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File: 166-02-34747

Citation: 2006 PSLRB 27

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

EDITH GENDRON

Grievor

and

TREASURY BOARD
(Department of Canadian Heritage)

Employer

Indexed as
Gendron v. Treasury Board (Department of Canadian Heritage)

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Sylvie Matteau, adjudicator

For the Grievor: James G. Cameron, counsel

For the Employer: Michel LeFrançois, counsel

Heard at Ottawa, Ontario,
April 27 to 29, May 18, and August 23 to 25 and 29, 2005.
(P.S.L.R.B. Translation)

I. Grievance referred to adjudication

[1] Edith Gendron lodged a grievance against the termination of her employment on June 2, 2004. The grievance was referred to adjudication on October 26, 2004. The grievor requested that the termination letter dated April 29, 2004, be withdrawn from her file, that all copies be destroyed in her presence, and that she be reinstated in her position without loss of salary or benefits.

[2] The grievor worked at the Department of Canadian Heritage. The reasons for the termination of her employment are set out in a letter from Eileen Sarkar, Assistant Deputy Minister of Citizenship and Heritage (Exhibit G-1) as follows:

> [Translation]
>
> . . .
>
> *In my correspondence of February 13 and April 13, 2004, I informed you that, under the provisions of the* Values and Ethics Code for the Public Service, *it has been established that the representative role of president of the organization "Le Québec, un pays!" is inconsistent with the duties of the position you currently hold in the Official Languages Support Programs Branch.*
>
> *Your responsibilities as Senior Program Officer are, among other things, to represent the Department in the negotiation and implementation of official languages agreements with representatives of the provinces and of governmental and non-governmental agencies. Those responsibilities are consistent with the mandate of the Department of Canadian Heritage, which is to promote the values of shared citizenship, thus forging closer ties among all Canadians in all provinces and territories of the country. Consequently, your outside activities may reasonably be perceived as likely to cause a conflict of interest and thus to impair your ability to perform your departmental duties objectively.*
>
> *I also told you that, in accordance with the compliance measures set out in the Code, if you intended to retain your position in the Department, you would have to relinquish your outside activities that contravene the Code by leaving your position as president of that organization. However, you have decided to continue those outside activities, thus maintaining the conflict of interest situation that you were asked to resolve.*
>
> *Consequently, since you have not complied with the provisions of the Code or the compliance measures set out in*

> *it that you were asked to take, by virtue of the powers delegated to me by the Deputy Minister of Canadian Heritage under paragraph 11(2)(f) and subsection 12(3) of the* Financial Administration Act*, I hereby advise you of my decision to dismiss you from your employment as Senior Program Officer, Official Languages Support Programs, at the Department of Canadian Heritage. Your employment will terminate at the close of business today, April 29, 2004.*
>
> . . .

[3] The employer contends that the activities and responsibilities specific to the position of president of the organization "Le Québec, un pays!", whose purpose is to promote Quebec sovereignty, are in conflict with the specific mandate of the Department of Canadian Heritage, of which the grievor is an employee. Specifically, it contends that the program for which it is responsible is the cornerstone of the federal government's efforts to promote Canadian unity. The grievor's conduct thus contravenes the *Values and Ethics Code for the Public Service* ("the Code"). Compliance with the Code is a condition of employment.

[4] Although the employer recognizes the grievor's rights of freedom of opinion and expression, it contends that this freedom is subject to the duty of loyalty, which is a reasonable limit on her fundamental rights as contemplated by section 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11 ("the *Charter*"). The termination of employment was therefore warranted.

[5] The grievor contends that the employer's decision violates her fundamental rights of freedom of expression and association. She considers that her personal activities could be accommodated so as not to conflict with her duty of loyalty to the employer. In her view, the employer admitted that it had interfered with her *Charter* rights. The burden is therefore on the employer to show that the disciplinary measure imposed was warranted in the circumstances and that it had no other choice.

[6] The grievor made three arguments in support of her grievance. Firstly, in view of the nature of her work, the limits of her decision-making power and her responsibilities, there is no actual conflict of interest between her personal activities and her work. Secondly, she contends that she made many efforts and proposals to the employer in order to avoid an apparent conflict of interest, which the employer rejected without reasonable grounds; she contends that, even if an apparent conflict of

interest were acknowledged, the employer has not established that there was no way to reconcile the grievor's rights with her duty of loyalty, or that it made efforts to that end. Thirdly, she contends that the employer did not proceed through gradual disciplinary measures, and that the termination was premature and therefore cannot be upheld.

[7] The parties admitted that there is no actual conflict of interest. Instead there is disagreement over whether there is apparent or potential conflict of interest. The grievor's political convictions were the same when she obtained her position in 2000. She had informed her director of those convictions at that time. What changed the situation is that she accepted the office of president of this new sovereigntist organization, a position that gives her a certain degree of visibility.

[8] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C. (1985), c. P-35.

II. Summary of evidence

[9] At the outset, a number of exhibits were adduced with the consent of the parties. They include the Code (Exhibit E-1), a binder of press clippings (Exhibit E-2), documents from the Internet site of "Le Québec, un pays!" (Exhibit E-3), the publication entitled *Le Québec, un pays!*, Vol. 1, No. 1, June 2004 (Exhibit E-4), the report of the Task Force on Public Service Values and Ethics ("the Tait Task Force") entitled *A Strong Foundation* (Exhibit E-5), and a chronology of events prepared by the employer, subject to the probative value of the facts set out therein (Exhibit E-6).

[10] The parties requested the exclusion of witnesses; that request was granted. The employer called five witnesses: Hilaire Lemoine, Director General, Official Languages Support Programs Branch ("the OLSP Branch") from 1993 to June 2004; Denise Lajoie, Public Relations Manager at the Department of Canadian Heritage since 2003; Eileen Sarkar, Assistant Deputy Minister responsible for policies and programs, including the OLSP; Ralph Heintzman, Vice-President, Public Service Values and Ethics, at the Public Service Human Resources Management Agency of Canada; and

Denis Thompson, Director General, Human Resources and Work Place Management, at the Department of Canadian Heritage.

[11] The grievor testified and called as witnesses Patrick Balsam, Director, Ministry of Education of Newfoundland and Labrador, responsible for the languages program, and Ed Cashman, Executive Vice-President, National Capital Region, Public Service Alliance of Canada.

A. Background

[12] The mandate of the Department of Canadian Heritage is to move toward a more cohesive and creative Canada. Its four strategic objectives are as follows (Exhibit E-11):

> *Canadian content: Promoting the creation, dissemination and preservation of diverse Canadian cultural works, stories and symbols reflective of our past and expressive of our values and aspirations;*
>
> *Cultural participation and engagement: Fostering access to and participation in Canada's cultural life;*
>
> *Connections: Fostering and strengthening connections among Canadians and deepening understanding across diverse communities;*
>
> *Active citizenship and civic participation: Promoting understanding of the rights and responsibilities of shared citizenship and fostering opportunity to participate in Canada's civic life.*

[13] At the Department of Canadian Heritage, the OLSP Branch falls under the department's third strategic objective. Its purpose is to enhance the vitality of the English-speaking and French-speaking minority communities in Canadian society. The Department acts in partnership with other governments under bilateral agreements, the purpose of which is to provide the official language minority communities with access to education in their language and to allow them to receive provincial and territorial services in that language. These agreements also enable young Canadians to learn English and French as second languages.

[14] The OLSP Branch ensures consistency with and interpretation of the objectives and orientations of these programs in all parts of the country. The Program Officer acts as a social development officer and manages the programs in close co-operation

with the Branch, which ensures that representations made in all regions of the country are made in the same context and with the same orientations.

[15] The grievor worked in the context of two types of federal-provincial agreements: education, and French-language services. She worked as a Program Officer at the Eastern Region desk, which is responsible for Newfoundland and Nova Scotia. Using the grievor's job description, which was adduced as Exhibit E-10, both the employer and the grievor explained her roles and responsibilities.

[16] The parties did not agree on the scope of the grievor's responsibilities, her discretionary authority, or the importance of her role in the analysis and forwarding of an application. They had differing interpretations of the terms used in her job description.

[17] That job description provides that the Program Officer administers official language support programs. Her duties have to do with developing and managing grants and contributions under federal-provincial agreements and special co-operation agreements, as well as drawing up and improving official language minority community development policies and fostering the full recognition and use of both official languages in Canada.

[18] According to the documentation provided, the Program Officer's main activities are to take part in planning and implementing the official languages support programs, in co-operation with the other regional offices. The Program Officer takes part in evaluating and negotiating various agreements and administering assistance to minority communities. Still according to the job description, the Program Officer develops negotiating strategies, conducts negotiations with various stakeholders including provincial governments, and takes part in those negotiations in order to reach and amend agreements and to develop and improve existing policies and programs.

[19] The job description also provides that the Program Officer takes part in setting priorities for the OLSP Branch's work plan. The Program Officer develops and drafts funding recommendations under the federal-provincial agreements in accordance with Treasury Board requirements and provides advice and recommendations to management and the senior executive on official languages policies. The Program Officer must also be aware of the setting in which priorities are set and official

languages issues arise. Lastly, for and on behalf of the Minister, the Program Officer drafts reports, briefing notes and sensitive letters on topics related to activities falling under the Department's official languages mandate.

[20] Mr. Lemoine explained that a number of responsibilities assigned to Senior Program Officers under the job description in fact belong to the OLSP Branch or to the desk team, rather than to the officer alone. For example, linguistic services agreements are developed in the OLSP Branch. Work teams have been created. Senior Program Officers are involved in this work because it is their subsequent duty to administer these programs. They bring their knowledge of the setting and their expertise to the work of these teams, which assess issues and concerns in the field.

[21] Mr. Lemoine also explained the nature of the federal-provincial agreements that the Minister signs with that person's provincial counterparts. These agreements are vehicles for transferring financial contributions to activities and initiatives set up in the provinces. They are the official documents that ultimately describe the undertakings of the two governments: the extent and scope of funding granted to the province, on the one hand, and the activities the province will carry out, on the other.

[22] The agreement development duties of the incumbent of the Senior Program Officer position are those of an adviser and drafter. The Senior Program Officer is the expert on the setting who drafts documents that are submitted to higher levels for approval. This person's administrative duties are to provide follow-up to the agreements. The Senior Program Officer performs regular liaison and audit work to ensure that commitments are met and that regular reports on activities and expenditures are prepared. According to Mr. Lemoine, the Senior Program Officer regularly negotiates with representatives of the provinces and local communities with regard to these duties.

[23] Mr. Lemoine explained the sensitive nature of this work, stating that it involves complex services that are difficult to deliver, depending on the capacity and sensitivities of the provincial authorities. The work varies depending on the region, being more sensitive in settings that are more unilingual and further from central Canada. The Senior Program Officer works to encourage and advise provincial institutions to adopt policies and programs for their official language minority communities. The Senior Officer acts as an ambassador and must have a very good understanding of the federal government's official languages responsibilities and

commitments. In Mr. Lemoine's opinion, doing this requires considerable persuasiveness, conviction and integrity that are recognized by stakeholders. The task is not to impose anything on the provinces, but to empower them to take part voluntarily in the programs. Mr. Lemoine stated: [translation] "The officers are on the front lines."

[24] Mr. Heintzman testified on the background to this case and the development of the federal government's thinking on the fundamental issue of the official languages. He explained how official languages policy is at the heart of the federal government's strategy for promoting Canadian unity.

[25] Among his various positions, Mr. Heintzman was Vice-Chair of the Tait Task Force, as well as Associate Constitutional Advisor to the Special Joint Committee on a Renewed Canada. A historian and a specialist in Quebec history, he was Senior Researcher and a member of the research steering committee for the Task Force on Canadian Unity (1978-1979).

[26] Mr. Heintzman explained that the Tait Task Force had been convened in 1994 in response to an existential crisis in the public service of Canada. The public service was losing its voice. Private-sector values were taking over and the foundations of the public service were being forgotten. In a context involving the potential loss of some 40,000 jobs, accountability issues, and diversification of service delivery methods, the question arose: what does it mean to be a public servant? The task was to rediscover the basic principles and values of the public service. The report of the Task Force was published in 1996, and again in 2000.

[27] The Tait Task Force examined the *Conflict of Interest and Post-Employment Code*, which applied in the public service at the time (Exhibit E-16). That code contains nine principles, which embrace fundamental concepts (page 40 of the report, Exhibit E-5), including the following:

> *Employees shall perform their official duties and arrange their private affairs in such a manner that confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced;*
>
> *Employees have an obligation to act in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law;*

. . .

> *If a conflict does arise between the private interests of an employee and the official duties and responsibilities of that employee, the conflict shall be resolved in favour of the public interest.*

[28] Mr. Heintzman confirmed that the Tait Task Force had proposed no changes to these principles. On the contrary, they were confirmed and incorporated in the new Code.

[29] With regard to the principle of loyalty to the public interest, Mr. Heintzman explained that the Tait Task Force had rediscovered it as [translation] "a cardinal principle" (page 27 of the report, Exhibit E-5). This principle is based on the public interest, as represented and interpreted by the democratically elected government and expressed in the law and the Constitution. In this sense, the democratic values that underlie this principle mean that citizens must have complete trust in the public service and must perceive that they are dealing with capable, neutral persons without the slightest bias. In Mr. Heintzman's view, in the public sector, the perception of this loyalty is fundamental and more important than the reality. This family of democratic values appears at page 7 of the Code:

. . .

> ***Democratic values:*** *Helping Ministers, under law, to serve the public interest.*
>
> *Public servants shall give honest and impartial advice and make all information relevant to a decision available to Ministers.*
>
> *Public servants shall loyally implement ministerial decisions, lawfully taken.*
>
> *Public servants shall support both individual and collective ministerial accountability and provide Parliament and Canadians with information on the results of their work.*

. . .

[30] With regard to the usual process for determining conflicts of interest, Ms. Lajoie explained that employees normally make a request and inform their manager in order to determine whether there is an actual, apparent or potential conflict of interest with regard to personal undertakings. Requests are referred to the labour relations division, which follows up on them. Additional information may be

required from the employees. Management is sometimes consulted in order to understand individual employees' duties. If necessary, the file is forwarded to Legal Services. A report is prepared for decision by the Deputy Minister or the delegated person.

[31] The grievor explained how she had been hired at the Department in December 1999. She had been approached by Pierre Gaudet, OLSP Operations Director at the time. She said that she had informed him of her sovereigntist convictions and of the fact that her spouse was going to run as a Bloc Québécois candidate in the federal election. She received an offer of employment for a PM-05 group and level position, for a determinate period, as Senior Program Officer in the OLSP Branch on May 2, 2000, (Exhibit E-14). She was appointed to that position for an indeterminate period on December 19, 2001, (Exhibit E-15). She occupied that position until the day her employment was terminated. On a few occasions, she replaced her immediate superior, Paula Doyon, at the PM-06 group and level, on an acting basis.

[32] The grievor has two skill sets: professional expertise and administrative expertise. She explained that, in concrete terms, first, her professional expertise and knowledge of minority cultural settings allowed her to analyse applications and make recommendations. She conducted an initial analysis of issues and relevant circumstances, checking for consistency with the Department's programs. She verified the validity of applications and the priority they should be given on the basis of the Department's objectives. Second, her administrative expertise allowed her to manage applications at all stages of the Department's approval process and to check the budgets and financial reports submitted by the recipients.

B. Facts

[33] On February 4, 2004, the grievor requested a meeting with her managers, Guylain Thorne and Ms. Doyon, to discuss a personal project, before February 15, 2004, (Exhibit E-21). That meeting was held on February 10, 2004. Benoît Corbeil, the grievor's union representative, was also present. The grievor informed her managers that she was going to run for office as the president of a new organization, "Le Québec, un pays!", in an election to be held on February 15, 2004. That meeting apparently lasted from 10 to 15 minutes.

[34] Given the Department's sensitivity to the issue of Canadian unity, the grievor stated that her intention was to inform her superiors of her intentions and thus to trigger the process of filing a confidential report in accordance with the Code. She wanted to be reassured about the impact of those activities on her employment and to check with her superiors about what could be done in view of the fact that she was a federal government employee.

[35] According to the grievor, her superiors' first reaction was very simple: since she did not handle Quebec cases, there was, at first glance, no conflict of interest. However, she was told that further consultations and verifications would have to be made. She said that she found this approach entirely legitimate. It was therefore agreed that another meeting would be held.

[36] Consultations were held within the Department to assess the grievor's situation. Managers explained that, because time was short, the usual procedure had not been followed.

[37] A second meeting lasting approximately 30 minutes was held on February 12, 2004. Ms. Lajoie took part in the discussion at that time and took notes at the meeting. She said that the atmosphere at that meeting was confrontational, which she considered unwarranted, particularly at that point in the discussions. This was supposed to be a briefing meeting. Ms. Lajoie felt that there had been no openness on the part of the grievor. Mr. Thorne purportedly asked the grievor to relinquish the presidency, while telling her that the employer saw no problem in her remaining a member of the group. Ms. Lajoie then informed the grievor that disciplinary action might be taken if she did not comply with the request.

[38] According to the grievor, it was not explained to her how her personal activity could have an impact on her impartiality and objectivity in continuing to do her work as before. She said she had simply been told that there was a public perception problem and that the Department's impartiality would be called into question. She said she had clearly asked about the nature of the conflict of interest. The Supreme Court decision in *Osborne v. Canada (Treasury Board),* [1991] 2 S.C.R. 69, was mentioned. The managers apparently answered that there was a risk that the situation might undermine federal-provincial relations and that the grievor would be in a position to criticize the federal government.

[39] Ms. Lajoie did not remember how the employer's decision was explained to the grievor. However, she confirmed that there was a reference to a reasonable public perception that there would be a conflict of interest. In the grievor's case, it was not a matter of belonging to a political party, but rather of political action in the broader sense. Under cross-examination, Ms. Lajoie admitted that the government at times had different strategies and objectives depending on the political party in power; however, in performing their work, employees had to overlook their political allegiances and respect the objectives of the elected government.

[40] At the end of that meeting, the grievor proposed that what she called a confidential report be filed, as provided by the Code. She said she had received contradictory information on this subject at the meeting. The Code to which she referred no longer existed. She asked for time to conduct research and consultations before making her final decision.

[41] A brief meeting was held on February 13, 2004, for the purpose of communicating the grievor's response. The same persons were present. Having confirmed her intention to run for the office of president of the organization, the grievor received a letter that day signed by Ms. Sarkar (Exhibit G-2). In that letter, Ms. Sarkar demanded that the grievor relinquish the position of president and stated that she could remain a member of the organization as long as she refrained from making public statements concerning the organization or its goals. She cited the Code as the basis for her demand. She also noted that the issue had been reviewed by the conflict of interest review committee, which had concluded that the grievor’s activities could reasonably be considered likely to cause a conflict of interest that might compromise the political neutrality of the public service. In the committee's view, there was also a possibility that her ability to perform her departmental duties in an objective manner would be called into question.

[42] The grievor found the order unfair and unreasonable in view of the subordinate nature of her position. She stated that she had been aware of the Department's media sensitivities from the outset. She said she was prepared to undertake not to make public statements about the Department or about the fact that she was a federal government employee. She was ready to explore any condition that would be included in the confidential report and would constitute a personal commitment to her

employer in the circumstances. She argued that she was not allowed to make that report.

[43] At the very end of the day on February 13, 2004, the grievor informed her superiors by e-mail that she did not intend to comply with the order that had been given to her to relinquish the position of president of the organization (Exhibit E-18). In that e-mail message, she stated: [translation] ". . . this order is a violation of my fundamental rights of freedom of thought, action and association outside my hours of work. . . ." She also stated that this [translation] "education and promotion" organization had [translation] "no structural link to any federal or provincial political party whatsoever."

[44] On February 15, 2004, the grievor was elected by acclamation to the position of president of "Le Québec, un pays!". In view of the unresolved situation with her employer, she deliberately refrained from making any public statement after her election, thus complying with the commitment she had made in her February 13, 2004, e-mail message (Exhibit E-18).

[45] A disciplinary meeting was immediately called by the employer (Exhibit E-19) and held on February 17, 2004. Ms. Sarkar was present at that meeting, as was Ms. Lajoie. The grievor was accompanied by Mr. Corbeil and a representative of the National Component, Donald Roy.

[46] In the grievor's mind, the purpose of the meeting was clear: disciplinary action was going to be taken against her. And yet that is not what occurred. At the start of the meeting, Ms. Lajoie apparently stated that there would not necessarily be any penalties. Ms. Sarkar then asked the grievor whether she had changed her position. The grievor requested five minutes, without interruption, to read a statement (Exhibit G-5).

[47] In that statement, the grievor proposed three scenarios that would allow her to remain as president of the organization. She favoured the first scenario in which she would be given a letter of apology and allowed to file a confidential report showing that her personal activities did not impair her ability to perform her duties in an objective manner. The second scenario involved a grievance against the order made on February 12, 2004, to be handled in accordance with the internal grievance procedure. The third scenario involved a grievance against the announced disciplinary measure

and bringing the affair to the attention of the media. Then, at the suggestion of her lawyers, the grievor requested that talks continue with her representatives.

[48] Ms. Sarkar thanked the grievor for her statement and addressed Mr. Roy. According to Ms. Sarkar, that meeting was an opportunity to discuss and understand the organization concerned. The three scenarios were discussed. Mr. Roy apparently said that Ms. Sarkar would lose control of the situation if the decision were made to bring the affair to the attention of the media (scenario 3).

[49] According to Ms. Sarkar, the grievor's representatives had told her that she had been poorly advised about the *Charter*'s impact and about her fundamental rights. Accusations of liberal partisanship were made against Ms. Sarkar. Her perception of the discussion was that the tone had been quite aggressive and that certain remarks were inappropriate. However, she admitted that the grievor had been honest and open in her actions and in her statement. There was nevertheless an apparent conflict of interest.

[50] It was clear in Ms. Sarkar's view that, in her relations with the provinces, the grievor was [translation] "the face of the department – of the program" and, at the same time, the representative of a sovereigntist organization. In Ms. Sarkar's view, the grievor did not appear to see this aspect of the matter; she wanted to negotiate an agreement enabling her to continue her personal activities. Based on the advice given to Ms. Sarkar, the only possible option was for the grievor to relinquish the position of president and remain a member of the organization, if she wished, because otherwise there was a conflict of interest.

[51] The grievor stated that she had intervened in the debate at one point, despite the fact that she had asked that talks continue with her representatives, when she observed that there was a deadlock. She reminded her managers that she had acted in good faith in informing them of the situation in advance. She repeated that she understood the Department's sensitivities with regard to the issue of Quebec sovereignty and added that she was prepared to take any appropriate action.

[52] Among other things, she said she would relinquish teleworking in order to reassure the employer that she would not use departmental tools for her personal activities. She also said she would give up replacing her immediate manager in an acting capacity as she had done in the past. She thus ensured that she would not take

part in any discussions or decisions concerning program implementation, and would curtail her access to confidential documents and information concerning the employer's decisions or strategies. She testified that she had assumed her career would stop at the PM-05 level, the highest subordinate level, in view of her personal choice. Lastly, she stated that she was prepared to make a commitment not to make any public statement about the Department and its strategies and policies, or about the fact that she worked there.

[53] The grievor admitted that Ms. Sarkar had thanked her for her integrity, transparency and good faith. At that stage in the discussions, the grievor had hopes that the first scenario that she had proposed at the meeting, the filing of a confidential report, would be accepted by Ms. Sarkar, who had told her at the end of the meeting that she would consider the situation.

[54] Mr. Heintzman explained how the employer had come to the conclusion that there was a conflict of interest. Conflict may be present at three levels: actual conflict, apparent conflict and potential conflict. He recalled the well-established requirement in the public sector that it was not necessary to show an actual conflict but rather a perceived conflict of interest. This requirement stems from the importance of maintaining citizens' trust in the impartiality of the public service and its programs and services. Thus there is a conflict of interest from the moment that an employee's personal activities may call that impartiality and transparency into question and from the moment those activities may raise a public controversy that taints the government's credibility or legitimacy. In this regard, the purpose of the instruments put in place is to prevent rather than to correct such situations.

[55] The case law, Mr. Heintzman said, points to three internal and external factors that should be considered in analyzing a conflict of interest situation: the nature and area of the activities, the visibility and role of the person in public as an embodiment of the government, and the person's level of influence on the government's decision-making process. Mr. Heintzman then showed how those factors applied in the grievor's case.

[56] From a personal standpoint, first, the grievor had accepted the position of president of an organization whose purpose was to promote Quebec independence. It was not a political party, but an organization with political aims. Second, as president,

the grievor was, by definition, the organization's representative, which meant that she had considerable visibility. Third, as president, she had a high degree of influence.

[57] From a professional standpoint, first, the grievor worked in a department where Canadian unity is a sensitive issue. Canadian unity goes to the very heart of the Department's mandate. Clearly, then, the objectives of the two organizations are in genuine conflict. In addition, the grievor worked in the field of the official languages, which is closely linked to the government's fundamental strategy for Canadian unity. Second, as the Senior Program Officer of the regional desk and as an analyst, the grievor played a role as a representative of the Department, a visible role in the regional community. She represented the federal government to its regional stakeholders. Third, the grievor's position was at the PM-05 level. Although far from the Deputy Minister level, this level was nevertheless not negligible. The grievor had some degree of influence given her negotiation, analysis and case preparation duties as well as her power to make recommendations.

[58] Mr. Heintzman therefore concluded that there was both an apparent and a potential conflict of interest. In his view, if the situation had been tolerated and the grievor had continued in that dual role, someone could have denounced the obvious contradiction between promoting an independent Quebec and managing a program essentially designed to achieve a cohesive and unified Canada.

[59] According to Mr. Heintzman, the suggestion that the grievor accept the position of president of that organization, while waiving her right to be its representative, would do nothing to alter the apparent or the potential conflict in any citizen's mind. In his view, the title alone inevitably gave rise to a perception of apparent conflict.

[60] Mr. Heintzman explained in detail the specific mandate of the Department of Canadian Heritage, since this factor was very important in analyzing the grievor's situation. The Department's primary purpose is to strengthen connections among Canadians. This objective, then, is opposed to the objective of the organization of which the grievor was the president.

[61] In addition, Mr. Heintzman noted that it was important to examine the specific context in which the grievor worked within the Department. He approached this analysis from two different standpoints: theoretical and historical; and pragmatic and political.

[62] From the theoretical and historical standpoint, Mr. Heintzman recalled that the ideology of protecting minority language rights in Canada goes back to the turn of the 20th century and the Honourable Henri Bourassa. According to this ideology, French-speaking Canadians are at home in all parts of Canada. In the 1960s, André Laurendeau, Co-Chairman of the Royal Commission on Bilingualism and Biculturalism (the Laurendeau–Dunton Commission) took up the torch from Henri Bourassa and made this ideology a strategy for Canadian unity, thus offering an alternative to Quebec separatism. Therefore, historically and theoretically, this strategy for expanding bilingualism has always been present and put forward by advocates of Canadian unity.

[63] From the pragmatic and political standpoint, Mr. Heintzman began by emphasizing that multilingual countries, are countries that experience constant tensions, a situation that requires ongoing effort and national consensus. The balance is often a delicate one and must be maintained with care. In his view, it would be fair to say that the Canadian consensus is related to the theory of Bourassa and Laurendeau; that is to say, if the rights of the French-speaking minority communities are not respected, national unity is compromised. The threat of separation is a threat to that consensus. If provincial political authorities no longer believe that their efforts are helping to maintain Canadian unity, it becomes much more difficult to maintain official language minority rights in all parts of the country, and there is no longer any motivation to do so.

[64] Therefore, with regard to the grievor and her responsibilities at the OLSP Branch, Mr. Heintzman admitted that he had no evidence that she was not convinced of the program's merits or that she was not competently providing her services. The conflict was at another level, stemming more from the fact that development of the official languages and support for minority communities underlie the unity, not the dismantling, of the country.

[65] The grievor's PM-05 level is a factor not known to the public. Thus, although the grievor's line level and degree of influence are factors that must be considered in assessing conflict of interest, at issue here is the public's perception, not the grievor's actual duties and responsibilities.

[66] Under cross-examination, Mr. Heintzman said that each case was considered on its merits. It might well be that persons in other PM-05 positions at the Department of

Canadian Heritage would not be in the same conflict of interest situation as the grievor. In his view, each situation must be considered separately.

[67] Mr. Heintzman also confirmed that, under the *Code*, it is individual employees' duty to bring all possible situations of conflict of interest to the attention of their managers. He explained that the confidential report is the tool used to bring such information to management's attention. That report is not part of the solution, but is only its trigger. Lastly, he admitted that, to his knowledge, the alternative open to the grievor was simply to remain a member of the organization. He nevertheless thought that a conceptual conflict of interest remained.

[68] Ms. Sarkar briefly summed up the grievor's job description: [translation] "She is responsible for the glue of Canada." The issue was largely one of image. It did not seem credible for the grievor to preside publicly over the organization "Le Québec, un pays!" and, the next day, to sit down at the table with the provinces and take part in negotiations with them to convince them that linguistic duality is a priority for Canadian unity.

[69] Mr. Lemoine explained that, according to the Department's mandate, French is to be a reality in all parts of Canada. To that end, the purpose of the agreements with the provinces other than Quebec is to have the importance of French and the validity of providing French-language services recognized and to create settings where the French language is recognized in order to ensure that Francophones feel at home in all parts of the country. With regard to society, the idea is to bring the various groups to understand the importance of representing and reflecting Canada's linguistic duality. The role of the Program Officer is thus that of an ambassador. Program Officers must encourage provincial governments to be generous with their official language minority communities, a job that requires tact, credibility and effort. A Program Officer must be able to understand the provinces' constraints.

[70] In Mr. Lemoine's view, Senior Program Officers are in privileged contact with provincial authorities and community groups, which must be able to rely on these officers, as their representatives to the federal government, to move their projects forward. Senior Program Officers must act in a manner consistent with the federal government and its Canadian unity ideology, which underlies its linguistic duality strategies. In Mr. Lemoine's opinion, Senior Program Officers cannot appear before provincial authorities unless their credibility is intact and unimpeachable.

[71] Mr. Lemoine illustrated the grievor's role in two important cases, one with regard to education in Nova Scotia, and the other with regard to a community centre in Newfoundland. The grievor had worked on case preparation. She had acted as an adviser on strategies and approaches to be taken based on her knowledge of the setting and her preliminary discussions with the representatives of the provincial ministries.

[72] According to Mr. Lemoine, it was impossible for the Branch to deal with the situation in which the grievor found herself. Here was an officer, an OLSP ambassador, an instrument of the strategy for Canadian unity, who was going to take a public position in favour of Quebec sovereignty, a position diametrically opposed to that of the Department. Quebec separation would jeopardize the blueprint for society that the *Official Languages Act* has been designed to promote since 1968.

[73] The presence of Quebec and the desire to provide it with a place in Confederation are an incentive for provincial governments to set up these programs. The provincial stakeholders are already sensitive to the language issue; their determination with regard to these matters could be fragile. The program's credibility cannot be called into question. Doing so would jeopardize the Department's ability to carry out its mandate. The language issue is a politically sensitive matter at the provincial level. It could become very difficult to justify official languages programs without Quebec's presence. Quebec Francophones represent some 20% to 25% of Canada's population.

[74] The mandate to promote linguistic duality in all parts of the country is exclusively that of the Department of Canadian Heritage. The Branch is the only entity that conveys these values in the country. To the extent that a prominent employee undertakes to promote fundamentally opposing values, an incompatibility exists. In Mr. Lemoine's view, one must go beyond what the individual represents; the Branch as a whole was called into question.

[75] This incompatibility would exist for any other employee, at any of various levels, who was involved in activities outside the Department. A publicly apparent conflict of interest is the crucial factor. Furthermore, the broader role of the work unit must be considered in cases involving lower-level employees. If an employee's personal activities are incompatible with the work unit's role, there is still an apparent conflict of interest regardless of the employee's low level. According to Mr. Lemoine, given the

Department's fundamental mandate, changing the grievor's duties or assigning her to non-public duties would do nothing to alter the situation.

[76] Under cross-examination, Mr. Lemoine stated that in his view members of the public, who do not know all the details of the grievor's duties and responsibilities, might perceive a contradiction between the mandates of the two organizations, in other words, a conflict of interest. The Department would then have to defend itself and explain the situation. The Branch was trying to avoid such a situation.

[77] From a hierarchical standpoint, it is understood that there are six levels and that the grievor is at the lowest level (Exhibit E-9). Two officers at the PM-03 and PM-04 group and level support the activities of PM-05 level officers, but there is no line relationship between them. In addition, the grievor was occasionally called upon to perform the duties of her supervisor, Ms. Doyon, at the PM-06 level, on an acting basis.

[78] The grievor was not responsible for any budgets. Nor did she have any signing authority for formal agreements. She had a power of recommendation and thus some degree of influence. The grievor took part in some federal-provincial meetings and accompanied her superiors to certain meetings in the provinces. Although the grievor said that she had attended such meetings only as an observer and that her role was only to take notes, Mr. Lemoine said that it was expected that all those at the table would help advance the negotiations and that the officer was there to give advice. The grievor regularly took part in preparing for these meetings.

[79] Under cross-examination, the procedure for preparing documents in support of project funding applications was examined and the grievor's role was clarified. Clearly, she had no decision-making power over the fate of a case. However, she definitely exercised influence, given her role as an analyst and her community expertise.

[80] Mr. Balsam testified about the federal-provincial agreement negotiation process and the decision-making process. He had known the grievor since 2000. He said he was surprised to learn through the media that her employment had been terminated and that she was a sovereigntist. He had observed no change in her work between February 2004 and the time she was dismissed.

[81] Ms. Sarkar stated that, on February 13, 2004, she had enough information to make the decision to require that the grievor abandon her plan to become president. However, Ms. Sarkar did not have enough information on the grievor's specific responsibilities in the Department, or on the organization in which she was running for the office of president, to make any other decision as a consequence of the grievor's decision to pursue her personal plan. There was little time before the election. The conflict review committee made an oral report to her.

[82] At a meeting on February 19, 2004, Ms. Lajoie gave the grievor and her union representative a list of five questions designed to clarify the organization's mandate and description as well as the role, responsibilities and expected commitment of the president. Lastly, the grievor was asked how she intended to avoid any actual, potential or apparent conflict between her official duties and the performance of her duties as president. Ms. Lajoie also explained that Ms. Sarkar was reflecting and consulting in order to make a decision in response to the events that would follow. Ms. Sarkar sent the grievor a reminder in a letter dated March 3, 2004, (Exhibit E-24). The grievor answered the questions on March 9, 2004, (Exhibit E-23).

[83] With her answers, the grievor submitted the general by-laws of "Le Québec, un pays!", which, among other things, state the following:

> [Translation]
>
> *3. PURPOSE*
>
> *The group is a non-partisan non-profit organization whose essential purpose is to promote Quebec sovereignty through pedagogical, educational and cultural means.*
>
> *In particular, to that end, it may:*
>
> *(a) inform the population of the Outaouais and increase its awareness of the basis of sovereignty;*
>
> *(b) conduct public campaigns, in particular advertising or information campaigns, for Quebec sovereignty;*
>
> *(c) organize meetings, forums and seminars to inform the public about and increase its awareness of Quebec sovereignty;*
>
> *(d) commission or distribute research and reports on various aspects of the Quebec reality;*

> *(e) organize special activities, particularly cultural and educational activities, for the promotion of Quebec sovereignty in certain areas;*
>
> *(f) receive gifts, bequests and contributions in cash, securities or other forms and administer them and organize fundraising campaigns.*

[84] Further on, the by-laws state:

> [Translation]
>
> *7. DIRECTORS*
>
> *7.1 President*
>
> *(a) The President shall represent the Group.*
>
> *(b) The President shall preside over the meetings of the Board of Directors and of the Group.*
>
> *(c) The President shall ensure that the by-laws of the Group are complied with.*
>
> *(d) The President shall, together with another director, sign the documents of the Group, as necessary.*

[85] On March 24, 2004, newspaper articles concerning the grievor's situation appeared (Exhibit E-2). The next day, the grievor held a press conference, accompanied by Mr. Cashman, Ed Broadbent (then an NDP candidate), Mario Laframboise of the Bloc Québécois, Scott Reid of the Conservative Party, and Jocelyne Gadbois of the Parti Québécois. Following that conference, other newspaper articles were published.

[86] On April 13, 2004, Ms. Sarkar again wrote to the grievor (Exhibit E-26), informing her that the Department was maintaining its position with regard to the conflict of interest in which it believed the grievor had placed herself and asking her once again to give up her position as president. Subject to her refraining from making any public statement about that organization, there was no objection to her remaining a member of it. In closing, Ms. Sarkar invited the grievor to make suggestions for resolving the conflict of interest in accordance with the Code. The grievor was asked to communicate her position before April 23, 2004.

[87] On April 23, 2004, the grievor replied to Ms. Sarkar (Exhibit E-27). She reiterated that she still did not understand why she should abandon her activities as president and thus waive her fundamental rights of freedom of expression and

association. In her opinion, there was no evidence of a conflict of interest. She therefore reaffirmed her wish to keep her job, while continuing to act as president in accordance with her commitment of March 9, 2004, to make [translation] "no public or corporate statement directly related to the Department of Canadian Heritage in the context of [her] duties as representative for the regional community political action group of which [she is] the president."

[88] At Ms. Sarkar's request, a meeting was held on April 28, 2004, to discuss suggestions for resolving the situation. The grievor was informed that Mr. Thompson would be present at that meeting. Mr. Thompson started the meeting by presenting its objectives, which were to confirm the positions of each party and to explore the grievor's suggestions. Ms. Sarkar read a statement she had prepared (Exhibit E-33), which reads as follows:

> [Translation]
>
> *Your responsibilities as Senior Program Officer of the program are, among other things, to represent the Department in the negotiation and implementation of official language agreements with representatives of the provinces and of governmental and non-government organizations.*
>
> *Those responsibilities are consistent with the mandate of the Department of Canadian Heritage, which is to promote the values of shared citizenship, thus forging closer ties among all Canadians in all provinces and territories of the country.*
>
> *Consequently, your outside activities may reasonably be perceived as likely to cause a conflict of interest and thus impair your ability to perform your departmental duties objectively.*

[89] The grievor and her representatives stated that they still did not understand the Department's position, and requested evidence of a conflict of interest. The grievor said that she and the Department did not agree on her duties and responsibilities. Ms. Sarkar testified that that point was secondary since the issue of image was more important to the Department. Considering the interference with her rights and the lack of evidence, the grievor reiterated her position and her undertakings of March 9, 2004. Mr. Thompson informed her that the Department would have to make a decision as soon as possible and communicate it to her.

[90] At a meeting on April 29, 2004, after the grievor had been invited once again to change her position or make other suggestions, she was given a termination letter.

[91] Ms. Sarkar stated that she had considered other solutions. However, since the conflict of interest was primarily apparent and the situation had been in the media spotlight since March 2004, she did not see any possibility of finding the grievor an alternative position in the Department. The fact that the situation had already received media attention made the exercise even more difficult. The Department's mandate and the impact that a new position might have on other employees and on service to outside client groups were considered. Ms. Sarkar recalled that those decisions were made in view of the fact that the Department was considered [translation] "the glue of the country".

[92] The possibility of offering the grievor a lower-level position or employing her in other departments were not explored. Such transfers cannot be imposed on either an employee or a host department. As well, according to Ms. Sarkar, neither the grievor nor her representatives suggested any alternatives. Throughout the discussions, the grievor insisted on keeping her position since she saw no conflict of interest.

[93] Mr. Cashman, on the other hand, testified that he had intervened in the case by contacting Mr. Thompson in order to find a solution for the grievor. They had discussed various options, specifically finding another PM-05 position elsewhere in the Department or in the government. They had also considered altering the grievor's duties. Those discussions did not produce any results. According to Mr. Cashman, the employer maintained its position.

[94] Given the employer's attitude, and admitting his frustration with the lack of customary co-operation, Mr. Cashman then opted for a press conference. His idea was to make the Department's representatives understand that fundamental rights were at stake and to hold them to account. He invited representatives of all the political parties to the conference in order to present the case from the standpoint of the grievor's fundamental rights, not that of a federal-provincial conflict.

[95] In Mr. Cashman's view, two factors were the source of the situation. First, there was a lack of respect for the grievor's fundamental rights, her rights of association and expression and, second, the employer never explained its position and provided no evidence of a conflict of interest. The employer did not want to discuss or solve the

problem. It maintained its position, whereas in Mr. Cashman's opinion a solution was possible.

[96] Under cross-examination, Mr. Cashman admitted that he had not mentioned those options to Ms. Sarkar, even though he had been present at the final meetings, including the April 28, 2004, meeting, and even though Ms. Sarkar had asked the grievor to provide possible solutions. In the employer's view, identifying possible solutions was the purpose of the meetings. Mr. Cashman also admitted mentioning that "the matter could get ugly if the media took an interest in it". According to Mr. Cashman, the April 28, 2004, meeting was the disciplinary meeting; at that point, negotiation was out of the question. He found the Department's attitude confusing. He concluded that the employer had made up its mind.

[97] Mr. Cashman was cross-examined at length on the circumstances of his offer to negotiate and the three options he presented to Mr. Thompson in a telephone conversation. Recalled for cross-examination and warned under the rule established in *Browne v. Dunn*, [1894] 6 R. 67 (H.L.), Mr. Cashman confirmed that he had made those offers. Subject to an objection to his testimony, Mr. Thompson, who had been present in the room throughout the hearing, testified on this point. He stated that Mr. Cashman had never made any such suggestion. No such options had been presented to him. Mr. Thompson submitted the notes taken during the telephone conversation with Mr. Cashman on March 2, 2004 (Exhibit E-39). These notes do not make any reference to such a suggestion. Mr. Thompson said that he would definitely have noted that important aspect of the discussion, particularly since it would have required follow-up on his part. I have taken the objection under advisement and shall address it in my reasons.

[98] The evidence also shows that, on April 30, 2004, the grievor held another press conference, accompanied by her spouse, Richard Nadeau, Stéphane Bergeron and Mario Laframboise, Bloc Québécois Members of Parliament. The comments made at that press conference and at subsequent media interviews given by the grievor were adduced as Exhibit E-2.

III. Summary of arguments

A. For the employer

[99] The employer emphasized at the outset that only the freedom of expression guaranteed by paragraph 2(*b*) of the *Charter* was relevant in the present case. The grievor's right of association was not interfered with because she was allowed to remain a member of the organization concerned. Furthermore, the fundamental right of expression must be viewed in relation to employees' duty of loyalty, as defined by the Supreme Court of Canada in *Fraser v. P.S.S.R.B.,* [1985] 2 S.C.R. 455. In the present case, the employer acted to prevent a situation that, objectively speaking, would involve the public appearance of impartiality.

[100] The Federal Court, in *Haydon v. Canada (Treasury Board)*, [2001] 2 F.C. 82 (T.D.), *Haydon v. Canada (Treasury Board),* [2004] F.C. 749 (TD) (upheld by the Court of Appeal, [2005] F.C.A. 249; application for leave to appeal to the Supreme Court of Canada denied on January 19, 2006) and *Chopra v. Canada* (*Treasury Board*), [2005] F.C. 958 (TD), also held that an employee's duty of loyalty is a reasonable and justifiable limit on the application of the *Charter* provisions. In the employer's view, that argument should not be revisited: the principle is accepted, and the duty of loyalty is recognized as a rule of law.

[101] In addition, the Supreme Court clearly held in *Fraser* (*supra*) that direct evidence of conflict of interest or of impairment of the general ability to act as a public servant was not required for apparent or potential conflict. In the present case, the substance, form and context of the criticism expressed might have led to the conclusion that there was such an impairment. It must be borne in mind that members of the public do not know the details of the grievor's responsibilities. In the public mind, appearances are everything. In the present case, the employer never claimed that there had been an actual conflict of interest.

[102] However, the apparent conflict of interest was of great importance, as the employer's witnesses stated. In her role, the grievor was the Department's representative to the client communities. She was an ambassador of the OLSP Branch, whose programs are set up in order to strengthen Canadian unity. Not only the employer's witnesses who explained the Department's position and specific mandate in detail, but also the newspapers that published citizens' opinions, comments and

editorials, revealed a potential if not apparent conflict of interest. Thus the employer's fear was confirmed and established.

[103] In *Osborne* (*supra*), with regard to the employee's right to work for or against a political party or candidate, the Supreme Court of Canada identified three factors for determining an employee's rights. Those rights must be examined from two standpoints: the professional and the personal activities of the employee. Mr. Heintzman testified concerning the employer's meticulous application of this test in this case.

[104] With regard to personal activities, in the employer's view, the evidence established that the grievor's primary objective, through the organization of which she was the president, was Quebec sovereignty and thus the break-up of Canada as we know it. In addition, the grievor could not be president of the organization without being its representative; that was unavoidable. Furthermore, the employer emphasized that, following the press conference of March 25, 2004, that question became a rhetorical one.

[105] With regard to professional activities, the grievor occupied a position as an OLSP program administrator. The purpose of OSLP programs is to develop and manage grants and federal-provincial agreements. There is a work team, and the PM-05 takes part in or prepares for negotiations with provincial counterparts. It is true that the grievor had no final decision-making power. However, that factor is not required for a conflict of interest to exist. What does give rise to a conflict of interest is the fact that the grievor was in constant contact with her provincial counterparts as a representative of the Department and the fact that the Minister made decisions on the basis of her analysis and recommendations. She herself characterized her relationship with her provincial counterparts as that of [translation] "a transmission belt". She testified as to her expertise and skills in making recommendations and conducting follow-up on cases. Lastly, the grievor's position was senior enough to enable her to replace, on an acting basis, her supervisor, who was a PM-06, a level to which the post-employment compliance measures set out in Chapter 3 of the Code apply.

[106] More importantly in the employer's view, this distinction among the grievor's duties is made by insiders; it is not a distinction that members of the public can draw. Once again, appearances are the fundamental issue. The grievor admitted that there was an apparent conflict of interest in her offering not to take on the role of the

group's representative because she wanted to spare the employer's sensitivities. The visibility of the grievor's position is obvious to the employer. The grievor worked in the small community of the official language minority communities, the Department's client communities; it was established that at least one annual meeting was held with the Senior Program Officers, including the grievor.

[107] In fact, the employer contends that the case is now a matter of public knowledge and that, [translation] “for the average person”, the contradiction between the grievor's professional and personal activities is fundamentally important. The employer had to act, and had to prevent the case from flaring up and controversy from undermining the Department's credibility and OLSP programs.

[108] In the employer's opinion, then, since all constitutional issues have now been resolved by the Supreme Court of Canada, at issue is only the fairness of the disciplinary measure, which is purely a labour relations matter.

[109] On that point, the employer recalled the managers' approach and the brief period of time that the grievor gave them to analyze the situation and make a decision. In the employer's opinion, the grievor had made the decision to run for the office of president. In her mind, giving it up afterwards was out of the question. She considered that she was protected by the decision in *Osborne* (*supra*). Her approach, and that of her representatives, was confrontational. In their view, the idea was solely to complete a confidential report, which in fact was never done. The managers were accused of being partisan, and threats were made that the media would be informed of the case. No penalty had yet been imposed. The meetings continued in order to hold discussions and obtain information on the activities of the organization concerned.

[110] In accordance with *Gannon v. Canada (Treasury Board),* 2004 FCA 417, concerning which the adjudicator had asked the parties for comments, the employer contended that, in view of the fact that the relationship of trust had been broken, there was no ground for reinstatement. In its view, it had been clearly and unequivocally established that the grievor had decided to remain as president of the organization and to remain in her position as well. The grievor had refused to obey the employer's orders and had publicly stated that the employer was motivated by bad faith and political partisanship. In addition, in a number of other grievances she demanded that disciplinary measures be taken against all her managers. The employer also questioned

the grievor's frankness, thus making it clear that the relationship of trust had been broken and that reinstatement of the grievor was impossible.

[111] With regard to the employer's obligation to find the grievor another position or to amend her position, there is no such obligation since at issue here is a disciplinary measure, not a duty to accommodate. Nor does the Deputy Minister have any power or authority under the *Public Service Employment Act* to appoint or transfer an employee to another department.

B. For the grievor

[112] In the grievor's view, three questions are at issue: (1) since it is admitted that there was no actual conflict of interest, was there, then, an apparent conflict of interest? (2) What were the possible solutions to the apparent conflict of interest, if any, and what were each party's responsibilities with regard to those possible solutions? (3) Was the ultimate penalty of termination appropriate in the circumstances?

[113] In fact, it must be determined how the grievor's fundamental rights should be balanced against her duty of loyalty to the employer. In *Fraser*, the Supreme Court of Canada held as follows, at page 466:

> *The act of balancing must start with the proposition that some speech by public servants concerning public issues is permitted. Public servants cannot be, to use Mr. Fraser's apt phrase, "silent members of society".*

[114] Unlike Mr. Fraser's situation, the grievor did not have an important or sensitive position and did not express criticism of which the substance, form or context were extreme to the point that an inference of impairment with regard to her work could be drawn.

[115] The Supreme Court of Canada decision in *Osborne* (*supra*) was also cited in support of the grievor's argument. In the present case, there was no compliance with the principle of reasonable limits on the employee's freedom of expression. The tests set out in *R. v. Oakes,* [1986] 1 S.C.R. 103, and discussed in *Osborne* (*supra*) are of particular interest. The grievor also cited, among other cases, *Chopra* (*supra*), *Threader v. Canada (Treasury Board)*, [1987] 1 F.C. 41 (CA); *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 S.C.R. 970; *Horn v. Treasury Board (Indian*

and Northern Affairs Canada), PSSRB File No. 166-2-21068 (1992); and *Singh v. Canada (Public Works and Government Services),* 2001 FCT 577.

[116] According to *Threader* (*supra*), the test that should be used to determine whether there is a conflict of interest is that of a reasonable and informed person, not just anyone and not, therefore, by more or less well-informed newspaper articles. The employer did not establish that persons with whom the grievor worked would come to the conclusion that there was a conflict of interest. On the contrary, Mr. Balsam stated that he did not know that the grievor was a sovereigntist and that he had not observed any change in her attitude or approach to cases since her election as president of the organization.

[117] The grievor's position is at the PM-05 level, which is not a management level. The grievor does not have any decision-making power. Her work is technical in nature. It was admitted that the Department for which she works, unlike other departments, is particularly sensitive to these political issues. In view of that fact, the grievor was transparent and deliberately took steps to inform her employer and take appropriate measures in order to minimize the consequences of her actions for herself and for the employer, in accordance with the Code.

[118] With regard to the visibility of her position, the grievor emphasized that being president of the organization was an activity outside her work and that, in that capacity, she would not speak out against the Department, which was not so in the other cases cited. She did not criticize her Department's policies or decisions.

[119] The grievor contends that the employer failed in its approach by not imposing progressive discipline. In support of that argument, she cited *Fraser* (*supra*). In that case, progressive discipline had been imposed on the employee and, on a number of occasions, the employer had imposed a disciplinary measure in order to put a stop to the employee's actions, which was not done in the present case. The employer immediately imposed the ultimate penalty, termination of employment.

[120] With regard to solutions to the situation, the idea was to examine them based on a number of options. The grievor made suggestions; she was open to finding a solution that would be consistent with the Department's sensitivities. She sought to understand the grounds for the Department's decision in order to find a solution that would satisfy both parties. The employer did not co-operate; it did not explain its

position, thus making it impossible to seek a solution. It reiterated its demand and its statement that there was a conflict of interest.

[121] In accordance with *Renaud* (*supra*), if the employer had made suggestions and the employee had rejected them, the adjudicator would have found in favour of the employer. In the present case, the employer did not make that effort; it made no effort to reconcile the grievor's fundamental rights with her duty of loyalty.

[122] The penalty was inappropriate. The grievor pointed out that there were no disciplinary measures in her file. No gradual disciplinary measures were imposed in order to induce her to alter her decision. Although that is the purpose of disciplinary measures, she was not given an opportunity to do so. In view of the importance of the rights at stake, the employer should have done more.

[123] The employer stressed employees' duty of loyalty. The grievor did not dispute this duty, but considered that it was not the real issue. The real task was to reconcile employees' fundamental rights with their duty of loyalty. In this case, the grievor did not directly attack the employer. For her, being president of the organization was a personal project.

[124] With regard to the grievor's reinstatement, in accordance with *Gannon* (*supra*), the grievor submitted that the adjudicator's jurisdiction is limited to the merits of the termination of employment. If the adjudicator finds the termination of employment unwarranted, she must reinstate the grievor. In the grievor's view, the relationship of trust was not broken since the employer considered settlement options until April 2004.

IV. Reasons

[125] The disciplinary measure imposed on the grievor is based on a decision by the employer that an apparent or potential conflict of interest exists between her duties at the Department of Canadian Heritage and her personal activities. Those activities are political, but not partisan.

[126] The grievor disputes the employer's finding of a conflict of interest and contends that the disciplinary measure imposed is unwarranted. That disciplinary measure denies her fundamental rights of expression and association, as well as her right to participate in political activities as recognized by the Supreme Court of Canada

in *Osborne* (*supra*). In her opinion, it was possible to reconcile her fundamental rights and her duty of loyalty to the employer.

[127] What, then, is the situation of the legislation and the case law with regard to these concepts: the grievor's right to participate in the political life of the country and, specifically, the limits on the freedom of expression guaranteed by the *Charter* that are permitted by the duty of loyalty of public servants, and the principles of conflict of interest?

A. The law and case law

1. The right of public servants to participate in the political life of the country

a) Freedom of expression and its limits

[128] In addition to the right of all public servants to work for or against a candidate or a recognized political party, recognized since 1991 by the decision in *Osborne,* a number of other issues have been resolved by the Supreme Court of Canada. As early as 1985, in *Fraser* (*supra*), the Court recognized the right of public servants to express themselves, to a certain extent, on issues of public interest. *Fraser* did not deal with the *Charter* since the events at issue had occurred before the proclamation of the *Charter* in 1982. In *Fraser*, Dickson C.J. confirmed that public servants cannot be "silent members of society"; their being so would not be compatible with either the well-established principles that allow for free and frank discussion in a democratic society or with the size of the public service and plain common sense. Dickson C.J. wrote:

. . .

> *An absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit. . . . (p. 467)*

[129] In *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, the Supreme Court of Canada reiterated what it meant by "expression", at paragraph 60:

> *Apart from those rare cases where expression is communicated in a physically violent manner, this Court has held that so long as an activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls*

> *within the scope of the guarantee of freedom of expression; see Irwin Toy, supra, at p. 969. The scope of constitutional protection of expression is, therefore, very broad.*
>
> . . .

[130] On the other hand, *Fraser* recognizes that this freedom of speech or expression is not absolute or unconditional, a principle that was subsequently confirmed in *Osborne*. This freedom must be limited and assessed in light of other important competing values: a public servant's duty to ensure that the public service, to which that person owes a duty of loyalty, is impartial and effective:

> *The federal public service in Canada is part of the executive branch of Government. As such, its fundamental task is to administer and implement policy. In order to do this well, the public service must employ people with certain important characteristics. Knowledge is one, fairness another, integrity a third.*
>
> *As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government.*
>
> *As the Adjudicator pointed out, there is a powerful reason for this general requirement of loyalty, namely the public interest in both the actual, and apparent, impartiality of the public service. . . . (Fraser, p. 470)*
>
> [Emphasis added]

[131] This freedom of expression is also circumscribed by the public servant's level and by the impairment the situation may cause to that person's ability to exercise his or her duties in a neutral and objective manner, taking into account the substance, form and context of the criticism expressed:

> *As to impairment to perform the specific job, I think the general rule should be that direct evidence of impairment is required. However, this rule is not absolute. When, as here, the nature of the public servant's occupation is both important and sensitive and when, as here, the substance, form and context of the public servant's criticism is extreme, then an inference of impairment can be drawn. . . .*
>
> *Turning to impairment in the wider sense, I am of opinion that direct evidence is not necessarily required. . . . It is open to an adjudicator to infer impairment on the whole of the evidence if there is evidence of a pattern of behaviour which an adjudicator could reasonably conclude would impair the usefulness of the public servant. Was there such evidence of behaviour in this case? In order to answer that question it becomes relevant to consider the substance, form and context of Mr. Fraser's criticism of government policy. (Fraser, p. 472-473)*

[132] Accordingly, where the existence of opposing values calls for a limit on a fundamental right guaranteed by the *Charter*, an analysis based on section 1 of the *Charter* must be undertaken.

b) Section 1 of the *Charter* and the constitutional convention of public service neutrality

[133] In *Osborne*, the Supreme Court of Canada analysed section 1 of the *Charter*, that is, the existence of "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In the same decision, that Court refers to the test set out by Dickson C.J. in *Oakes* (*supra*):

> *. . . to establish a reasonable limit two central criteria must be satisfied: first, the government objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" and second, the means chosen must be reasonable and demonstrably justifiable in a free and democratic society. (Osborne, p. 97)*

[134] To determine whether rights and freedoms guaranteed by the *Charter* should be limited, Dickson C.J. wrote in *Oakes*:

> *. . . The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. (p. 136)*

[135] In *Ross* (*supra*), at paragraph 78, La Forest J. agreed that, in applying the *Oakes* test, an approach involving a formalistic test uniformly applicable in all circumstances must be eschewed. Rather, the *Oakes* test should be applied flexibly so as to strike a good balance between individual rights and community needs. La Forest J. added: "In undertaking this task, courts must take into account both the nature of the infringed right and the specific values the state relies on to justify the infringement." Thus, when an analysis on the basis of section 1 of the *Charter* is undertaken, opposing values must be situated in their factual and social context.

[136] The Supreme Court of Canada recognized that the Government's objectives of preserving "the neutrality of the civil service to the extent necessary to ensure their loyalty to the Government of Canada and hence their usefulness in the public service" had been fully canvassed in *Fraser* and acknowledged as legitimate (*Osborne*, p. 97*)*.

[137] In *Fraser*, Dickson C.J. wrote at page 469, "[a] job in the public service has two dimensions, one relating to the employee's tasks and how he or she performs them, the other relating to the perception of a job held by the public." This decision also recognized that public servants must know, or at least be deemed to know, that employment in the public service involves the acceptance of certain restraints in order to maintain the public's perception of public service neutrality. This is, then, the duty of loyalty, which is a reasonable limit on the fundamental rights of public servants.

[138] The second part of the section 1 analysis, the "proportionality test", involves three determinations:

> *. . . that the measure adopted is rationally connected to the objective (rational connection); that the measure impair as little as possible the right or freedom in question (minimal*

> *impairment); and that there be proportionality between the effects of the measure and the objective* [proportionality]. *(Ross, paragraph 99)*

[139] As *Fraser* and *Osborne* illustrate, there is no doubt that a rational connection exists between the common law duty of loyalty and the objective of promoting an impartial and effective public service. In *Fraser*, Dickson C.J. writes at page 471, ". . . There is in Canada, in my opinion, a similar tradition [to that in the U.K.] surrounding our public service. The tradition emphasizes the characteristics of impartiality, neutrality, fairness and integrity."

[140] According to the Supreme Court of Canada in *Osborne*, the need to preserve the impartiality and even the appearance of impartiality differs depending on the position occupied by the public servant within the public service:

> *The result of this broad general language is that the limits apply to a great number of public servants who in modern government are employed in carrying out clerical, technical or industrial duties that are completely divorced from the exercise of any discretion that could be in any manner affected by political considerations. The need for impartiality and indeed the appearance thereof does not remain constant throughout the civil service hierarchy. As stated by Dickson C.J. in Fraser, supra: "It is implicit throughout the Adjudicator's reasons that the degree of restraint which must be exercised is relative to the position and visibility of the civil servant" (p. 466). To apply the same standard to a deputy minister and a cafeteria worker appears to me to involve considerable overkill and does not meet the test of constituting a measure that is carefully designed to impair freedom of expression as little as reasonably possible. (p. 99)*
>
> [Emphasis added]

[141] The provision contested in *Osborne* prohibited all public servants from engaging in any partisan work regardless of the nature of the work or the public servant's role, rank or importance in the public service hierarchy, and resulted in the Supreme Court's decision that:

> *. . . [t]he limits on freedom of expression in this case are over-inclusive and go beyond what is necessary to achieve the objective of an impartial and loyal civil service. (p. 100)*

[142] Subject to the exceptions to the duty of loyalty noted in *Fraser*, freedom of expression may be limited only to the extent necessary to pursue the objective of an

impartial, effective public service. That said, the limit must be minimal in order to ensure that the right is affected only to the extent necessary.

[143] Recently, this Board discussed the duty of loyalty in *Haydon v. Treasury Board (Health Canada)*, 2002 PSSRB 10, and *Chopra v. Treasury Board (Health Canada)*, 2003 PSSRB 115. In *Haydon v. Canada (Treasury Board)*, [2001] 2 F.C. 82 (TD), the Federal Court confirmed at page 110 that:

> *. . . the common law duty of loyalty as articulated in Fraser sufficiently accommodates the freedom of expression as guaranteed by the Charter, and therefore constitutes a reasonable limit within the meaning of section 1 of the Charter.*

[144] The present case also raises the issue of a conflict of interest between the grievor's personal and professional activities. Thus a brief review of the case law on this subject is called for as well.

2. Conflict of interest

[145] The Federal Court of Appeal addressed the issue of conflict of interest, for example in *Threader* (*supra*). Mahoney J., writing on behalf of that Court, held that an apparent conflict of interest is legal grounds for disciplinary action:

> *The Crown [is] entitled in law to enjoin its servants from putting themselves in a position of an apparent conflict of interest; the rationale for its doing so is patently obvious. As was said by Chief Justice Dickson in Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, at page 466, in respect of a very different factual situation:*
>
> *The Adjudicator recognized that a balance had to be struck between the employee's freedom of expression and the Government's desire to maintain an impartial and effective public service.*
>
> *. . .*
>
> *Manifestly, the public service will not be perceived as impartial and effective in fulfilling its duties if apparent conflicts between the private interests and the public duties of public servants are tolerated. (p. 53)*

[146] The Court added that the existence of an apparent conflict of interest must be determined by an informed person in an objective and rational manner. The question asked by that Court, and which has arisen in the present case as well, is the following:

> *Would an informed person, viewing the matter realistically and practically and having thought the matter through, think it more likely than not that the public servant, whether consciously or unconsciously, will be influenced in the performance of his official duties by considerations having to do with his private interests? (p. 57)*

3. Duty to accommodate

[147] The grievor suggested that, in a way, the employer had a duty to accommodate her. She drew my attention to the Supreme Court of Canada decision in *Renaud* (*supra*), in which the employee had filed complaints against his employer and his union pursuant to British Columbia's *Human Rights Code*. At issue was the duty to accommodate an employee's religious beliefs when doing so would require an amendment to a collective agreement. That decision addressed the nature of the duty to accommodate and the employee's participation in seeking solutions to a discriminatory situation. It sets out the duties of the employer:

> *The duty resting on an employer to accommodate the religious beliefs and practices of employees extends to require an employer to take reasonable measures short of undue hardship.*
>
> *. . .*
>
> *. . . More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. . . . What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case. . . . (p. 982 to 984)*

[148] At pages 994 and 995 that Court indicated that, along with the employer and the union, the complainant also has a duty to assist in securing an appropriate accommodation:

> *. . .*
>
> *The inclusion of the complainant in the search for accommodation was recognized by this Court in O'Malley. At page 555, McIntyre J. stated:*
>
> *Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance*

> *in this case of part-time work, must either sacrifice his religious principles or his employment.*
>
> *To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.*
>
> *This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in O'Malley. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.*

[149] Although those principles may help identify the appropriate measure in the present case, discrimination against the grievor is not at issue here, and in this regard the employer does not have a duty to accommodate. At issue, rather, is the application of section 1 of the *Charter* having regard to the grievor's freedom of expression in the circumstances.

4. Principles and tests to be applied

[150] In summary, it may be noted that the constitutional convention of public service neutrality is acknowledged to be essential to the principle of responsible government and thus is a legitimate limit on the exercise of the fundamental rights of public servants.

[151] Thus the grievor's right to participate in political activities, outside his or her hours of work, is recognized, provided that this right does not affect the legitimate objective of a public service that is impartial and effective and perceived as such. This right is included in the freedom of expression guaranteed by the *Charter*. A limit

imposed on the exercise of this right must be justified on the basis of section 1 of the *Charter*.

[152] In *Ross*, the Supreme Court of Canada summarized its approach in these circumstances, at paragraph 61:

> *In Irwin Toy, supra, and more recently in R. v. Keegstra, [1990] 3 S.C.R. 697, this Court has adopted a two-step enquiry to determine whether an individual's freedom of expression is infringed. The first step involves determining whether the individual's activity falls within the freedom of expression protected by the Charter. The second step is to determine whether the purpose or effect of the impugned government action is to restrict that freedom.*

[153] Since freedom of expression is not an absolute value, an analysis based on section 1 of the *Charter* must be undertaken in order to determine, in each case, whether the limit on this freedom is reasonable. Whether the limit is reasonable is determined by applying two basic tests set out in *Oakes* to the circumstances. In terms of proportionality, three factors must be considered. Since *Oakes*, the courts have regularly used these factors to illustrate the application of these tests.

[154] From these court decisions, including *Ross*, it is also clear that the Supreme Court of Canada set the bar very high with regard to minimal impairment of the rights guaranteed by the *Charter*.

[155] Lastly, in the case of an apparent conflict of interest, the Supreme Court of Canada has held that direct evidence of impairment of ability to perform the work is not required. Thus the existence of an impairment of the general ability to act as a public servant may be inferred from the substance, form and context of the criticism expressed, providing that this finding is made from the standpoint of a reasonable and reasonably well-informed person.

[156] Let us now see how these principles apply to the situation of the grievor and the Department of Canadian Heritage.

B. Situation of the grievor

[157] The employer explained the special mandate entrusted to the Department of Canadian Heritage at length. Mr. Heintzman and Mr. Lemoine eloquently explained the federal government's chief strategy for promoting Canadian unity by means of the

Official Languages Act and OLSP programs. Elsewhere, the charter of the organization "Le Québec, un pays!" states that its main objective is to promote Quebec sovereignty. Luc Côté, the organization spokesman, told the media that its role was to take over from the Parti Québécois while that Party was in opposition in Quebec (Exhibit E-2, Tabs 1 and 2).

[158] In accepting the position of president of this organization, the grievor took a public stand, thus shifting to political action with an organization whose objectives were contrary to those of the employer. Confronted with this situation, the employer applied the tests of the *Fraser* doctrine. Equating the grievor's actions with criticism of the government's policies and programs, the employer concluded that there was a conflict of interest that made it impossible for the grievor's personal activities to coexist with her professional duties. The employer then asked the grievor to give up her personal projects. The grievor refused to stop being president of the organization concerned and approached the media. In response to the grievor's decision, the employer imposed a disciplinary measure that has resulted in the present grievance.

[159] The present case is quite different from those cited in the case law. First, the grievor's actions do not constitute either direct criticism of the government's policies or decisions, as was the case with Mr. Fraser, Dr. Haydon and Dr. Chopra, or malicious criticism. In the present case, the grievor adopted a political philosophy that is defended by two political parties, one federal and the other provincial, in Quebec. The organization of which she is president supported that political action in a non-partisan manner, as is shown by the grievor's testimony and the organization's charter and Internet site. Thus the specific nature of the present case arises from the fact that the perceived conflict of values and objectives between the grievor and her employer is situated in the legitimate exercise of her rights of freedom of expression and participation in political life.

[160] Second, the employer had recognized the grievor's right to her political opinion and some degree of partisan activity. It had hired the grievor knowing that she was a sovereigntist, and recognized her right to be a member of the organization provided that she did not criticize the policies of the Department employing her.

[161] At issue, then, is not a denial of the exercise of the fundamental right of association or a denial of participation in the political life of the country. In fact, the *Osborne* doctrine allows the grievor to participate in political activities outside her

hours of work. At issue are, first, the extent of the grievor's participation in political life and the impact of that participation on the employer's activities and, second, the employer's reaction to the situation.

C. Issue

[162] What, then, is the extent of the right to participate in political activities according to the *Osborne* doctrine and section 1 of the *Charter* where these non-partisan political activities are fundamentally in conflict with the employer's policies and programs?

[163] In the following analysis, I shall first address the issue of conflict of interest and the duty of loyalty. I shall then analyse the situation thus defined in relation to the principles of fundamental rights guaranteed by the *Charter*, particularly freedom of expression, and the limits on that freedom set out in section 1, as defined by the case law, and also in relation to public servants' right to participate in political life. Lastly, I shall consider the disciplinary measure imposed by the employer in light of this analysis.

1. Conflict of interest and the duty of loyalty

[164] An analytical procedure for determining whether a conflict of interest exists has been developed in the case law. As indicated in *Threader*, such a finding must be made, first, from the standpoint of a reasonable and reasonably well-informed third party and, second, by considering the impact of the public servant's personal activities on that person's ability to perform his or her duties and on the credibility of the programs or policies implemented by the public servant on the employer's behalf (*Fraser* and *Osborne*).

[165] The public stand taken by the grievor in her role as president can be viewed as indirect criticism of OLSP programs and their objectives. Here the test developed in *Fraser* is helpful to our analysis. According to that test, direct evidence of impairment of a public servant's ability to perform impartially the duties of that person's position, or of impairment of the credibility of the employer' programs, is not required but may be inferred. At that point the situation must be considered overall, with regard to the substance, form and context of the criticism expressed.

[166] A number of factors are of assistance in this analysis: the nature and field of the activities concerned (mandate and objectives), the visibility and role of the public servant (duties and responsibilities) and, lastly, the level of that person's power and influence.

[167] The parties have acknowledged that at issue in the present case is not an actual but an apparent or potential conflict of interest. In this regard, after analysing the situation, the parties reached conclusions on the basis of two different points of view. The employer views the situation as a conflict between the main objectives and mandates of the two organizations, the Department and the organization "Le Québec, un pays!". The grievor sees the situation from the perspective of her duties and responsibilities at the OLSP Branch and as president of the organization. That said, although the grievor sees no conflict between her professional duties and her personal activities and the employer is convinced otherwise, a finding of apparent conflict of interest must be made, not from the grievor's or the employer's perspective, but rather from the perspective of a reasonable and reasonably well-informed person.

[168] Some, like the employer, will see a conflict between the mandates and objectives of the two organizations and will infer conflict in the grievor's situation that jeopardizes her ability to represent the employer and possibly the credibility of the programs she implements. Others, like the grievor, will see no conflict between the sovereigntist agenda and her role in promoting French and French-language services and supporting minority language communities outside Quebec. They will conclude that there is no conflict of interest in the grievor's situation and consider that she may certainly continue to perform her duties in a neutral and objective manner. My job is not to decide between these two views, but simply to ask whether such a perception can reasonably exist.

[169] Although the evidence has shown that opinion is divided, there is nevertheless an apparent conflict of interest starting at the time the first cluster of opinions can reasonably be formed. The newspaper articles published at that time confirm the existence of this cluster of opinions. According to the opinions and comments expressed in the newspapers at that time, rightly or wrongly, a public perception of a conflict of interest can exist.

[170] On the basis of the evidence, with regard to the first factor, that is, the two organizations' respective mandates and objectives, in my opinion it is fair to conclude

that a reasonable and reasonably well-informed person can perceive an apparent conflict of interest that could impair the work of the grievor or the credibility of the program she is responsible for implementing. These mandates appear to be diametrically opposed.

[171] As well, the uncontradicted evidence of the existence of a Canadian consensus on the theory of Bourassa and Laurendeau, that is, that Canadian unity depends on protecting and promoting the language rights of the French-speaking minority communities, has demonstrated the importance of OLSP programs, whose credibility is crucial to the Department. The provincial policy-making authorities must believe that their efforts help maintain Canadian unity. In this regard, Ms. Sarkar provided a striking illustration of the grievor's duties: [translation] "She is responsible for the glue of Canada." Since the issue is indeed one of image, it does not seem credible for the grievor publicly to be president of the organization "Le Québec, un pays!" and the following day to sit down at the negotiating table with her provincial counterparts and help persuade them that linguistic duality is a priority for Canadian unity. In fact, it can be difficult if not impossible for the Branch to deal with the grievor's situation as an ambassador for the OLSP programs, which are instruments of Canadian unity, and for the Quebec sovereigntist agenda.

[172] With regard to the other two factors, that is, the grievor's duties and responsibilities and the level of her power and influence, the evidence is to the effect that the grievor worked on OLSP programs in the Eastern Region as a Senior Program Officer (PM-05). Her work was at the heart of these programs and the strategy for Canadian unity; she represented the federal government to its provincial counterparts. The grievor's duties were to analyse applications received, advise program officials, prepare the required documentation for the signature of federal-provincial agreements, examine budgets and reports and make recommendations. As long as the applications, draft agreements and reports were in order, she had no discretionary power over what became of them. The PM-05 level of her position required her to administer the program as defined. She had no power or influence over the definition of this program; her role was limited to interpreting and applying it.

[173] Although the evidence has therefore established that the grievor did not have final decision-making power, a role in defining the Department's policies and their application, or a position level comparable to that of a Deputy Minister or an Associate

Deputy Minister, there is nevertheless an apparent conflict of interest. In fact, what I note is that the grievor was in an ongoing relationship with her provincial counterparts as a representative of the Department and that it was on the basis of her analysis and recommendations that the Minister made decisions.

[174] Accordingly, from the perspective of any reasonable person, a conflict of interest can be perceived between, on the one hand, the grievor's personal activities as president of a sovereigntist organization, given the symbolism and visibility of that office and, on the other hand, her duties as a representative of the Department with the mandate of promoting Canadian unity, despite the fact that the level of her position and her decision-making power were not significant.

[175] In fact, the employer rightly contends that direct evidence of impairment of ability to perform the work is not required in cases of apparent conflict of interest and that, under these circumstances I may infer that the grievor's situation jeopardizes the credibility of OLSP programs, which are the cornerstone of the federal government's strategy for Canadian unity. The grievor's personal choices call the program's objectives into question. Quebec's presence within the Canadian federation is essential in convincing the provinces of the program's importance. Without Quebec's presence, it would be more difficult to motivate the provinces to contribute to OLSP programs and to extend their services to the official language minority communities.

[176] No public servant is obliged to adopt the employer's convictions. For public servants, whether to accept a position that fosters "corporate" values and interests that may contradict their own values and interests is a personal choice. That said, under the duty of loyalty, public servants may not allow their own actions to impair the performance of their duties or the credibility of their employer's actions, directly or indirectly, or to create such a perception. In fact, according to the constitutional convention recognized by the Supreme Court of Canada in *Fraser* and *Osborne*, public servants have a duty to preserve the reality and the perception of an impartial, effective public service. That is why legitimate limits on certain activities may be imposed on public servants, as on any other employees.

[177] By virtue of the employer-employee relationship, the grievor is subject to a duty of loyalty to her employer. According to the *Fraser* doctrine, the decision in *Threader* and the Code, a conflict of interest is resolved by giving priority to the public interest over the private interest. In this regard, the grievor may not jeopardize the neutral,

objective exercise of her duties or the credibility of her employer's programs, strategies or policies except in very specific circumstances, for example the public interest as defined in *Fraser*, *Chopra* and *Haydon*. The present case does not present these circumstances.

[178] Thus, consideration of the three factors set out in *Fraser* leads me to conclude that, in view of the public's perception, the public stand taken by the grievor creates an impairment to her ability to perform her duties effectively, this, on the basis of the form of the criticism, that is, the office of president of the organization, a symbolic public stand; on the basis of its substance, that is, the opposition between the values and mandates of the organizations the grievor represents; and, lastly, on the basis of its context, that is, the Canadian consensus on preserving Canadian unity, the very basis of the OLSP programs.

[179] Whether the grievor believes that she can in fact perform her duties in a neutral and effective manner is therefore irrelevant. In conclusion, the employer was justified in considering that the grievor's outside activities, as a representative of an organization promoting Quebec sovereignty, and her responsibilities as a public servant, as a senior analyst of OLSP programs and a representative of the Department for these programs promoting Canadian unity, were incompatible and could adversely affect the employer. By her actions, the grievor placed herself in a situation that created a reasonable perception that her personal activities were likely to affect the credibility of the objectives and programs for which she acted as an OLSP representative and to which she owed a duty of loyalty.

2. Appropriateness of the disciplinary measure in relation to the rights of freedom of expression and participation in political life and the limits on those rights

[180] At issue now is whether the employer's actions in response to this situation of apparent conflict of interest were appropriate. Once more, the employer demanded that the grievor withdraw from her responsibilities as president of the organization "Le Québec, un pays!" and terminated her employment following her refusal to acquiesce to that demand.

[181] This issue is resolved by applying the principles and tests developed in the case law in cases where a fundamental freedom enshrined in the *Charter* is at stake. At first glance, the employer's demand and the termination of employment imposed on the

grievor in the circumstances set out above do constitute a limit on her full enjoyment of freedom of expression, and the fairness of that disciplinary measure must be evaluated on the basis of its compliance with section 1 of the *Charter* and the conditions of these reasonable limits.

[182] As noted above, the Supreme Court of Canada has repeatedly been called upon to address the issue of freedom of expression. What emerges from a reading of these decisions, including *Ross*, is that in the view of that Court a limit on this freedom is justified only in very exceptional circumstances. The test set out by the Supreme Court of Canada in *Oakes* and reiterated in *Osborne* involves three determinations: (1) the existence of a legitimate objective of the measure limiting this fundamental freedom; (2) minimal impairment of the freedom guaranteed by the *Charter*; and (3) a rational connection establishing proportionality between the effects of the measure and its objective.

[183] The employer's objective of seeking to preserve the political neutrality and impartiality of the public service and the public perception thereof has been recognized as legitimate by the Supreme Court of Canada. Nor is the government's objective of promoting Canadian unity called into question. As well, the federal government strategy manifested in OLSP programs reflects the Canadian consensus. This first determination of the test is met.

[184] With regard to minimum impairment of the freedom, the employer had an obligation to ensure that it limited the grievor's rights only minimally. I must conclude that, in the circumstances, the employer did not ensure that a balance was struck. Since this determination is not met in the present case, I need not address the third determination. Instead, I shall further analyse this second determination.

[185] The employer opted for a solution that terminated the grievor's employment and income. This is a significant adverse consequence of her exercise of the rights of freedom of expression and participation in political life. I consider that in the present case there were a number of solutions that the employer should have offered to the grievor before opting for termination of employment. Efforts should have been made to find a solution allowing the grievor to exercise her rights while preserving the interests of the employer and the credibility of its programs. Clearly, termination of employment is an extreme solution that does not minimally impair the grievor's rights.

[186] The evidence has established the grievor's abilities and skills. It has also established that the work of the Department of Canadian Heritage falls under four different strategic objectives. Given that the grievor's acting as a representative, in both her personal activities and her duties at the Department, is the source of the conflict of interest, there must be room to adjust her duties and responsibilities so that they do not include representation of OLSP programs or have to do with the Department's strategy for Canadian unity.

[187] Given these facts, I therefore conclude that there were other options that were not explored and that could have eliminated the conflict while allowing the grievor to participate in her outside activities. Thus I find the disciplinary measure imposed by the employer to be excessive given the circumstances here, particularly in the case of an employee the quality of whose work has not been contested. The grievor was hired because of her expertise, knowledge, and experience with French-speaking communities in Saskatchewan. Her competence and professional performance have not been questioned by the employer. On the contrary, Mr. Lemoine indicated that he definitely relied on the grievor's good judgement and expertise to assist him in performing his own duties.

[188] Nor did the grievor express public criticism of the employer's programs and policies, which was not the case in the other case law cited by the employer in support of its disciplinary measure. As well, the conflict of interest is apparent and has more to do with the perception that the grievor's role as president of the organization "Le Québec, un pays!" is incompatible with the government's main objectives for Canadian unity and the departmental program that is the main instrument for achieving these objectives.

[189] The grievor did not use or disclose information obtained in the course of her duties, or the employer's resources, for the benefit of the organization for which she was an activist outside her hours of work. The grievor's honesty in this regard was not contested.

[190] In short, as was not the case in *Fraser*, the grievor did not render herself unable to perform other duties in another position that would be less visible and less directly related to the objective of Canadian unity promoted by the Department of Canadian Heritage.

[191] Accordingly, I find that the disciplinary measure of termination of employment imposed by the employer, without exploring or offering to the grievor the option of another comparable position with another of the Department's programs, does not meet the minimal impairment determination. It does not pass the test of section 1 of the *Charter* with regard to impairment of the grievor's freedom of expression, and cannot be maintained.

D. Corrective action

[192] According to the hierarchy of standards, in the present case the *Charter* takes precedence over the duty of loyalty and the employer's code of ethics. As well, the form that corrective action should take depends on the *Charter*. Accordingly, the employer had a duty to seek a solution that would balance the grievor's rights against her obligations to the employer. The grievor had a duty to co-operate in good faith and to accept any reasonable solution.

[193] The grievor's initial actions were transparent. She requested a meeting with her supervisors in order to inform them of her intentions. She believed it was sufficient to offer to complete a confidential report, as required by the Code.

[194] The grievor's testimony was unequivocal. She had no intention of abandoning her personal projects, but was prepared to discuss solutions in order to strike a balance between her fundamental rights and her duty of loyalty.

[195] It seems to me that events accelerated following the grievor's public statements in March 2004. Confronted with the grievor's attitude, her public statements and her firm position with regard to her personal projects, the employer saw no option but to terminate her employment.

[196] Mr. Cashman's testimony alleging that he suggested solutions to the employer, in the person of Mr. Thompson, was contradicted by Mr. Thompson's testimony. The objection to Mr. Thompson's testimony was taken under advisement. In light of my conclusions, I need not express an opinion on that objection.

[197] In *Gannon* (*supra*), the Federal Court of Appeal held that the public servant must be reinstated if it was found that the termination of employment was unwarranted. The parties were asked to comment on that decision. Their written submissions are found in the Board record; I have taken them into consideration.

[198] Since I consider that the disciplinary measure imposed by the employer was excessive and therefore unwarranted but have also determined that the grievor's personal activities impaired the credibility of the employer's objectives and programs, I find that the grievor cannot be reinstated in the position that she occupied at the time her employment was terminated as long as she is president of the organization concerned.

[199] In *Singh* (*supra*), the Federal Court determined the extent of an adjudicator's jurisdiction in ordering an employer to appoint a dismissed public servant to an alternate position or at least to search diligently for an alternate position for that person. Although that Court agreed that an adjudicator cannot order the appointment of a public servant to an alternate position, it stated as follows at paragraph 16:

> *. . . the adjudicator could not order that the applicant be appointed to an alternate position. However, that is not to say that he had no jurisdiction to find that the employer could not limit its search for alternate employment to a branch where such a position could not possibly be available to the applicant because of the mandatory "secret" security clearance. . . .*

[200] The Federal Court concluded as follows, at paragraphs 18 and 19:

> *A similar practice is followed in the private sector labour jurisprudence where upon the non-culpable incapacitation of an employee, efforts are made to transfer the affected employee to another position. . . . This practice attempts to balance an employer's objective in maintaining productivity with an employee's interest in preserving his employment.*
>
> *In my view, subparagraph 92(1)(b)(ii) of the [Public Service Staff Relations Act] in conjunction with paragraph 11(2)(g) of the [Financial Administration Act] affords an adjudicator the jurisdiction to inquire as to whether the Treasury Board searched diligently for alternate positions. Termination of employment should be the option of last resort. . . .*

[201] Although in the present case it can be concluded that the grievor was responsible for the impairment of her ability to perform her duties since she could always choose not to be president of the organization concerned, the fact that her choice falls within the ambit of *Charter* protection places her in a comparable situation, and the employer must deal with her choice.

[202] Given the facts of the present case, the case law and the hierarchy of standards, I find that, with regard to its obligations under the *Charter*, the employer has not established that it fulfilled its duty to strike a balance or to ensure minimum impairment of the grievor's fundamental rights. Termination of employment is an excessive disciplinary measure that is unwarranted in the particular circumstances of this case.

[203] Accordingly, unless at the time of her reinstatement the grievor is no longer president of the organization "Le Québec, un pays!", the employer must search diligently for an alternate position for her. It must therefore offer her a position at the same or an equivalent level that will not create a perception of impairment of her ability to perform her duties or impairment of the objectives and programs of the Department of Canadian Heritage promoting Canadian unity. During this search, the grievor is to be placed on leave with pay.

[204] Lastly, as is emphasized by the Supreme Court of Canada in *Renaud*, cited by the grievor in support of her grievance, and taking into account the principles set out in that decision that may guide us in the present case, it is understood that the grievor must extend her full co-operation to this search process and must accept any reasonable offer made to her by the employer. Ultimately, she cannot expect a perfect situation.

[205] Furthermore, in accordance with the grievor's duties with regard to the constitutional convention of public service neutrality and impartiality, she must limit her public communications so as not to discredit the employer's programs promoting Canadian unity.

[206] I realize that the parties are favourable to the process of mediation, having taken part in it from the outset of the present case. I encourage them to make use of mediation again in resolving any dispute arising from the implementation of the present decision.

[207] For all the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[208] The present grievance is allowed to the extent indicated above. Although the employer was justified in concluding that the grievor placed herself in a situation of apparent conflict of interest because of her personal activities, termination of employment is an excessive disciplinary measure with respect to the *Charter* in the circumstances of the present case. Accordingly:

- I order the employer to reinstate the grievor with pay and benefits starting on the date of termination of her employment with, obviously and as is current practice, mitigation of the amounts owing;

- I order the employer to offer the grievor a position at the same or an equivalent level, as soon as possible, that will not give rise to an apparent conflict of interest with her duties or the objectives and programs of the Department of Canadian Heritage promoting Canadian unity;

- I order the grievor to facilitate and to co-operate fully in this search and to accept any reasonable offer made by the employer;

- I order the grievor to limit her public communications so as not to discredit the employer's programs promoting Canadian unity; and

- I retain jurisdiction over any dispute arising from the implementation of the present decision for a period of 120 days from the date of this decision.

March 9, 2006.

P.S.L.R.B. Translation

Sylvie Matteau,
adjudicator