

## BREAKING CASE LAW

El-Helou v. Canada  
(Courts Administration  
Service)

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## This Issue

### Duty of Fairness in an Investigation

*El-Helou v. Canada (Courts Administration Service),*  
[2012] F.C.J. No. 1237

The Federal Court granted judicial review and overturned the decision to dismiss two complaints that had been put forward under Federal Whistleblower legislation, *The Public Servants Disclosure Protection Act*. Although the investigation resulted in one of the three complaints being referred to hearing, the complainant was unhappy that the other two complaints had been dismissed. The complainant argued that the investigation had been insufficient and that there had not been procedural fairness.

This case appears to be a high watermark on the duty of fairness that may be owed to a complainant in an investigation. The promises made by the investigator were likely significant to the Judge, however the decision does have some bold statements that the duty of fairness owed to the complainant includes the right to be told the substance of the response by the person being investigated and giving the complainant a further opportunity to be heard. At paragraph 76 of the decision, the Judge appears to adopt the notion that the complainant has the right to know the case to be met. Traditionally, this right is given to the person facing the investigation, and not the person making the complaint.

The Ombudsman, in his role under the *Health Professions Act* (Alberta) has been providing advice to regulatory colleges that complainants should know the substance of the response by the person being investigated. While the Ombudsman does not have legislative authority to direct how an investigation is to be undertaken, his advice is to be given some consideration by a regulatory college under the *Health Professions Act*.

It is unknown if the *El-Helou* case is under appeal and if it is, whether it will be overturned on appeal. Nonetheless, it is a case to keep in mind when conducting investigations, especially when an investigator may make promises or representations to a complainant as to what the complainant can expect during the investigation process.