Values and Ethics Code for the Public Sector* in addition to knowingly directing or counselling someone to commit a wrongdoing, contrary to paragraphs 8(*e*) and (*f*) of the Act, respectively. Finally, he contended that the conduct disclosed in Disclosures 335 and 336 amounted to criminal conduct prohibited by subsection 126(1) of the *Criminal Code*, R.S.C.

1985, c. C-46, and in the case of Disclosure 336 alone, conduct prohibited by paragraph 129(1)(*a*) of IRPA.

[5] Subsection 126(1) of the *Criminal Code* makes it a crime to contravene an Act of Parliament, without lawful excuse, by intentionally doing anything it forbids or intentionally omitting to do anything that it requires to do. Paragraph 129(1)(*a*) of IRPA makes it an offence for an officer or employee of the Government of Canada to knowingly make or issue any false document or statement, or accept or agree to accept a bribe or other benefit, in respect of any matter under that Act, or to knowingly fail to perform their duties under it.

## II. The Commissioner's Decision

[6] By letter dated February 22, 2018, the Commissioner refused to commence an investigation into these disclosures. He set out the task he had to perform in this fashion:

> In order to determine whether an investigation is warranted under the Act, I must first assess whether the disclosure concerns a wrongdoing as defined at section 8 of the Act. I must also consider sections 23 and 24 of the Act which list restrictions and the discretionary factors that I may take into account in deciding whether to deal with a disclosure or commence an investigation.
>
> (Commissioner's Letter of Decision at page 2)

[7] The Commissioner refused to deal with Disclosure 334 because subsection 24(2) of the Act prohibits him from dealing with a disclosure where, in his view, the subject matter of the disclosure relates solely to a decision made in the exercise of an adjudicating function under an

Act of Parliament. The appellant did not challenge that finding in the Federal Court. Disclosure 334 is therefore not at issue in this appeal.

[8] Regarding Disclosures 335 and 336, the Commissioner found that there was a "valid reason", as per paragraph 24(1)(*f*) of the Act, for not dealing with them as it did not appear to him that a wrongdoing had occurred in either instance.

[9] Insofar as Disclosure 335 is concerned, that finding was based on the Commissioner's understanding that (*i*) CBSA and IRCC had the statutory authority, under the *Citizenship Regulations*, SOR/93-246 (the Regulations) and IRPA, to cancel the individual's citizenship certificate and subsequently proceed with his removal from Canada; (*ii*) the appellant's complaints regarding this course of action amounted to a disagreement as to the application of the Regulations and IRPA; (*iii*) such course of action was approved following consultations, thereby suggesting that it was the result of an informed process; and (*iv*) there were recourse mechanisms available to the individual affected by this course of action to challenge the decisions to strip him of his citizenship certificate and remove him from Canada. With respect to Disclosure 336, the Commissioner's conclusion was based on his understanding that (*i*) the appellant's complaints amounted to a disagreement regarding the application of IRPA and that (*ii*) the two individuals affected by the delaying of the issuance of the requested travel documents had legal recourses to challenge that decision.

## III. The Federal Court's Decision

[10] The Federal Court, applying the standard of reasonableness, refused to interfere with the Commissioner's decision. It first noted that the proper forum to address the legal validity of the citizenship revocation decision, removal decision and the decision to not issue travel documents, which underlie the appellant's disclosures, was judicial review, not the disclosure mechanism set out in the Act, as "Parliament has not mandated the Commissioner to judicially review the decisions of other administrative decision makers, nor has the Commissioner been mandated to judicially interpret legislation" (Federal Court Decision at paras. 34-36). The Federal Court then rejected the appellant's claim that paragraph 24(1)(*f*) of the Act cannot be interpreted as an all-inclusive basket clause because this would render paragraphs (*a*) to (*e*) unnecessary. It held that such an interpretation would be contrary to the intent of the Act, which confers on the Commissioner broad discretionary powers to deal with disclosures, "including the ability not to deal with a disclosure that would otherwise satisfy the definition of wrongdoing" (Federal Court Decision at para. 42).

[11] Finally, the Federal Court was satisfied that the Commissioner's refusal to take further action in this case was reasonable, noting that the Commissioner's decisions under sections 8 and 24 of the Act were owed a significant degree of deference, given the broad discretion granted to the Commissioner by Parliament. In particular, it held that although the Commissioner's reasons for decision were "far from perfect" in that they could have "more clearly delineated the analysis being undertaken and explicitly addressed and commented on all of the evidence provided with the disclosures", they were sufficient to allow it to understand why the Commissioner refused to take further action and to determine whether that decision falls within the range of legally acceptable outcomes (Federal Court Decision at paras. 48-50).

## IV. The Appellant's Position

[12] The appellant claims that the Federal Court erred in its interpretation of paragraph 24(1)(*f*) of the Act by failing to engage in a bilingual analysis and by relying on case law that suffers from that same defect. He also takes issue with the Federal Court's characterization of his "central submission" on the Commissioner's role. The appellant contends in this respect that that role, given the Act's definition of "wrongdoing", is to "take a position as to what the law requires be done or not be done" as this is the only way that the Commissioner can "determine whether there has been 'a contravention' of the law or regulation". It is not, contrary to the Federal Court's characterization of his central submission, that of "judicially review[ing] the decisions of other administrative decision makers" or "judicially interpret[ing] legislation" (Appellant's Memorandum of Fact and Law at para. 56).

[13] The appellant further contends that the Commissioner's decision not to investigate Disclosures 335 and 336 is unreasonable on the basis that (*i*) the Commissioner failed to meaningfully address his submissions; (*ii*) the reasons for decision lack the requisite degree of justification, intelligibility and transparency; and (*iii*) the reason advanced for not dealing with the disclosures at issue, which were made to bring to light violations of the rule of law, is not "valid" as it runs contrary to the Act's primary objective of enhancing public confidence in the integrity of public servants.

## V. Issue and Standard of Review

[14] It is trite law that when sitting on appeal from a decision of the Federal Court on a judicial review application, this Court must determine whether the Federal Court chose the appropriate standard of review and, if so, whether it properly applied it in reviewing the administrative decision. This requires the Court to "step into the shoes" of the Federal Court and effectively focus on the administrative decision under review (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47). As recently stated by the Supreme Court in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 12 W.W.R. 1 (*Horrocks*), "[t]his approach accords no deference to the reviewing judge's application of the standard of review;" it rather requires the Court to "perform[] a *de novo* review of the administrative decision" (*Horrocks* at para. 10).

[15] Based on prior case law, including this Court's decision in *Agnaou v. Canada (Attorney General)*, 2015 FCA 30, 476 N.R. 156 at paragraph 35 (*Agnaou*), Gleeson J. reviewed the Commissioner's decision on a standard of reasonableness. This was prior to the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*) though, where that Court re-examined its approach to judicial review of administrative decisions. In that case, the Supreme Court held that when reviewing such a decision, the reviewing court "should start with the presumption that the applicable standard of review for all aspects of that decision", including those related to the interpretation of the decision maker's home statute, "will be reasonableness" (*Vavilov* at paras. 25 and 115).

[16] It is not disputed that Gleeson J.'s choice of the reasonableness standard of review remains valid under the *Vavilov* framework. Indeed, reasonableness was the proper choice as

there is no basis upon which the presumption in favour of that standard, which can only be rebutted in a limited number of circumstances (*Vavilov* at para. 69), could have been displaced in this case.

[17] Therefore, "stepping into the shoes" of the Federal Court, the issue for this Court in this appeal is to determine whether the Commissioner's decision is reasonable. This issue, in my view, raises the following two questions:

(i) Is the Commissioner's finding that no wrongdoing occurred reasonable?

(ii) If so, was it reasonably open to the Commissioner not to investigate the disclosures at issue?

[18] In answering these questions, our task is not to decide the issue ourselves according to our own yardstick or determine what the correct decision would have been. Our role is rather to approach the reasons provided by the Commissioner with "respectful attention", with a view to understanding the chain of analysis and ensuring that the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law that constrain the Commissioner (*Vavilov* at paras. 83-86; see also *Dunsmuir v. New-Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47).

[19] Again, this is no different where the point in issue entails the interpretation by the decision maker of its home statute. As cautioned by the Court in *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, 337 A.C.W.S. (3d) 380 (*Mason*)), reviewing courts "should not make any definitive judgments and conclusions themselves" on the statutory

interpretation component of a reasonableness review as "[t]hat would take them down the road of creating their own yardstick and measuring the administrator's interpretation to make sure it fits" (*Mason* at para. 17).

## VI. Analysis

### A. *The Commissioner's Finding that No Wrongdoing Occurred is Reasonable*

[20] A *de novo* reasonableness review of the Commissioner's decision leads me to the conclusion that there is no basis to interfere with it. The thrust of that decision is that no wrongdoing within the meaning of section 8 of the Act occurred, be it in the circumstances set out in Disclosure 335 or those set out in Disclosure 336. In the Commissioner's view, the appellant's complaint was in the nature of a disagreement as to the manner in which the *Citizenship Act* and IRPA were applied in those two fact-specific instances.

[21] It is important, at this point, to underscore what the core of the appellant's position has been throughout these proceedings. That position, which is encapsulated in paragraphs 2 to 4 and 56 of the appellant's Memorandum of Fact and Law, can be summarized as follows:

(i) Public servants cannot pretend not to know what the law and jurisprudence say and take measures that run contrary to them until and unless the Federal Court rules otherwise on the specific facts of any given case;

(ii) Allowing this to happen, especially in cases where no one has an interest or the ability to seek judicial review, would lead to situations of evident abuse;

(iii)This is the very type of wrongdoing situation the Commissioner was created to investigate and prevent; to do that, he "must take a position as to what the law requires be done or not be done";

(iv) Any contrary view would exclude from the application of the Act most of the day-to-day work of entire segments of the Federal public service administration, upset the public interest in upholding the rule of law and run counter to Parliament's stated objective of maintaining and enhancing public confidence in the integrity of public servants.

[22] What I gather from this—as well as from the appellant's oral submissions at the hearing of this appeal—is that any alleged error of law or mixed fact and law committed by public servants in the application or administration of a statute or regulation amounts to a "contravention" of a law (or regulation). As such, it triggers the Commissioner's duty to investigate whenever that error, for whatever reason, is not judicially challenged by the person directly affected by it, be it through judicial review, statutory appeal, or other legal recourses. I take it too that paragraph 8(*a*) of the Act is central to the appellant's argument, paragraphs 8(*e*) and (*f*) being, at best, peripheral.

[23] The interpretation of paragraph 8(*a*) of the Act put forward by the appellant is a far-reaching one that the Commissioner was reasonably entitled to reject. Indeed, this view appears to have little, if any, traction in the wording of that provision, when read in context and

purposively, as required by the modern approach to statutory interpretation (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 36 O.R. (3d) 418 at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26, both quoting Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87).

[24] Section 8 reads as follows:

| **Wrongdoings** | **Actes répréhensibles** |
|---|---|
| **8** This Act applies in respect of the following wrongdoings in or relating to the public sector: | **8** La présente loi s'applique aux actes répréhensibles ci-après commis au sein du secteur public ou le concernant : |
| **(a)** a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act; | **a)** la contravention d'une loi fédérale ou provinciale ou d'un règlement pris sous leur régime, à l'exception de la contravention de l'article 19 de la présente loi; |
| **(b**) a misuse of public funds or a public asset; | **b)** l'usage abusif des fonds ou des biens publics; |
| **(c)** a gross mismanagement in the public sector; | **c)** les cas graves de mauvaise gestion dans le secteur public; |
| **(d)** an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant; | **d)** le fait de causer — par action ou omission — un risque grave et précis pour la vie, la santé ou la sécurité humaines ou pour l'environnement, à l'exception du risque inhérent à l'exercice des attributions d'un fonctionnaire; |
| **(e)** a serious breach of a code of conduct established under section 5 or 6; and | **e)** la contravention grave d'un code de conduite établi en vertu des articles 5 ou 6; |
| **(f)** knowingly directing or counselling a person to commit a | **f)** le fait de sciemment ordonner ou conseiller à une personne de |

| | |
|---|---|
| wrongdoing set out in any of paragraphs (a) to (e). | commettre l'un des actes répréhensibles visés aux alinéas a) à e). |

[25] The ordinary meaning of the expression "a contravention of" in paragraph 8(*a*) of the Act ("la contravention de" in the French version) generally conveys the idea of a breach, an infraction, a violation, a transgression, a trespass, an infringement (*Merriam-Webster.com Dictionary* (January 3, 2022) *sub verbo* "contravention", online: <https://www.merriam-webster.com/dictionary/contravention>). It conveys the same idea in French: "enfreindre, transgresser, violer" (*Larousse* (January 4, 2022) *sub verbo* "contrevenir", online: <https://www.larousse.fr/dictionnaires/francais/contrevenir/18912>; *Le Robert Dico en ligne*, (January 4, 2022) *sub verbo* "contrevenir à", online: <https://dictionnaire.lerobert.com/definition/contrevenir>). Contravening a law is often referred to as well as "breaking", "infringing", or "violating" the law (*Cambridge Dictionary* (January 4, 2022) *sub verbo* "contravene", online: <https://dictionary.cambridge.org/dictionary/english/contravene>; (*Oxford English Dictionary: The Definitive Record of the English Language* (Oxford: Oxford University Press, 2010) *sub verbo* "contravene"; Bryan A. Garner, ed., *Black's Law Dictionary*, 11th ed. (St. Paul, Minnesota: Thomson Reuters, 2019)).

[26] One could reasonably say that this hardly encompasses the concept of reviewable or appealable errors. Committing that kind of error, on the one hand, and transgressing, breaking or violating a law on the other, do not generally carry the same legal connotation. The former concerns the legal validity of government action that courts have been entrusted to review

through judicial review proceedings or statutory appeals, so as to ultimately ensure the preservation of the rule of law. The latter is closer, I would think, to the idea of the wilful, intentional transgression of a law, usually for an improper or morally reprehensible purpose; this is generally, although not always, akin to penal or quasi-penal conduct.

[27] Reviewing courts are called upon to review administrative action almost daily. Looking at the text of paragraph 8(*a*) of the Act, I very much doubt Parliament intended reviewable or appealable errors to be "wrongdoings" or that the Commissioner be vested with some sort of surrogate authority to review the legality of government action in matters where no legal challenge was brought against such action by the person directly affected by it. Pushed to its limits, the appellant's position would mean that the thousands of decisions rendered daily by public servants in the administration of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the *Canada Pension Plan*, R.S.C. 1985, c. C-8, or the *Employment Insurance Act*, S.C. 1996, c. 23, would fall within the ambit of paragraph 8(*a*) of the Act each time an error has allegedly been committed in rendering those decisions, provided the person directly affected by that error has not judicially challenged the legal validity of the decision. Again, I very much doubt that this is what Parliament had in mind when it adopted section 8 of the Act, and, in particular, paragraph 8(*a*).

[28] Context does not seem to support the expanded view advocated by the appellant either. First, a review of the parliamentary debates that led to the adoption of the Act clearly shows that that legislation (Bill C-11, at the time) was meant to address "serious" wrongdoings, not any type of wrongdoing. One of the experts assigned to testify before the parliamentary committee tasked

with studying Bill C-11 (the Committee), Dr. Edward Keyserlingk, who was at the time the Public Service Integrity Officer, stressed that "by its own terms", that Bill was "designed to address serious instances of wrongdoings, for instance breaking of laws and regulations, gross mismanagement, or serious threats to life, health, or the environment" (House of Commons, Standing Committee on Government Operations and Estimates, *Evidence*, 38-1, No. 11 (November 30, 2004) at 1110 (Dr. Edward Keyserlingk)).

[29] This was echoed by Mr. Ken Boshcoff, a Member of Parliament (MP) from the governing Liberal Party, when the Committee resumed its study of Bill C-11 in June 2005. Mr. Boshcoff, while the Committee was discussing the need for the Commissioner to have the requisite discretion to decide how to deal with a disclosure, wanted to make sure "that the legislation that we do is focused and effective" and that it is "very clear that this is for serious whistle-blowing and wrongdoing and that it isn't something else that is more appropriately dealt with in another package" (House of Commons, Standing Committee on Government Operations and Estimates, *Evidence*, 38-1, No. 50 (June 28, 2005) at 1215 (Ken Boshcoff)).

[30] This, in turn, was reaffirmed a few weeks later when Bill C-11 was debated in the House of Commons shortly before being adopted. Liberal MP Paul Szabo wanted "to be absolutely sure that Canadians understand the expectations of the bill." He stated in that regard that the wrongdoings contemplated by Bill C-11 "would have to do with breaking some law of Canada, putting employees at risk or gross mismanagement," pointing, as an example, to "things that we experienced with the former privacy commissioner [...], where there were very serious problems." Expectations ought not to be, he reminded the House, to somehow solve "human

resources complaints, or general complaints or matters related to policy directions or decisions of government" (*House of Commons Debates*, 38-1, No. 131 (October 4, 2005) at 1340 (Paul Szabo)).

[31] It is appropriate to add at this point that the sponsorship scandal, which exhibited very serious instances of misuse of public funds, gross mismanagement, and lawbreaking giving rise to criminal convictions, was also very much present in the minds of parliamentarians when Bill C-11 was debated, as evidenced by the numerous references to that scandal in the parliamentary debates (*House of Commons Debates*, 38-1, No. 131 (October 4, 2005) at 1030-35 (Benoît Sauvageau, BQ), 1100 (Gurmant Grewal, CPC), 1120-30 (Paul Crête, BQ), 1130-35 (John Williams, CPC), 1215 (Odina Desrochers, BQ), 1235-40 (Deepak Obhrai, CPC), and 1300 (Joe Preston, CPC); *Senate Debates*, 38-1, No. 142 (October 27, 2005) at 1420-30 and 1450 (Hon. Noël A. Kinsella, Leader of Opposition)).

[32] The parliamentary debates also reveal that Bill C-11 was "really intended to protect whistle-blowers", as stated by the Committee's opposition member from the Bloc Québécois, Louise Thibault (House of Commons, Standing Committee on Government Operations and Estimates, *Evidence*, 38-1, No. 46 (June 21, 2005) at 1110 (Louise Thibault)), a statement reaffirmed by Mr. Szabo, who told the House that that bill "deal[t] with the protection of public servants who come forward with allegations of serious wrongdoings" (*House of Commons Debates*, 38-1, No. 131 (October 4, 2005) at 1340 (Paul Szabo)); see also this statement of Liberal MP and Parliamentary Secretary to the Treasury Board President, Honourable Diane

Marleau: House of Commons, Standing Committee on Government Operations and Estimates, *Evidence*, 38-1, No. 47 (June 21, 2005) at 1605 (Hon. Diane Marleau)).

[33] According to Mr. Ralph Heintzman, Vice-President, Public Service Values and Ethics, Public Service Human Resources Management Agency of Canada, who appeared before the Committee as an expert witness, that protection was the main device chosen to strike a balance between two competing interests related to the status of a public servant: the duty of loyalty that prevents public servants from speaking publicly and freedom of expression enabling them, among other things, to bring to light circumstances that, in their view, amount to wrongdoing (House of Commons, Standing Committee on Government Operations and Estimates, *Evidence*, 38-1, No. 47 (June 21, 2005) at 1605 (Ralph Heintzman)).

[34] In the eyes of the parliamentarians, therefore, Bill C-11 was not just about disclosures, but mainly about protecting public servants who believe a serious wrongdoing has occurred and wish to disclose it. There are no indicia whatsoever in the parliamentary debates that the proponents of Bill C-11 intended that the notion of "wrongdoing" be expanded to include, without more, the concept of reviewable or appealable errors.

[35] The debates also reveal that attempts were made by some members of the Committee to remove from the language of section 8, qualifiers such as "gross" or "serious". Those attempts failed as it was felt that the absence of qualifiers would "make[] it difficult to know where to draw the line to get into actual wrongdoing" as "some guidance" was required as to where to cross that line (House of Commons, Standing Committee on Government Operations and

Estimates, *Evidence*, 38-1, No. 47 (June 21, 2005) at 1650 (Ralph Heintzman)). In his testimony before the Standing Senate Committee on National Finance, Mr. Heintzman underscored that most allegations of wrongdoing, in his experience, turned out not to be founded, emphasizing thereby the "need to ensure that someone's idea of a wrongdoing is properly tested before it is aired publicly as a supposed wrongdoing" (Senate, Standing Committee on National Finance, *First and Final Meeting on Bill-11, An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings*, 38-1, (November 23, 2005) at 32:15-32:16 (Ralph Heintzman)).

[36] This supports the view that Parliament intended, in adopting the Act, to address serious wrongdoings, not any type of wrongdoing. This is reflected in the wording of section 8 of the Act. According to paragraph 8(*c*), a case of mismanagement in the public sector is only a "wrongdoing" if it amounts to "gross mismanagement" ("cas graves de mauvaise gestion" in the French version). The same is true of breaches to a code of conduct established under the Act: by virtue of paragraph 8(*e*), only "serious" breaches ("contravention grave" in the French version) meet that definition. Furthermore, for an act or omission to engage the application of paragraph 8(*d*), the danger it creates to the life, health or safety of persons or to the environment must be "substantial and specific" ("grave et précis" in the French version).

[37] These, again, provide some contextual indicia that Parliament did not intend that the wrongdoing contemplated by paragraph 8(*a*) of the Act be an open-ended, catchall notion that could include concepts such as that of reviewable or appealable errors in the application of a statutory regime, as contended by the appellant. At the very least, those indicia provide some

adequate footing to the position adopted by the Commissioner in this case that the circumstances set out in Disclosures 335 and 336 do not amount to wrongdoings but are rather in the realm of disagreements as to the proper application and interpretation of two acts of Parliament in regard to two specific sets of facts.

[38] A further indicium is the presence of section 9 of the Act, which subjects wrongdoers, in addition to "any penalty provided for by law" ("toute autre peine prévue par la loi" in the French version), to disciplinary action, including termination of employment. This, again, signals, in my opinion, that the conduct contemplated by Parliament at paragraph 8(*a*) of the Act is closer to penal or quasi-penal conduct than it is to the concept of reviewable or appealable errors. It is indeed entirely conceivable that the conduct associated with the wrongdoings set out in paragraphs 8(*b*) to (*e*) (misuse of public funds, gross mismanagement, act or omission creating a substantial risk to the life, health or safety of persons or to the environment, serious breach of a code of conduct, knowingly directing or counselling a person to commit a wrongdoing) could give rise to penalties or disciplinary action. However, such connection becomes less obvious in respect of paragraph 8(*a*) when one looks at that provision in a way that goes beyond the ordinary meaning of the terms "contravention of any Act of Parliament … or of any regulation made under any such Act." This is particularly the case when one claims, as does the appellant, that such meaning includes reviewable or appealable errors committed in the application or administration of a piece of legislation as such conduct does not ordinarily attract penalties or disciplinary action.

[39] In sum, the position taken by the Commissioner rests on a reasonable interpretation of section 8 of the Act, when read in context. Contrary to the appellant's contention, a purposive

reading of that provision does not alter the reasonableness of that position. As indicated previously, the appellant contends that the Commissioner's position in this case upsets Parliament's stated objective of maintaining and enhancing public confidence in the integrity of public servants. The key word in this stated objective is "integrity", but the ordinary meaning of that term refers to the notion of moral uprightness; it is the quality of being honest and having strong moral principles (*Cambridge Dictionary*, (January 7, 2022) *sub verbo* "integrity", online: <https://dictionary.cambridge.org/dictionary/english/integrity>; *Merriam-Webster.com Dictionary* (January 7, 2022) *sub verbo* "integrity", online: <https://www.merriam-webster.com/dictionary/integrity>). It is synonymous to terms such as rectitude, probity and honour (*Merriam-Webster.com Dictionary* (January 7, 2022) *sub verbo* "integrity", online: <https://www.merriam-webster.com/dictionary/integrity>). One, I believe, could reasonably be forgiven for not immediately associating the concept of integrity to the commission of a reviewable or appealable error.

[40] All of this equally applies to the paragraph 8(*e*) wrongdoing allegation. As indicated previously, the breach of a code of conduct established under the Act only amounts to a wrongdoing if it is a "serious breach". Again, alleging, without more, that reviewable or appealable errors have been committed in the application or administration of a piece of legislation to a particular set of circumstances may reasonably be found not to engage paragraph 8(*e*) of the Act or, for that matter, criminal or penal prohibitions such as subsection 126(1) of the *Criminal Code* or paragraph 129(1)(*a*) of IRPA.

[41] This is not to say that the wilful, repeated ignorance or defiance of the applicable law in the administration of a piece of legislation could not give rise to a "wrongdoing" within the meaning of paragraphs 8(*a*) or (*e*) of the Act, especially if this is done in the pursuit of an improper purpose, but here, the disclosures at issue appear to be of a wholly different nature.

[42] Disclosure 335, as we have seen, ultimately concerns the legality of the deportation of an individual who was found, by a court order, to have obtained Canadian citizenship by fraud (in that case, by assuming the identity of another individual). The issue raised in Disclosure 335 is whether that measure should have been preceded by the revocation of the individual's fraudulent Canadian citizenship through the formal process set out in the *Citizenship Act* rather than—as was done in that case—by the surrender of the individual's citizenship certificate through the means set out in section 26 of the Regulations, that alternate procedure being resorted to on the basis of the view that the individual never was a Canadian citizen.

[43] Disclosure 336 concerns the legality of delaying the issuance of travel documents to two permanent residents of Canada wishing to travel back to Canada. The issue it raises is whether inadmissibility concerns could reasonably justify such action and could in turn justify, prior to the travel documents being issued, that the IAD, which already had outstanding matters before it concerning these individuals, be seized of these concerns and be called upon to make a determination *in abstentia*, if needed.

[44] The issues raised in both instances are well within the sphere of what is generally characterized, in administrative law, as alleged—and judicially reviewable or appealable—errors

of law or of mixed fact and law. It was therefore reasonably open to the Commissioner to find that neither disclosure exhibited a "wrongdoing" within the meaning of section 8 of the Act, as neither could reasonably be said to exhibit a conduct normally associated with lawbreaking or with serious breaching of a code of conduct.

[45] Instead, the Commissioner found that these allegations were in the nature of disagreements as to the way IRPA and the *Citizenship Act* were to be interpreted and applied to these two fact-specific instances and that legal recourses were open to the individuals directly affected by the conduct that was the subject of the appellant's complaints. As such, it did not appear to the Commissioner that a wrongdoing as contemplated under the Act had occurred. This finding was reasonably open to the Commissioner.

B. *It was Reasonably Open to the Commissioner Not to Investigate the Disclosures at Issue*

[46] Having concluded that no wrongdoing had occurred, it stands to reason that the Commissioner was entitled not to take further action regarding the disclosures at issue. According to paragraph 22(*b*) of the Act, it is the Commissioner's duty to "receive, record and review disclosures of wrongdoings in order to establish whether there are sufficient grounds for further action" (emphasis added). That is what the Commissioner did in this case: he reviewed the disclosures at issue, assessed whether they concerned wrongdoing as defined in section 8 of the Act, and found that they did not. Coupled with the fact that the individuals directly affected by the measures taken in each case had legal recourses against these measures, he concluded,

based on paragraph 24(1)(*f*) of the Act, that there was a "valid reason for not dealing with the subject-matter of the disclosure[s]."

[47] As this Court recognized in *Gupta v. Canada (Attorney General)*, 2017 FCA 211, 2017 CarswellNat 5703 (WL Can) (*Gupta*), the Commissioner was given, by virtue of subsection 24(1) of the Act, the right to refuse to commence an investigation into a disclosure "for certain reasons specified in the provisions and (as provided in paragraph 24(1)(f)), for any reason that the Commissioner considers a 'valid reason'" (*Gupta* at para. 8) (emphasis added).

[48] In *Agnaou*, this Court emphasized the "very broad discretion enjoyed by the Commissioner under section 24 of the Act in deciding whether or not to investigate a disclosure" (*Agnaou* at para. 70; see also *Gupta* at para. 9). In making that observation, the Court dismissed the view that the exercise of that discretion was constrained by the requirement that the refusal to investigate, as is the case in matters governed by the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, be limited to "plain and obvious" instances (*Agnaou* at paras. 67-69).

[49] As pointed out by Gleeson J., up to now, paragraph 24(1)(*f*) of the Act has been interpreted as recognizing "the possibility for overlap between the enumerated reasons the Commissioner may refuse to deal with a disclosure at paragraphs 24(1)(*a*) to (*e*) and paragraph 24(1)(*f*)" (Federal Court Decision at para. 43). This is probably why paragraph 24(1)(*f*) has been so far referred to in the case law as a "basket clause" (Federal Court Decision at para. 40, quoting *Gupta v. Canada (Attorney General)*, 2016 FC 1416, 2016 CarswellNat 11517 (WL Can) at para. 44).

[50] The appellant accepts that the Act gives the Commissioner "extremely wide" discretion and an "enormous latitude" when it comes to deciding whether to investigate a disclosure (Memorandum of Fact and Law at para. 37). He accepts as well that there may theoretically be some level of overlap between 24(1)(*a*) to (*e*) and 24(1)(*f*). However, he contends that paragraph 24(1)(*f*) cannot be read as an all-inclusive basket clause as this would allow the Commissioner to sidestep paragraphs 24(1)(*a*) to (*e*). He submits that the presence of the word "autre" in the French version of paragraph 24(1)(*f*) prevents such a reading. As there is no equivalent term in the provision's English version, the appellant relies on the shared meaning rule of statutory interpretation to claim that the narrower meaning—that of the French version—should prevail.

[51] Paragraph 24(1)(*f*) reads as follows:

| **Right to refuse** | **Refus d'intervenir** |
|---|---|
| **24 (1)** The Commissioner may refuse to deal with a disclosure or to commence an investigation — and he or she may cease an investigation — if he or she is of the opinion that | **24 (1)** Le commissaire peut refuser de donner suite à une divulgation ou de commencer une enquête ou de la poursuivre, s'il estime, selon le cas : |
| […] | […] |
| **(f)** there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation. | **f)** que cela est opportun pour tout autre motif justifié. |

[52] The Federal Court rejected the appellant's contention on the ground that the adoption of the narrower meaning would run contrary to the intent of the legislation:

> [42] In enacting the PSDPA Parliament's intent was to establish effective procedures for the disclosure of wrongdoing and the protection of public servants and to balance these objectives against a public servant's duty of loyalty and freedom of expression rights (PSDPA preamble). In pursuit of this balance Parliament has vested in the Commissioner broad discretionary powers including the ability not to deal with a disclosure that would otherwise satisfy the definition of wrongdoing. The Commissioner may refuse to deal with a disclosure where "there is a valid reason for not doing so". This discretion has been described in the jurisprudence of this Court as being "extremely wide" and as granting "enormous latitude" to the Commissioner (*Detorakis* [*v. Canada (Attorney General)*, 2010 FC 39, 358 F.T.R. 266] at para 106 and *Canada (Attorney General v Canada (Public Sector Information Commissioner)*, 2016 FC 886[, [2017] 2 F.C.R. 165] at para 129).
>
> [43] To adopt an interpretation of section 24 that failed to recognize the possibility for overlap between the enumerated reasons the Commissioner may refuse to deal with a disclosure at paragraphs 24(1)(a) to (e) and paragraph 24(1)(f) would, in my opinion, be contrary to the intent of the legislation.

[53] That position appears wholly consistent with what was described in the parliamentary debates, when paragraph 24(1)(*f*) was discussed, as a "general discretionary authority" or a "general discretion" vested in the Commissioner to not deal with a disclosure if there is a valid reason not to do so, irrespective of the "guidance" found in the preceding provisions of subsection 24(1) (House of Commons, Standing Committee on Government Operations and Estimates, *Evidence*, 38-1, No. 50 (June 28, 2005) at 1215 (Ralph Heintzman)).

[54] At any rate, the Commissioner can hardly be faulted for having resorted to paragraph 24(1)(*f*) of the Act in a manner that has been, so far, permitted by the Federal Court case law. As the Supreme Court pointed out in *Vavilov*, "precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide", emphasizing that it would be unreasonable for the decision maker

to interpret and apply a legislative provision without regard to a binding precedent (*Vavilov* at para. 112).

[55] The Commissioner did not explain in any great detail why he resorted to paragraph 24(1)(*f*) of the Act. Quite apart from the fact that there were precedents binding on him that supported that choice, the Supreme Court noted in *Vavilov* that there may be instances where the administrative decision maker "has not explicitly considered the meaning of a relevant provision in its reasons", but where the reviewing court may nevertheless be in a position "to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable" (*Vavilov* at para. 123). I believe this is the case here.

[56] I believe that it is important at this stage to re-emphasize that matters of statutory interpretation "are not treated uniquely" and may be evaluated on a reasonableness standard (*Vavilov* at para. 115). Where that standard applies to such a matter, as is the case here, our role, again, is not to undertake a *de novo* analysis of the question or to ask ourselves "what the correct decision would have been" (*Vavilov* at para. 116, quoting *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 50). Our task, in a case such as this one, is to determine whether the interpretation that stems from the decision maker's decision falls within a range of possible, acceptable outcomes.

[57] Here, I find that the interpretation that stems from the Commissioner's decision does fall within a range of possible, acceptable outcomes, essentially for the reasons given by Gleeson J. It seems to me that the narrower interpretation of paragraph 24(1)(*f*) advocated by the appellant

would, contrary to Parliament's intent, especially when subsection 24(1) is read together with paragraph 22(*b*) of the Act, unduly restrict the Commissioner's discretion not to investigate a disclosure in a matter such as this one, a discretion that was qualified as "very broad" in *Agnaou* and which was envisaged as a stand-alone "general discretionary authority" in the debates that led to the adoption of the Act.

[58] In short, the appellant has not succeeded in establishing that paragraph 24(1)(*f*), in light of the text, context, and purpose, is only open to his own watertight-driven interpretation, prohibiting, for all intents and purposes, any overlap with the preceding paragraphs.

[59] I would add that I find it difficult to conceive that the Commissioner's discretion not to investigate a disclosure could be hindered by the wording of paragraphs 24(1)(*a*) to (*e*) in instances, such as the present one, where the Commissioner comes to the reasonable view that no wrongdoing within the meaning of section 8 occurred. This begs the question: what is the point of taking further action on a disclosure if there is no indicia of wrongdoing in the first place? Again, in such matters, one can reasonably say that the Commissioner must have the requisite discretion not to investigate the disclosure.

[60] The appellant fears that such a view would confer on the Commissioner "unlimited" discretion. However, as in any other statutory setting where an administrative decision maker is entrusted with discretionary authority, the exercise of that authority must be compatible with the rule of law; it cannot, for example, be based on irrelevant or discriminatory grounds or on an improper purpose, or be fettered, and it has to be exercised according to the *Canadian Charter of*

*Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (Guy Régimbald, *Canadian Administrative Law*, 3rd ed. (Toronto, LexisNexis, 2021) at 230-256; *Prince George (City of) v. Payne*, [1978] 1 S.C.R. 458, 75 D.L.R. (3d) 1 at 463; *R. v. Sharma*, [1993] 1 SCR 650, 100 DLR (4th) 167 at 666; *Moore v. Minister of Manpower and Immigration*, [1968] S.C.R. 839, 69 D.L.R. (2d) 273 at 849; *Vavilov* at para. 108, citing *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 at para. 18; *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038, 59 D.L.R. (4th) 416).

[61] Here, the Commissioner's exercise of discretion was well rooted in the language of the Act, read in context and purposively, and could reasonably sustain the conclusion that there was a valid reason not to investigate the disclosures at issue. I see no reason to interfere with that conclusion.

[62] The appellant also claims that the Commissioner's decision is unreasonable on the ground that the reasons provided lack the requisite degree of justification, intelligibility, and transparency, especially in light of the Commissioner's prior decision to grant him access to legal advice as permitted by section 25.1 of the Act. He insists here on the "culture of justification in the administrative decision making" that the Supreme Court, in *Vavilov*, felt the need to develop and strengthen (*Vavilov* at para. 2).

[63] However, the Supreme Court also insisted that administrative justice is not judicial justice and that written reasons given by an administrative body are not to be assessed against a standard of perfection. For example, it is not, on its own, fatal that they do not include "all the

arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" (*Vavilov* at para. 91, quoting *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 16). Also, administrative decision makers are not always expected "to deploy the same array of legal techniques that might be expected of a lawyer or judge" (*Vavilov* at para. 92). In the end, the administrative decision maker must provide intelligible and transparent justification (*Vavilov* at para. 98, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 54).

[64] In *Mason*, the Court summarized in this fashion *Vavilov*'s teachings on the reasonableness review of an administrative decision maker's reasoning:

> [32] Reasons of administrators are to be "read holistically and contextually" in "light of the record and with due sensitivity to the administrative regime in which they were given": *Vavilov* at paras. 97 and 103. But the basis for a decision may also be implied from the circumstances, including the record, previous decisions of the administrator and related administrators, the nature of the issue before the administrator and the submissions made: *Vavilov* at paras. 94 and 123; and see, *e.g.*, *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140. For this reason, the failure of the reasons to mention something explicitly is not necessarily a failure of "justification, intelligibility or transparency": *Vavilov* at paras. 94 and 122. In reviewing administrators' reasons, a reviewing court is allowed to "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn": *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267 at para. 11; *Vavilov* at para. 97.
>
> [33] From express or implied reasons, the reviewing court must be able to discern an "internally coherent and rational chain of analysis" that the "reviewing court must be able to trace" and must be able to understand on "critical point[s]": *Vavilov* at paras. 85 and 102-103. The reasoning must be "rational and logical" without "fatal flaws in its overarching logic": *Vavilov* at para. 102.

[65] While I agree that it would have been desirable for the Commissioner to provide more detailed reasons, I am nevertheless satisfied that the Commissioner's reasons for decision do provide, in the present matter, intelligible and transparent justification. In sum, I am of the view that those reasons, in light of the record that was before the Commissioner, allow a reviewing court to understand why the decision was made and to determine whether the decision falls within a range of acceptable outcomes (see *Grant v. Unifor*, 2022 FCA 6 at para. 9, citing *Mason* and *Vavilov*), regardless of the fact that access to legal advice was provided to the appellant. As correctly pointed out by the respondent, legal access decisions cannot be determinative of the more robust assessment being made of the actual disclosure.

[66] For all these reasons, I would dismiss the appeal.

[67] The respondent seeks its costs on appeal. In the Federal Court, despite being on the losing end of the proceeding, no costs were awarded against the appellant on the basis that a no-costs order was justified by the public interest in having the appellant's claims against the Commissioner's decision litigated.

[68] The appellant asks this Court to exercise its discretion under rule 400 of the *Federal Courts Rules*, SOR/98-106, in the same manner. However, I am not persuaded that there is any reason, in this appeal, not to follow the usual course on this issue, which is to award costs to the successful party. As this Court is empowered under rule 400(4) to award a lump sum in lieu to

any assessed costs, I would award costs to the respondent in an amount of $700, disbursements included.

"René LeBlanc"
J.A.

“I agree
Johanne Gauthier J.A.”

“I agree
Yves de Montigny J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-407-19 |
| **STYLE OF CAUSE:** | ALEXANDRU-IOAN BURLACU v. ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY |
| **DATE OF HEARING:** | DECEMBER 1, 2021 |
| **REASONS FOR JUDGMENT BY:** | LEBLANC J.A. |
| **CONCURRED IN BY:** | GAUTHIER J.A.<br>DE MONTIGNY J.A. |
| **DATED:** | JANUARY 19, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Alexandru-Ioan Burlacu | FOR THE APPELLANT<br>SELF-REPRESENTED |
| Stéphanie Dion | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| A. François Daigle<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |