**Date:** 20080808

**Files:** 166-02-36572 and 36573

**Citation: 2008 PSLRB 64**

*Public Service Staff Relations Act*

Before an adjudicator

BETWEEN

**JOHN KING**

Grievor

and

**TREASURY BOARD**
**(Canada Border Services Agency)**

Employer

Indexed as
*King v. Treasury Board (Canada Border Services Agency)*

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

**REASONS FOR DECISION**

***Before:*** Dan Butler, adjudicator

***For the Grievor:*** Andrew Raven, counsel

***For the Employer:*** Debra Prupas, Joseph Cheng and Shelley Quinn, counsel

Heard at Toronto, Ontario, March 4 to 6, 2008,
and at Ottawa, Ontario, March 18 and 19, 2008.

## I. Grievances referred to adjudication

[1] On July 26, 2004, the Canada Border Services Agency (CBSA or "the employer") imposed a 30-day disciplinary suspension without pay on John King ("the grievor"). At that time, the grievor's position of record was as a customs inspector (PM-02) at Pearson International Airport ("Pearson") in Toronto, Ontario, but he performed the duties of the First National Vice-President of the Customs and Excise Union Douanes Accise (CEUDA) on a full-time basis.

[2] Barbara Hébert, Vice-President, Operations, CBSA, outlined the grounds for her decision to discipline the grievor in a letter dated July 26, 2004 (Exhibit E-1, tab 35), as follows:

. . .

> *This is with respect to your letter of May 25, 2004, to Tom Ridge, Secretary of the United States Department of Homeland Security.*
>
> *Mr. King, the content of your letter causes me significant concern. I am profoundly disturbed by both the message you convey to the Department of Homeland Security with respect to non-Canadian citizens and your references to our operations that are intended to, or could be construed as, pointing to weaknesses in Canada's border management practices.*
>
> *Your statements regarding non-Canadian citizens imply that, solely by virtue of the fact that an individual is not a Canadian citizen, but instead a permanent resident or in possession of a work permit, he or she constitutes a security risk. I find these statements offensive and contrary to the values adhered to by the CBSA and the Canadian government as a whole. Furthermore, these statements are without foundation, since all candidates for employment in the public service undergo an appropriate security screening process, regardless of the status of their citizenship. Had you raised this issue through the appropriate internal channels, prior to writing Mr. Ridge, you would have been aware of this information.*
>
> *You sent the above-noted letter without the knowledge of or consent of CBSA management. It is well established that public servants owe a duty of loyalty to the federal government, as their employer. Additionally, employees of the CBSA must respect the obligations regarding public criticism as stated in the Agency's Code of Conduct.*

> *I find that, by writing a letter about our operations that is intended to, or could be construed as, pointing to the weaknesses in Canada's border management practices to the Department of Homeland Security, you have breached the above-noted duty and obligations. Such behaviour cannot be tolerated.*
>
> *On two occasions, management offered to you the opportunity to provide any mitigating factors that you wanted management to consider, however you chose not to avail yourself of these opportunities. I have also considered the letter I previously provided you, dated February 22, 2002, in which I reminded you of your obligations regarding public criticism and of the importance of public confidence in allowing the employer to fulfill its mandate.*
>
> *Due to the seriousness of your actions, you are suspended without pay for a period of 30 working days (225 hours). Given that your schedule consists of five 8.57 hour shifts followed by three days of rest, this suspension will commence at the conclusion of our meeting on Monday July 26, 2004, and cease at end of day on Sunday, September 5, 2004. Please be advised that, during your period of suspension, you are prohibited from entering CBSA premises without the prior written consent of CBSA management.*
>
> *Any further misconduct in which you may participate, in relation to the above-noted letter, including but not limited to the distribution of the letter, will be considered a separate and distinct act of misconduct and subject to further and more severe disciplinary action, up to and including the termination of your employment.*
>
> *Pursuant to the applicable collective agreement, you have twenty-five days to grieve this decision.*
>
> . . .

[3] The grievor challenged the employer's decision in two grievances. The first grievance (PSLRB File No. 166-02-36572), presented at the initial level of the grievance process on August 18, 2004, sought the following corrective action:

> . . .
>
> *i) That Barbara Herbert, Norm Sheridan and Bruce Herd be required to physically attend a meeting with me, at my place of work, the purpose of which is to apologize for their continued harassment, interference and the inappropriate discipline rendered;*

*ii) That a letter by Barbara Herbert clearing me of any related wrongdoing and which reflects her (as requested by self) personal apology, be posted in my workplace;*

*iii) That the employer issue clearer direction, nationally, as to the administrative due process that must be strictly adhered to by management representatives when administering discipline and investigating alleged misconduct;*

*iv) That guidelines affecting quantum of discipline be established that is to be administered to management representatives when they contravene the aforementioned;*

*v) That the employer establish a mechanism/protocol, which is reflective and/or identifies senior management representatives which will be responsible for the immediate intervention of related complaints raised by union officials;*

*vi) That Barbara Herbert, Norm Sheridan and Bruce Herd be appropriately disciplined by the employer for their continued violations under the Harassment Policy;*

*vii) That I be reimbursed all salary and potential income lost as a result of this suspension, including statutory holiday pay, shift premium. Etc.;*

*viii) That I be reimbursed all leave credits that would normally have been earned during this 225 hour suspension;*

*ix) That said discipline and all related notes on file by the employer be removed from all my working files;*

*x) That I be awarded a monetary award for the continued personal harassment against myself;*

*xi) That I be made whole.*

. . .

[*Sic* throughout]

[4] In the second grievance (PSLRB File No. 166-02-36573), also presented at the initial level of the grievance process on August 18, 2004, the grievor added the allegation that the employer's action violated the *Canadian Charter of Rights and Freedoms* ("the *Charter*"):

. . .

> *I grieve my employer* [*sic*] *has violated my rights and freedoms as set out in the Canadian Charter of Rights and Freedoms Part 1, Sections 1, 2 and 7.*
>
> *I received a 30 day suspension without pay (225 hours) for writing a letter to Mr. Tom Ridge, Secretary of Homeland Security, U.S.A.*

. . .

[5] The grievor requested the following corrective action in his second grievance:

. . .

> *i) That the employer establish & publish policy/guidelines which clearly acknowledge, identify and ensure the protection of people of* [*sic*] *Canada's rights while employed in the federal sector;*
>
> *ii) That the employer establish & publish policy/guidelines which set out quantum's of discipline for employer representatives who contravene employees rights under the Charter of Rights and Freedoms;*
>
> *iii) That the employer establish & publish policy/guidelines which set out quantum's of discipline for employer representatives that knowingly condone and/or allow such violations to employee's rights to administrative due process during the administration of discipline;*
>
> *iv) That I receive an appropriate monetary award for damages resulting from this violation to my fundamental rights and freedoms. This amount being no less than ten times the initial discipline imposed on me;*
>
> *v) That a court of competent jurisdiction also direct such remedy as the court considers appropriate and just in the circumstances;*
>
> *vi) That the employer representatives involved and/or responsible for these violations to myself receive discipline equal or greater than the discipline they allowed or imposed on myself;*
>
> *vii) That I be reimbursed all incurred expenses associated with this complaint;*

*viii) That I be made whole.*

[6] Unsuccessful in overturning the discipline through the internal grievance procedure, the grievor referred his grievances to the Public Service Labour Relations Board ("the Board") for adjudication on September 8, 2005.

[7] 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*, these references 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 ("the former *Act*").

[8] The Chairperson of the Board has appointed me to hear and determine these matters as an adjudicator.

[9] At the beginning of the hearing, the parties stipulated that I should consider the grievor's previous disciplinary record to be clear for the purpose of this decision.

[10] During the evidence phase of the hearing, the grievor removed elements (i), (iii), (iv), (v), (vi) and (x) from the corrective action sought in his first grievance and elements (i), (ii), (iii), (v) and (vi) from the corrective action sought in his second grievance.

## II. Summary of the evidence

[11] On application by the grievor, with the concurrence of the employer, I issued an order excluding witnesses.

[12] The employer adduced evidence through five witnesses. The grievor was the sole witness on his own behalf. A total of 54 exhibits were admitted.

[13] Over the course of the hearing, the witnesses and the parties referred frequently to the text of the grievor's letter dated May 25, 2004, and addressed to Tom Ridge, Secretary, United States Department of Homeland Security (Exhibit E-1, tab 19). Given its centrality to this case, and as an aid for understanding the testimony of the witnesses, I reproduce the letter below in its entirety:

[CEUDA letterhead]

*Re: Public Safety and Security – International Borders*

*Dear Mr. Ridge,*

*The intent of this letter is to provide you with information, which may prove useful when assessing risk to public safety and security and which will hopefully attribute the further enhancement of border protection. At this time, I will focus on matters pertaining to the recruitment and staffing of front line officer protecting Canada's borders.*

*I understand you may already be aware of this information via the media, ongoing consultations with officials representing the Canadian Government or other sources, but keeping in mind our nations common responsibility of providing the essential service of national security, I feel it prudent to ensure your awareness.*

*Since the terrorist attacks of September 11, 2001 little has changed as far as the recruitment and staffing practices for Canada's first line of defence.*

*The following quote is taken from a recent competition for the position of Customs Inspector, closing date May 14, 2004.*

***Who Can Apply***

"Preference will be given to Canadian citizens. Please indicate in your application the reason for which you are entitled to work in Canada: Canadian citizenship, permanent resident status or work permit."

*It is my understanding that one must be a U.S. citizen in order to be eligible to apply for either a Customs or Immigration position in the United States. In Canada however, such positions are open to non-Canadian citizens with permanent resident status or that have been issued a work permit. Technically, this means that foreign nationals that may be attending school in Canada and who have acquired work permits, as a means of sustaining themselves, would be eligible for a position protecting Canada's borders. This provision also allows for refugee claimants to apply who may be waiting for their claim to be processed and who may have been issued a work permit for similar reasons. This may raise concerns as all Customs Officers, regardless of status, have access to our port of entry coding systems, electronic database, internal intelligence bulletins, and other sensitive and protected information as well as the authority to release persons and goods.*

*As an elected national representative for the Customs Excise Union Douanes Accise, I am further perplexed by yet another contradiction in terms of standards and/or staffing practices and continue to question why we do not have one minimum standard for officers assigned front line security positions.*

*For the period 2001/2002 for example, the Canada Customs Revenue Agency terminated the contracts of approximately 60-65 full-time officers that had been assessed in the field as performing their duties in a fully satisfactory manner. Many of these officers worked for several years on the front line, gained valuable experience and some even held supervisory positions in the Customs environment. Unfortunately, these officers were eventually released from duty after failing to successfully complete a mandatory nine (9) week training course. Successful completion of this training is required prior to being appointed to an indeterminate position.*

*Although student officers work year round, the majority are hired on a* ***temporary seasonal basis*** *for the peak summer period and are assigned Primary Inspection Line duties. These duties include but are not restricted to determining the authenticity of travel documents and the admissibility of travelers. In an effort to prepare student officers for front line duties, they receive three-weeks of training. As there is no pass/fail test at the end of this training, there is no way of determining how much of the information is retained. Therefore, there is no method of determining whether student officers are prepared or qualified to perform sensitive and essential immigration and customs duties prior to them being assigned to work the front line.*

*Customs officers endorse one minimal standard that* ***all*** *officers should meet. Which includes the successful completion of a mandatory training course. It is however difficult to understand and accept those full-time officers that were released for failing to qualify for the position and be replaced by student officers that are not required to meet the same minimal standard and who lack the same knowledge and experience.*

*The following is taken from a publication given at a 2003 Customs Senior Managers Conference:*

"No one knows better than yourself that the pace of change has accelerated notably over the past several years. The volume of goods and people entering and leaving Canada has increased, as have the number of threats to public and economic security. **The requirement to facilitate and promote trade and travel** while **managing protection** is never easy, yet you continue to respond quickly and appropriately to new challenges. You are the main reason that Canada Customs is recognized as a world leader and a model of excellence in Customs management."

*When one compares the previous quote with the following, in addition to reviewing current staffing practices and standards in Canada and the U.S., it can be reasonably*

> *concluded that the Canadian Government's priorities are quite different.*
>
> ***U.S. Customs Service – America's Frontline***
>
> *Mission*
>
> "We will lead the unified national effort to secure America. We will prevent and deter terrorist attacks and protect against and respond to threats and hazards to the nation. We will ensure safe and secure borders, welcome lawful immigrants and visitors, and promote the free-flow of commerce."
>
> *Customs is commonly referred to as Canada's first line of defence. It is ironic that such terminology continues to be used when in fact front line officers are denied the first response capability. Although Customs Officers are identified as* "First Responders" *we lack the tools to complete what is known as the* "Use of Force Continuum" *which puts front line Customs officers in the position of relying on other police when encountering individuals that we are to protect society from. Our options as officers on our nations* "First Line of Defence" *is to tactically reposition and withdraw and hope the threat is apprehended after entering our country. This could prove fatal should front line officers encounter weapons of mass destruction being smuggled into or out of Canada.*
>
> *Any delay, which may result in the apprehension of criminals and/or terrorists with their weapons, is not in the best interest of public safety or security in either country.*
>
> *Should you wish to discuss further, I can be reached at the number below.*
>
> *Respectfully*
>
> [signature]
>
> *John King*
> *1st National Vice-President*
> *Customs Excise Union Douanes Accise*
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[14] The employer's first witness was Roger Lavergne who, at the time of the grievor's alleged misconduct, was Director, Intelligence and Risk Management Division, CBSA headquarters.

[15] Mr. Lavergne testified that he interacted with representatives of the United States government for the purposes of managing border security intelligence exchanges between the CBSA and its American counterparts. He had contacts weekly or more often with, among others, Jeffrey Powell, Assistant Attaché, Immigration and Customs Enforcement, Department of Homeland Security, located at the United States Embassy in Ottawa. Mr. Lavergne recounted that Mr. Powell called him on May 28, 2004, and asked whether he knew a "John King" who worked at the CBSA. Mr. Lavergne replied in the affirmative. Mr. Powell then advised him that he had received a copy of a letter addressed by the grievor to Secretary Ridge that raised issues about practices at the CBSA. Mr. Powell sent a copy of the letter to Mr. Lavergne.

[16] Asked for his views about the contents of the letter, Mr. Lavergne replied that he believed that it was inappropriate for the grievor to raise serious internal issues with a representative of another government, especially given the sensitive political climate between the United States and Canada regarding border cooperation. As to the statements in the letter, Mr. Lavergne outlined several concerns:

> (1) the letter left the impression that non-citizens employed in border service positions were less trustworthy;
>
> (2) the letter tried to incite fear by representing a view that the CBSA's hiring practices were not rigorous enough;
>
> (3) the comments regarding the recruitment of students by the CBSA raised further issues about the sufficiency of border security that should not have been discussed with other governments in the existing political climate;
>
> (4) the comments about the release of full-time officers who failed the mandatory nine-week training course inappropriately referred to a controversial issue between the employer and the union; and
>
> (5) the reference to first responders not having the tools to do their job broached the sensitive "arming" issue with another country, again potentially eroding confidence.

[17] Mr. Lavergne raised the matter with Denis Lefebvre, Executive Vice-President, CBSA. Mr. Lefebvre asked him to contact Mr. Powell to find out whether Secretary Ridge's office planned to respond to the letter. Mr. Lefebvre also asked that he pass on

the message to Mr. Powell that senior management would follow up and take appropriate action. Mr. Powell later told Mr. Lavergne that he had not received confirmation that the Secretary's office intended to respond.

[18] In cross-examination, Mr. Lavergne verified that he did not know how Mr. Powell came to have a copy of the letter. He knew only that Mr. Powell said that the United States government had received it.

[19] Asked by the grievor whether there was anything factually false in the contents of the first page of the letter, Mr. Lavergne referred to the reference that ". . . little has changed as far as the recruitment and staffing practices for Canada's first line of defence." He stated his view that there had in fact been many changes made to the quality and packaging of the training provided to border service officers. He also identified the reference to refugee claimants applying for CBSA positions as a concern, but then admitted that he was unsure whether the statement in the letter was true or false. Mr. Lavergne testified that he did not believe that there was anything else factually incorrect in the first page of the letter.

[20] With respect to the contents of the second and third pages of the letter, Mr. Lavergne indicated paragraph by paragraph either that he was unsure about the factual basis of what was said or that the content was correct.

[21] At the conclusion of his detailed review of the letter, Mr. Lavergne testified that, overall, he had "no quarrel regarding its factuality" and that everything in the letter was public information. He stated that his concern was, instead, about the potential damage that might have been caused by sending such a message to another government in the climate that prevailed.

[22] The second employer witness was Norman Sheridan, District Director, Passenger Operations, Pearson, who has been in that role since April 1999. Mr. Sheridan manages the immigration, food product inspection and customs "business lines" at the airport.

[23] Mr. Sheridan testified that the grievor began working at the airport in September 1989 as a customs inspector. He became the branch president of his union in fall 1995 and then a member of the National Executive of the CEUDA in 1999. At the time he sent his letter to Secretary Ridge, the grievor was First National Vice-President of the CEUDA. Mr. Sheridan confirmed that, essentially, the grievor had not performed

the duties of a customs inspector since taking on full-time union duties in "the late 1990's."

[24] Mr. Sheridan outlined that the grievor, in his union role, had challenged management on many issues, including the training and use of students in customs inspection roles. He stated that the grievor had raised concerns through normal union channels, at local and regional labour-management consultation committees, and through emails but also with the media and by writing letters to persons outside the CBSA. Mr. Sheridan offered his view that the appropriate way for a person in the grievor's union position to pursue the union's concerns was directly with management, contacting either the regional director, the regional director general or the CBSA's vice-presidents of human resources and of operations.

[25] Mr. Sheridan recalled an incident on September 13, 2001 — two days after the events of September 11, 2001 ("9/11") — when, during a telephone conversation with the grievor and Emerson Waugh, then the branch president of the Toronto union local, the grievor indicated that he was considering writing to United States President George Bush regarding what he believed to be the security risks caused by the CBSA's policy of assigning students hired for the summer to perform primary inspection line (PIL) duties (Exhibit E-1, tab 7). Mr. Sheridan stated that he reminded the grievor that the training module provided to students and to term employees for PIL duties was identical to that given to full-time officers at that time. He told the grievor that he should not write to President Bush. He felt that the grievor was trying to take advantage of the uncertain situation in the immediate wake of the 9/11 attacks.

[26] Mr. Sheridan described in detail how the PIL works and why many full-time customs inspectors preferred duties other than PIL duties. He indicated that the CBSA did not assign students to secondary inspection tasks (e.g., baggage examination or more detailed immigration screening) for which further training was required. As to the grievor's contention that using summer students on the PIL undermined security, Mr. Sheridan indicated that, in fact, students were more likely than full-time officers to refer to online customs and immigration data systems in carrying out PIL functions, suggesting a situation of more rigorous scrutiny rather than one of less scrutiny.

[27] Mr. Sheridan took the possibility seriously that the grievor would write to President Bush and briefed his superiors about the situation. On September 14, 2001, he called the grievor at home and told him not to write President Bush about the

student employment issue at the risk of discipline "... up to and including termination" (Exhibit E-1, tab 12). He notified the grievor that the Acting Regional Director was sending the grievor a letter on the matter by courier (Exhibit E-1, tab 13).

[28] Mr. Sheridan testified that he became aware in late June or early July 2004 through Bruce Herd, Director of Human Resources, Greater Toronto Area (GTA) Region, CBSA, that the grievor had sent a letter to Secretary Ridge in May. He reacted to the letter with concern because management had previously cautioned the grievor about providing information to persons outside the CBSA that was misleading, inaccurate and reckless. Mr. Sheridan was particularly concerned that the grievor had addressed his letter to Secretary Ridge, who had earlier partnered with (at the time) Deputy Prime Minster John Manley in a significant joint Canadian-American initiative known as the "Ridge-Manley Shared Border Accord and 30-Point Plan" ("the Ridge-Manley Plan") (Exhibit E-3).

[29] Mr. Sheridan detailed his concerns about the content of the grievor's letter. They were, in summary:

> (1) that by not ensuring that all of the relevant facts were conveyed, the grievor left the reader to draw conclusions without all of the pertinent facts;
>
> (2) that the comments about the CBSA hiring non-citizens were misleading because the large number of applicants for CBSA jobs meant that it did not have to hire non-citizens;
>
> (3) that, despite the CBSA not needing to hire non-citizens, everyone hired, including non-citizens, were subject to the same security clearance procedures;
>
> (4) that the letter created doubt about Canada's commitment to the Ridge-Manley Plan by suggesting that the CBSA hired refugee claimants who would in turn be in a position to make determinations about the entry of other persons, including other refugee claimants, into the country;
>
> (5) that the grievor's comments about employees who were released after failing the nine-week training program in Rigaud incorrectly implied that the CBSA was giving preference to students and did not want to have full-time officers in primary inspection jobs;

(6) that the letter failed to outline the initial cognitive abilities testing and subsequent monitoring that occurs for all classes of employees throughout the training programs;

(7) that the comparison of two paragraphs allegedly contrasting American and Canadian mission statements was invalid and suggested that Canada was not taking border security seriously;

(8) that the letter did not provide full information about the tools available to border service officers and that the Incident Management/Intervention Model (IMIM) used by the CBSA and by law enforcement agencies across Canada provided that "tactical repositioning" was an appropriate response to a threatening situation at any time; and

(9) that the suggestion that officers are defenceless was baseless, that Agency policies provided other options and that having side arms would not make a difference in the context of primary and secondary inspection functions.

[30] Mr. Sheridan summarized his views by stating that it was inappropriate to send a letter to Secretary Ridge, the American partner in the Ridge-Manley Plan. The letter, in his view, left the reader to draw conclusions that were not factual and undermined the belief that the CBSA was committed to joint border security in an environment where trust about its commitment to border security was essential.

[31] After receiving the letter, Mr. Sheridan recounted that he reviewed it with Mr. Herd and then convened a fact-finding meeting on July 8, 2004, attended by the grievor, Mr. Waugh and Mr. Herd. At the meeting, Mr. Sheridan outlined his concerns about the letter. He stated that the grievor confirmed that he had in fact written and signed the letter. The grievor felt that the letter had been carefully phrased, asked how Mr. Sheridan and Mr. Herd had received a copy, and expressed concerns about a breach of privacy. The grievor indicated that he was prepared to write a second letter to Secretary Ridge to provide clarification concerning the points that Mr. Sheridan had raised regarding hiring and using students. Mr. Sheridan told the grievor not to do so. He described the grievor's behaviour as both concerned and aggressive; at one point, he talked about releasing the letter to the House of Commons, to the United States Congress, to northern American states and to the public at large. Mr. Sheridan responded that the grievor should have known not to send the letter in the first place

because he had been previously cautioned about releasing misleading or inaccurate information. He instructed the grievor not to disseminate the letter any further. Mr. Sheridan testified that over the course of the meeting, the grievor never explained the reasons for the letter nor apologized for it.

[32] On July 9, 2004, Mr. Sheridan received an email from the grievor in which he complained about the lack of 24 hours' notice for the "disciplinary fact-finding investigation" the previous day and notified Mr. Sheridan that he was in the process "... of drafting a formal complaint to the Minister to address your threats" (Exhibit E-1, tab 23). Mr. Sheridan confirmed that the grievor did in fact send a letter of complaint to Anne McLellan, Minister of Public Safety and Emergency Preparedness who was also Deputy Prime Minister in July 2004 (Exhibit E-1, tab 24).

[33] Mr. Sheridan testified that he telephoned the grievor at home on July 12, 2004 (Exhibit E-1, tabs 25 and 26), and at work on July 15, 2004 (Exhibit E-1, tab 28). On the latter occasion, Mr. Sheridan told the grievor through Mr. Waugh who had taken the line that he wanted to meet with the grievor the next day for further fact-finding. Mr. Waugh replied that Mr. Sheridan was harassing the grievor, who would only attend a second meeting if he were ordered to do so. Mr. Sheridan explained that he chose not to order the grievor to attend because he was concerned that the grievor's response might be insubordinate and did not want to add to the difficulty of the situation.

[34] Mr. Sheridan reported that the grievor filed a harassment complaint against him and Mr. Herd on July 16, 2004 (Exhibit E-1, tab 30).

[35] Mr. Sheridan also outlined that the grievor wrote a second letter to Deputy Prime Minister McLellan on July 15, 2004, in which he offered to write to Secretary Ridge to provide clarification regarding the CBSA's training program and standards for students and other classes of border services officers (Exhibit E-1, tab 27).

[36] In cross-examination, Mr. Sheridan accepted as true the statement the grievor made in his letter that Canadian citizenship was not a requirement for officers performing customs and immigration duties at the CBSA. He also concurred that the grievor had indicated in the letter that ". . . preference will be given to Canadian citizens." Mr. Sheridan agreed that he took issue with the grievor's letter because the grievor did not explain the security screening process for recruits.

[37] As to the issue concerning students, Mr. Sheridan confirmed that it had been an important matter for the union for a long time. He accepted the accuracy of the grievor's statement in the letter that the CBSA did not have one "minimal" training standard for all front-line officers as well as the accuracy of his reference to the requirement that full-time officers must pass the nine-week Rigaud training program, a program that students did not have to pass. He agreed that the grievor had offered to write a letter of clarification about training requirements to Secretary Ridge and that he instructed the grievor not to do so. Asked for the reason for his instruction, Mr. Sheridan stated again that the training issue was only one example of the problems he had with the letter, that it was "fraught with inconsistencies" and that writing again to Secretary Ridge would not help the situation.

[38] Mr. Sheridan identified as an inaccuracy the suggestion in the letter that officers were unable to properly defend the border. On that point, he accepted the proposition put to him by the grievor that officers are not trained to use lethal force and that they do not have the tools to complete the IMIM continuum; that is to say, the tools to administer lethal force (Exhibit E-1, tab 1). Mr. Sheridan nonetheless maintained that the grievor's statements were incomplete and misleading. He pointed out that, on numerous occasions, officers apprehended individuals without having access to sidearms. The grievor's statement that all officers could do was withdraw was not true.

[39] Returning to the fact-finding meeting of July 8, 2004, Mr. Sheridan confirmed that the grievor had stated at the meeting, when asked, that his intent in sending the letter was outlined in the letter itself. He recalled that he asked the grievor why he had not discussed the letter with management first before sending it. Generally, Mr. Sheridan indicated that he was not satisfied with the information provided by the grievor at the meeting. In his view, there remained the "whole issue of why [the grievor] did not follow internal channels" and why he had not provided full information in his letter. Mr. Sheridan verified that the grievor never categorically refused to answer questions at the meeting.

[40] At the conclusion of the cross-examination, the grievor asked Mr. Sheridan what he had done to advise secretary Ridge or anyone else about the shortcomings of the grievor's letter. Mr. Sheridan replied that "he did not write anything."

[41] Mr. Herd was the third witness for the employer. He testified that he first became aware of the grievor's letter when Patricia Ballantyne, Director General, Labour

Relations and Compensation, CBSA, contacted him in late June 2004, provided him a copy of the letter and indicated that it had caused great concern among senior CBSA managers. She asked that management in Toronto conduct a fact-finding investigation.

[42] Mr. Herd testified that he was surprised that such a letter had been sent to a senior official in the United States, that he found the letter to be very critical of CBSA policies and that he felt that it did not provide a "true reflection" of those policies. He stated that the grievor, as an employee of the CBSA, should not be critical of his employer, particularly to a senior official of a foreign government. Mr. Herd also stated his view that the letter was misleading "in some ways."

[43] Mr. Herd outlined how he and Mr. Sheridan organized the fact-finding meeting of July 8, 2004, and then summarized the discussion that occurred at the meeting in much the same way as had Mr. Sheridan. He added that the grievor mentioned that he did not intend to pursue the letter any further after sending it in late May 2004. Mr. Herd testified that the grievor became agitated at being questioned about the letter. The grievor stated that if pursued about it, he would consider making the letter more public by disseminating it on Parliament Hill and to the United States Congress. Mr. Sheridan and Mr. Herd told the grievor that such action would jeopardize his circumstances. Asked whether the grievor had apologized for the letter at the meeting, Mr. Herd answered in the negative and testified that the grievor stated that the letter was a private matter between himself, Secretary Ridge and Deputy Prime Minister McLellan.

[44] With respect to the harassment complaint launched by the grievor against him and Mr. Sheridan, Mr. Herd noted that the complaint was subsequently dismissed.

[45] In cross-examination, Mr. Herd agreed that the grievor never refused to answer questions at the July 8, 2004, meeting. Asked whether there was any subject matter that he and Mr. Sheridan were unable to cover at the meeting, Mr. Herd indicated that the only area where Mr. Sheridan went into detail was the issue of training students. According to Mr. Herd, the meeting "did not get into a detailed discussion of the letter, line by line" because he and Mr. Sheridan did not want to force the grievor to do so. It was the grievor's opportunity to explain the circumstances, and it was his choice whether to avail himself of that opportunity to provide mitigating information.

[46] Mr. Herd confirmed that he had no evidence that Secretary Ridge ever received the letter.

[47] The fourth employer witness, Hélène Mombourquette, joined the CBSA in June 2005 as the manager of labour relations at headquarters. Her testimony was limited to an issue regarding the identification of certain facsimile numbers that appeared on the top of the copy of the grievor's letter that Mr. Powell provided to CBSA management. As that issue, in my view, does not bear significantly on the decision to be made, it is unnecessary to summarize Ms. Mombourquette's very brief evidence here.

[48] The final employer witness was Ms. Hébert, who has been the CBSA's vice-president of operations since May 2004. Her career, before her appointment to her current role, included a lengthy tenure as Regional Director General, Customs, GTA, of the (then) Canada Customs and Revenue Agency (CCRA).

[49] Ms. Hébert explained the CBSA's policy regarding "armed and dangerous look-outs", that is, persons for whom a "look-out" has been issued at the border and who have been identified as armed and dangerous (Exhibit E-2). Ms. Hébert stated that the policy since March 26, 2001, has required officers who encounter such persons at the border to release them for entry and then immediately notify the appropriate police authority for interception.

[50] The creation of the CBSA in December 2003, according to Ms. Hébert, was an expression of the government's efforts in line with the Ridge-Manley Plan (Exhibit E-3) to improve the integration of border management and security functions. Another expression of that intent was the establishment by the Canadian government at the same time of the Department of Public Safety and Emergency Preparedness. Similar to the American Department of Homeland Security created one year earlier, the role of the new department was to integrate and improve the coordination of programs conducted by the separate agencies that comprised the department's "portfolio" (for example, the CBSA, the Royal Canadian Mounted Police and the Canadian Security Intelligence Service).

[51] Ms. Hébert explained that because so much of Canada's economic sustainability was tied to the United States, the Canadian government wanted to work closely with the United States following 9/11 "to ensure a border regime that allowed for efficient

cross-border trading." The "Smart Border Declaration" of December 12, 2001 (Exhibit E-1, tab 11), built on earlier shared border accords to enhance "umbrella work" previously begun by the two countries. At that time, according to Ms. Hébert, the "Smart Border Declaration" received broad media coverage, and its contents were the subject of multiple communications to employees of the (then) CCRA. A later document entitled "Canada's National Security Policy" was also a response to the events of 9/11; it further addressed collaborative undertakings by the two countries and similarly received broad media exposure as well as circulation to employees (Exhibit E-1, tabs 17 and 18).

[52] Ms. Hébert identified the CCRA's *Code of Ethics and Conduct* (Exhibit E-1, tab 5) as the authority that continued to apply to employees after the creation of the CBSA. Ms. Hébert testified that the *Code of Ethics and Conduct* was available to employees on the CBSA website and that the employer held sessions with employees across the country to familiarize them with its requirements.

[53] Ms. Hébert testified that the grievor's letter first came to her attention when Paul Burkholder, Vice-President, Human Resources, CBSA, showed it to her on June 2, 2004. She testified that she was "incensed" by the letter, thought it completely inappropriate and believed that the grievor had "betrayed" the Canadian government by sending a letter that had the potential to seriously undermine American confidence in Canada's border regime. Ms. Hébert stated that her responsibilities gave her first-hand knowledge of how seriously the United States took border security matters and of how extensively Canadian government officials, together with the business and tourism communities, had worked to try to keep the border as "thin" as possible by maintaining the trust of their American counterparts.

[54] Ms. Hébert testified that a copy of the grievor's letter was received by Minister McLellan's office. She also confirmed that she was consulted by human resources representatives who sent a briefing note dated June 28, 2004, to the President of the CBSA about the grievor's letter indicating that administrative action would be launched in response (Exhibit E-1, tab 22).

[55] Ms. Hébert recounted that she spoke with Mr. Sheridan and Mr. Herd shortly after their fact-finding meeting with the grievor on July 8, 2004, and took notes of their description of what had occurred (Exhibit E-5). She subsequently learned that Mr. Sheridan proposed a second meeting with the grievor but that the grievor declined

to attend. Before convening a disciplinary meeting on July 22, 2004, Ms. Hébert testified that she saw the grievor's letter to Minister McLellan of July 9, 2004 (Exhibit E-1, tab 24), a second letter from the grievor to the Minister dated July 15, 2004 (Exhibit E-1, tab 27), and the Minister's response to the grievor dated July 22, 2004 (Exhibit E-1, tab 33).

[56] According to Ms. Hébert, the grievor did not attend the disciplinary meeting that she convened on July 26, 2004. She provided her letter of discipline (Exhibit E-1, tab 35) to Mr. Waugh and Victoria Rhéaume, a lawyer, who attended on the grievor's behalf. She also mailed the letter of discipline to the grievor's home.

[57] In the letter of discipline, Ms. Hébert referred to another letter dated February 22, 2002, that she sent to the grievor (Exhibit E-1, tab 13). That correspondence was the result of a mediation process that had taken place to resolve a dispute arising from an exchange of emails with the grievor in September and October 2001. The email exchange concerned his alleged threat to write President Bush in connection with his concerns about Canadian authorities "compromising" border security (Exhibit E-1, tabs 8 and 9). Ms. Hébert testified that there are appropriate channels for communications with other governments and that the grievor was not an official authorized to engage in such communications. In her February 2002 letter, she referred to the principles enunciated in a memorandum dated June 17, 1999, from Gerry Troy, Acting Assistant Deputy Minister, CCRA. At that time, the grievor had sought clarification from the employer about what employees were permitted to say in public. Mr. Troy's memorandum was a response to that request and was shared with all senior union representatives in what was then the southern region of Revenue Canada. It laid out the principles that the department expected employees to observe concerning any public statements that they might make concerning the department. Ms. Hébert maintained that the employer, through the Troy memorandum, her email exchange with the grievor in September and October 2001, and her letter of February 2, 2002, as well as a letter sent by CCRA Assistant Commissioner Dan Tucker to the grievor in March 2002 (Exhibit E-6), had clearly made the grievor aware of what was expected of employees and of those who performed union duties.

[58] Ms. Hébert returned to her earlier comment that she was "incensed" by the grievor's letter. She testified that she thought it was reprehensible that an employee of the CBSA and of the public service would send a letter to the "second-highest ranking

official in the United States government" with content that "had the potential of seriously undermining U.S. confidence in Canada's border management." She acknowledged that the grievor was also a union representative and that he signed the letter as the First National Vice-President of the CEUDA. She stated that her letter to the grievor of February 22, 2002, the Troy memorandum and Mr. Tucker's correspondence all articulated the fact that union representatives do enjoy more latitude in the statements that they can make but that there are boundaries. In her words, "even a union representative has an obligation to consider when making remarks that are critical of the government's policies and programs." The *Code of Ethics and Conduct* (Exhibit E-1, tab 5) also refers to making sure that comments are neither reckless nor malicious. Any statement that an employee makes should not undermine confidence in government programs.

[59] Ms. Hébert outlined in detail her concerns with the contents of the grievor's letter, summarized as follows:

> (1) the grievor created the impression that there are vulnerabilities and weaknesses by saying to Secretary Ridge that he needs to be cognizant of risks from Canada;
>
> (2) it was not the grievor's responsibility to write Secretary Ridge and discuss border management issues;
>
> (3) the grievor's statement about non-citizens was offensive in its implication that they pose a security risk and omitted the fact that security clearance at the "enhanced reliability" level applied to all persons hired by the CBSA;
>
> (4) the issue of citizenship had never been broached at any level of union-management consultation to Ms. Hébert's knowledge;
>
> (5) the letter failed to explain the "total context" of the processes used by the CBSA to interview, train and test all classes of employees, not just the full-time officers who take the "pass/fail" Rigaud program;
>
> (6) the letter did not mention that students received the same amount of training for primary inspection duties as was provided to indeterminate employees during the nine-week Rigaud program;

(7) the comparison of mission statements was a misleading contrast of statements that were not "equal"; and

(8) the "Armed and Dangerous" policy was frequently cited as a reason at that time for the government to issue firearms to officers, but it was the government's policy not to do so.

[60] In selecting a 30-day suspension as the appropriate disciplinary response to the grievor's letter, Ms. Hébert testified that she considered the seriousness of "to whom" he wrote, the content of the letter that, in her view, tried to create fear by pointing out weaknesses in border management, and the fact that management had apprised the grievor "numerous times" of its expectations about what he could say externally. She judged that the grievor's misconduct was very serious and that termination of his employment was a possibility. She decided against termination because she was hopeful that her letter would send "a significant signal" to the grievor about his conduct. She noted that while she was aware at that time of recent suspensions of 1 and 10 days given to the grievor, those suspensions did not enter into her calculation. Ms. Hébert noted in her conclusion that the grievor's behaviour violated the "Public Criticism of the CCRA" section of the *Code of Ethics and Conduct* (Exhibit E-1, tab 5).

[61] Asked why she did not detail her concerns about the contents of the grievor's letter in her letter of discipline, other than the issue of citizenship, Ms. Hébert stated that she felt that two general references in her letter to the grievor pointing out weaknesses in border management had the effect of including her other more specific concerns into the statement of reasons for imposing discipline.

[62] As to the grievor's offer to write a second letter of clarification to Secretary Ridge, Ms. Hébert reiterated her belief that the grievor should not have written Secretary Ridge in the first place, so clearly a second letter would also have been inappropriate.

[63] Ms. Hébert's examination-in-chief closed with her stating that, to her knowledge, the grievor never expressed remorse for his misconduct.

[64] In cross-examination, the grievor asked Ms. Hébert whether she agreed with the proposition that no employee should be disciplined for publicly stating things that were true. Ms. Hébert replied that the context was important. She could see occasions

where discipline would be appropriate even if the statements were true, such as where those statements revealed confidential or secret information. The grievor pressed Ms. Hébert further as to whether she felt that discipline would be appropriate where the true statements that were made were about matters already in the public domain. Ms. Hébert answered that she still thought that the *Code of Ethics and Conduct* (Exhibit E-1, tab 5) communicates an obligation not to criticize the government's policies or programs. In that light, she stated that it was "theoretically possible" to impose discipline where statements were made that were true and in the public domain but that were critical of the government's policies or programs. After being asked to comment on the component elements of the "Public Criticism of the CCRA" section of the *Code of Ethics and Conduct*, Ms. Hébert again stated that it was "possible," in her opinion, for a union official to be disciplined for speaking truthfully about matters in the public domain if his or her statements were critical of government programs.

[65] The grievor asked Ms. Hébert about the information that Mr. Sheridan and Mr. Herd gave her regarding the fact-finding meeting of July 8, 2004. She could not confirm whether Mr. Sheridan and Mr. Herd told her that the grievor refused to answer questions. She was, nonetheless, confident, based on their conversation, that they gave the grievor an opportunity to provide an explanation for what he had done and that no explanation was forthcoming.

[66] Ms. Hébert explained that she understood that Mr. Sheridan and Mr. Herd expressed concerns at the fact-finding meeting about both the contents of the grievor's letter and to whom it was sent. She conceded, however, that her notes of her conversation with Mr. Sheridan and Mr. Herd did not refer to content criticisms (Exhibit E-5). She also stated that she had no knowledge of whether the question of citizenship — the only content issue specifically mentioned in her letter of discipline — was discussed at the fact-finding meeting.

[67] Ms. Hébert agreed that the statement in the grievor's letter that CBSA officers did not have to be Canadian citizens was true. She then testified that the reference to a citizenship requirement in the United States was inaccurate but, when questioned further on the point, she indicated that she was not certain. Asked if she had checked at the time whether her information about the only content issue mentioned in her disciplinary letter was accurate, she replied that she believed that she had been told

that the reference was checked and found to be inaccurate. She confirmed that she did not personally verify that fact. She stated, however, that the issue of the factual accuracy of the reference to citizenship requirements was not a significant factor in her decision to render discipline. What offended her, instead, was the implication that non-citizens posed a risk to Canadian border security.

[68] Ms. Hébert agreed that the statements the grievor made in his letter about students and about arming customs inspectors, as well as the excerpts that he took from the Canadian and American mission statements, were all accurate. On the arming issue, she agreed that she did not like the statements made by the grievor because they criticized government policy. She also found that the last sentence of the letter concerning the arming issue was "silly." Responding to a further series of questions, Ms. Hébert agreed that all of the following matters mentioned in the letter were in the public domain: the qualifications required to become a customs inspector in Canada and in the United States, the CBSA's policies regarding the employment of students, the training provided to students and to term employees, and the fact that Canadian officers were not armed at that time while American officers were armed.

[69] When the grievor proposed to Ms. Hébert that the recipient of the grievor's letter was a more important factor in her decision to discipline than the content of the letter, she disagreed and stated that she considered both the recipient and the letter's contents in reaching her decision.

[70] Ms. Hébert indicated that her decision to suspend the grievor was based "in part" on the fact-finding conducted by Mr. Sheridan and Mr. Herd. She agreed that there had been no meetings with the grievor about his letter other than the fact-finding session of July 8, 2004. She conceded that she did not have meeting notes from Mr. Sheridan and Mr. Herd and that her only record of what occurred was her own notes of her conversation with them (Exhibit E-5).

[71] Other than the initial message to Mr. Powell through Mr. Lavergne that the CBSA planned to address the matter of the grievor's letter, Ms. Hébert testified that there were no subsequent communications about the letter between the Canadian and American governments. She stated that the CBSA did not take any action to advise American authorities that statements made in the letter were inaccurate. She said that she had no information as to whether Secretary Ridge actually received the letter or whether the CBSA had inquired about its receipt. She stated that senior management

made a conscious decision not to pursue the matter at higher levels of the United States government to avoid increasing the sensitivity of the situation.

[72] Ms. Hébert confirmed that the grievor was on leave for union business at the times pertinent to the case. She stated that the fact that he was on leave for union business was not a relevant consideration for her.

[73] In re-examination, Ms. Hébert testified that while on leave for union business, the grievor was still required to notify the employer concerning his days of rest and was required to apply for other types of leave. Asked why the grievor's leave status was not relevant to her decision to discipline, she answered that "she addressed the situation from the perspective that the grievor was an employee."

[74] The employer closed its case.

[75] The grievor was the sole witness on his own behalf. He testified that Revenue Canada hired him as a customs officer in September 1989 and that he worked in that capacity at Pearson until he was elected in March 1996 to the presidency of the Toronto District Branch of the CEUDA. Since 1996, he has not performed any customs inspector duties and has been engaged on a full-time basis as a union officer. Beginning in 1999, those duties included responsibility for the national occupational safety and health (OSH) portfolio. He became chairperson of the CEUDA's Standing OSH Committee and also sat on the National Joint OSH Policy Committee. At the time he wrote the letter to Secretary Ridge, the grievor was the elected First National Vice-President of the CEUDA.

[76] The grievor testified that in his own representational work, both the arming issue and the uniform training requirement for all employees issue had been "hot" items since 1999 or 2000. The grievor explained that there was a direct link between health and safety and training. The union was concerned about possible risks caused by the use of students who did not receive the same training as full-time officers who graduated from the Rigaud program. Students also did not face the same "pass/fail" training criterion applied to those officers. The grievor referred to a 1996 article in the *Globe and Mail* newspaper as evidence that issues relating to the use of students had been on the agenda for many years (Exhibit G-5). The grievor testified that the union had tried to address those issues through internal union-management consultation processes, by lobbying members of Parliament and by making submissions to the

Auditor General. He indicated that he had also personally testified before the Senate Committee on National Defence and Security in 2002 regarding student issues as well as the security of border security data banks. He tendered a "certificate of participation" as proof of that appearance (Exhibit G-6).

[77] Concerning the threat that he allegedly made to write President Bush in 2001, the grievor recalled discussions that he had with Mr. Sheridan in September 2001 about the admission of "undesirables" at Pearson, during which the name "Bush" came up. He denied, however, threatening to write President Bush and believed that his statement to Mr. Sheridan had been more to the effect that "George Bush would appreciate hearing about these concerns." The grievor confirmed that he did not write to American authorities at that time.

[78] After the creation of the CBSA in 2003, the employer began to share job hazard analyses and information about security risks in consultation meetings with the union. As First National Vice-President of the CEUDA, as the CEUDA lead on OSH issues, and as chairperson of his union's Border Security Committee starting in 2003, the grievor testified that it was his role to be a messenger for the concerns brought to him by members about workplace hazards and risks. He recounted that both the citizenship issue and the question of a harmonized training requirement for all employees were among the matters identified as concerns by his members. The grievor testified that consultations with the employer did not resolve the issues brought forward by the union about arming officers, using students and standardizing training requirements. In all three areas, the employer and the union were "on opposite ends of the spectrum."

[79] Before sending his letter to Secretary Ridge, the grievor testified that he accessed a United States website to confirm the citizenship requirement for American customs and immigration officers. He also talked with American colleagues in the United States pre-clearance section at Pearson and verified the requirement.

[80] The grievor stated that the intent of his letter was exactly as stated in its first paragraph. He had no intent to embarrass Canada.

[81] On the citizenship issue, the grievor maintained that he had no intent to suggest that all non-Canadians were a security risk and "merely" wished to show that there was a difference in the citizenship requirement between the two countries.

[82] The grievor testified that he raised the student issue because it was a long-standing concern to his members. He recalled that he had witnessed first hand colleagues who had received satisfactory performance assessments for as many as five years losing their jobs after failing the Rigaud program and being replaced by students.

[83] As to the two mission-statement quotations cited in the letter, the grievor stated that those statements were what was available at that time. He believed that they remained in force today. The concern expressed in the letter was that Canadian authorities placed more emphasis on facilitating trade across the border than on security.

[84] With respect to the letter's reference to "armed and dangerous look-outs," the grievor maintained that he was just stating the facts regarding the tools available to officers relative to the IMIM model (Exhibit E-1, tab 1) and the link to the health and safety of employees. The union believed that officers were vulnerable if armed and dangerous persons turned against them at the border because they had no capability or training to deal with such situations.

[85] The grievor testified that he sent a copy of his letter to Deputy Prime Minister McLellan because it concerned issues that both countries were discussing. He stated that he "had nothing to hide" and wanted her to pursue the issues that he raised. Other than one of the quotes referenced in the letter, the grievor maintained that everything in it had been in the public domain for many years.

[86] The grievor confirmed that he never received a response to his letter nor confirmation that it was received by Secretary Ridge.

[87] The grievor outlined his recollection of the fact-finding meeting of July 8, 2004. He indicated that he questioned the reason for the meeting, asked whether it was disciplinary and asked Mr. Sheridan and Mr. Herd to identify their concerns. The grievor testified that they did discuss the letter but when asked for specifics, Mr. Sheridan pointed out only one issue, the question of students not receiving the Rigaud training. According to the grievor, Mr. Herd said that the problem was not so much what he had written but rather to whom. The grievor offered to write a second letter to Secretary Ridge to clarify "whatever the employer deemed necessary" but Mr. Sheridan and Mr. Herd declined the offer. The grievor did not write a second letter.

[88] The grievor said that he did not refuse to answer any questions put to him at the meeting. He confirmed at the meeting that he drafted the letter and clearly stated that he had no intent to disseminate it. He called the letter a "dead issue."

[89] When he received a call from Mr. Sheridan to attend a second meeting, the grievor maintained that Mr. Sheridan offered no specific reason for meeting again. As the grievor felt that he had already answered all of their questions, he could not see a need for another meeting with Mr. Sheridan and Mr. Herd unless they wished to make an accusation or provide him with something specific to which to respond.

[90] Going into the fact-finding meeting, the grievor stated that he did not feel that he had done anything wrong as a union representative. He felt that his letter contained statements of fact already accessible to the public. The CEUDA itself had been active on the Internet in publishing information about the issues raised in the letter. The grievor offered as an example a document created by the CEUDA National Board of Directors as revised in June 2004 (Exhibit G-8).

[91] The grievor testified that he did not attend the meeting convened by Ms. Hébert on July 26, 2004, but was represented by his union representative and by counsel he had retained. He requested that his representatives ask Ms. Hébert whether there was anything he could do to mitigate possible discipline, such as making an apology. The grievor understood that his representatives acted on his request.

[92] In cross-examination, the employer asked the grievor to confirm whether he had been a union representative on a full-time basis since 1996. The grievor replied that he had been elected to a union position in March 1996 but did still work as a customs inspector on a few statutory holidays immediately following his election.

[93] Given the grievor's testimony that everything in his letter was publicly available, the employer asked him to identify where in the document, created by the CEUDA National Board of Directors (Exhibit G-8), the citizenship issues were raised. The grievor replied that there was no mention of the citizenship issue in that document. Concerning the student issue, the grievor stated that it was covered regularly in union publications. Asked where in the CEUDA's 18-point position regarding the employment of students (Exhibit G-8) there was an indication that the union wrote to other governments or used similar tactics to pursue its concerns, the grievor stated that it was not necessary in that document to report on all of the tactics used by the union.

Pressed further on the point, the grievor said that it was impossible in posted union documents to identify every initiative taken by representatives or to report on the activities of all OSH representatives. The CEUDA document in question (Exhibit G-8) was not a detailed summary of everything the component was doing.

[94] The grievor confirmed that his letter of May 25, 2004, was the first time he wrote to an official of a foreign government. He disagreed with the employer's assertion that he was stating positions in the letter and maintained that he was providing facts, not a personal view.

[95] Referring to the union's Joint Management of the Canada/US Border Accord Committee (Exhibit G-4), the employer asked the grievor whether he wrote to Secretary Ridge as its chairperson. The grievor replied in the negative and stated that he was not restricted to his chairperson role and that he sent his letter in his capacity as First National Vice-President of the CEUDA.

[96] The employer suggested to the grievor that, as of Ms. Hébert's letter of February 22, 2002 (Exhibit E-1, tab 13), there was nothing unclear in the employer's position regarding the writing of a letter such as his. The grievor replied that he understood that the policy on making public statements was his "limitation" and that he could write a letter provided that he did not contravene the provisions of the policy. He emphasized that he felt that he had the right to contact outside persons or write to them as long as he did not violate the policy. Asked to confirm that he knew the employer's view about his threatening to write an official such as President Bush, the grievor stated that he believed that there was no problem as long the letter contained nothing that was false or malicious. He agreed with the employer that there are limits to what a first national vice-president of a union can say but testified that he could not accept that stating facts that are on the public record could undermine the credibility of CBSA programs.

[97] The grievor agreed with the employer that 9/11 changed the world dramatically and that it heightened fears among Canadians. He was also aware of what was being said in the American media about the Canadian border. He stated that customs inspectors were striving to ensure confidence in the border. If they did not live up to expectations, the results might be far more tragic. Following 9/11, the union was trying to address ongoing concerns that might have contributed to another tragedy. Union

representatives were compiling their own statistics to make sure that information about border security issues presented to decision makers was accurate.

[98] The grievor acknowledged that he was aware of the views expressed in a letter dated January 2, 2002, on behalf of Revenue Minister Martin Cauchon concerning the limits on the freedom of expression enjoyed by union leaders (Exhibit E-9). He stated that the union "had its own opinion." The grievor agreed that he had always believed that union officials had more latitude to make statements consistent with their statutory role as advocates of union rights. He stated that he did not believe that a union official was required to secure approval from management for any statement he or she made.

[99] Asked further about the intent of his letter, the grievor testified that it "recapped" issues that had been previously raised and that it shared information. He understood at that time that the letter would find its way through appropriate channels and lead to discussions between the two countries. The grievor agreed with the employer when asked to confirm that he did not have a designated role as an employee to advise a foreign official. He maintained that there was nonetheless an expectation and obligation on a union official to address issues and concerns raised by the membership in "appropriate forums" as necessary. He stated, as an example, that "sometimes you can get quicker results through a media campaign" than by "spinning your wheels" in internal discussions. The result he sought in writing Secretary Ridge was a discussion of issues for the purpose of achieving change, for example, arming officers. He felt that his letter would link to ongoing discussions between the two countries about standardizing border policies and programs. He considered the letter to be private, addressed only to Secretary Ridge and to Deputy Minister McLellan.

[100] The grievor confirmed that he had no expertise in international relations.

[101] The grievor closed his case without re-examination.

## III. Summary of the arguments

### C. For the employer

[102] The employer submitted that I must answer two overarching questions: Was there misconduct when the grievor wrote his letter of May 25, 2004, to Mr. Ridge, the U.S. Secretary of Homeland Security? If so, was the discipline invoked by the employer appropriate for that misconduct?

[103] In addressing those questions, the employer acknowledged that the case turned on the line of decisions summarized in *Shaw v. Deputy Head (Department of Human Resources and Skills Development) et al.*, 2006 PSLRB 125. The decisions referenced in *Shaw* establish that an employee, acting as a union official within the proper scope of union duties, must be accorded "a fair degree of latitude" in representing members. In the appropriate context, he or she may criticize the employer without the risk of discipline for breaching his or her duty of loyalty. However, employees performing union roles do not enjoy *carte blanche*. There are clear limits to what they can say or do. In the employer's submission, were I not to find that the grievor's criticism of the employer in this case surpassed the limits recognized in the arbitral jurisprudence, then it will be "open season" for all union representatives.

[104] The employer argued that I must first determine whether the grievor was acting within the legitimate and proper scope of his union duties when he wrote Secretary Ridge. If I find in the negative, then I must deny the grievance because the immunity from discipline accorded to union officials does not extend to actions taken outside the appropriate scope of official union duties. If I determine, instead, that the grievor was working within the proper scope of his union role, then the test summarized in *Shaw* applies: Did the grievor make statements in his letter that were malicious or knowingly or recklessly false? If so, then the employer did indeed have cause to discipline the grievor even though the activity occurred while he performed his union role.

[105] The employer takes the strong view that given the extreme sensitivity of border management issues between Canada and the United States in the wake of the terrorist attacks of September 11, 2001, writing the letter of May 25, 2004, to one of the highest officials of the Government of the United States was not an activity within the proper and appropriate scope of the grievor's union role. That the letter was written under the CEUDA's letterhead was not sufficient to bring it within that scope. Moreover, writing

to Secretary Ridge could not further the goals of the union as the American authorities had no power or authority regarding the issues raised by the grievor. Only by communicating domestically with Canadian authorities could the grievor have furthered the legitimate objectives of his union.

[106] According to the employer, the grievor's letter was unacceptable both because it was addressed to Secretary Ridge and because of its contents. The letter was entitled "Public Safety and Security – International Borders." The grievor was not an expert in international relations, in international borders or in public safety and security. Through his letter, he ran the risk of interfering in the highly sensitive relationship between the Canadian and American border administrations. He inappropriately expressed opinions about Canadian government priorities and about American public security interests, areas that were clearly outside his responsibility and knowledge. He simply had no business discussing border security issues with a senior official of a foreign government, and particularly not with Secretary Ridge.

[107] In his letter, the grievor stated that his purpose was ". . . to provide [Secretary Ridge] with information, which may prove useful when assessing risk to public safety and security . . . ." The employer argued, to the contrary, that the grievor's purpose was to inflame the Canadian-American relationship and "to incite fear" at a time of heightened sensitivity.

[108] The grievor alleged in the letter that ". . . little has changed as far as the recruitment and staffing practices for Canada's first line of defence. . ." since the attacks of 9/11. According to the employer, he omitted to say that Canada and the United States, both individually and together, have made significant changes in border security since 9/11 (see, for example, Exhibit E-1, tabs 11 and 14).

[109] The employer contended that the discussion of citizenship in the letter broached an issue not previously raised with management. The grievor's inference that non-citizens cannot be trusted to perform customs inspection work was unfounded and unfair. He neglected to tell Secretary Ridge that every prospective employee of the CBSA goes through the same security clearance process regardless of citizenship status. The grievor's comments were thus misleading by leaving the impression that non-citizen ". . . access to our port of entry coding systems, electronic database, internal intelligence bulletins, and other sensitive and protected information . . ." created a security risk.

[110] On the issue of hiring students, the grievor similarly neglected to mention that students receive exactly the same training as full-time employees for the PIL duties that management assigns to students. The grievor did not provide the whole picture. His depiction of the situation involving students was "an untruth."

[111] As to the two quotations that appear in the letter, purportedly to contrast Canadian and American mission statements, the employer contended that the grievor "cherry-picked" from the content of the documents to the intended disadvantage of the CBSA. The employer argued that the grievor could have selected a different paragraph from the Canadian document (Exhibit E-1, tab 15) that is much more comparable to the American excerpt. By failing to do so, he specifically cast the Canadian government in a negative light. According to the employer, the grievor's choice of paragraphs was a comparison of "apples and oranges" intended to make the CBSA look bad.

[112] In the employer's submission, had the grievor addressed his letter to the Canadian government, "we would not be here today." Clarifying that assertion, the employer argued that the context and content of the letter would not have been the same if the grievor had addressed it to Canadian authorities, and those differences would have been significant. The letter to Secretary Ridge surpassed the limit of what was acceptable because the grievor sent it knowing how concerned American officials and the American public were about border issues in the wake of 9/11 and knowing also the extent to which the sustainability of the Canadian economy was so closely tied to maintaining a "thin border" that did not obstruct trade and tourism. The grievor's letter was reckless. He knew very well what the employer's response would have been had he submitted the letter to management for advance review. In that regard, the employer referred to Ms. Hébert's testimony that "everyone knows how seriously the U.S. takes the management of its borders." It was reprehensible that an employee would send a letter to the "second-ranking" U.S. official with content that had serious potential to undermine confidence in border security.

[113] The grievor's evidence was that he believed that he was not acting outside the scope of union duties when he sent his letter. However, management had previously and repeatedly made clear to him its expectations about the appropriate limits for union expression and activity in such documents as the "Gerry Troy" memorandum of June 17, 1999 (Exhibit E-1, tab 3), Ms. Hébert's letter of February 22, 2002 (Exhibit E-1,

tab 13) and the *Code of Ethics and Conduct* (Exhibit E-1, tab 5). By ignoring those expectations, the grievor violated the duty of loyalty that he owed his employer.

[114] For guidance on the appropriate balance between a public servant's duty of loyalty and his or her right to speak freely, the employer referred me to the leading case of *Fraser v. Canada (Public Service Staff Relations Board),* [1985] 2 S.C.R. 455. *Fraser* found that there were instances where a public servant could ". . . actively and publicly express opposition to the policies of a government. . ." but could not engage in ". . . sustained and highly visible attacks . . .":

. . .

> *41 . . . 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.*

. . .

[115] According to the employer, *Fraser* supports the proposition that extreme criticism of the government by a public servant — of which the grievor's letter was an example "of the highest order" — constitutes a breach of the duty of loyalty that appropriately exposes the public servant to discipline. The criticism in the grievor's case was "of the highest order" because it touched on very sensitive border management security issues and was expressed to a partner whose decisions about the border could have had a very serious impact on Canada's economy.

[116] The case law summarized in *Shaw* looks at free speech and the duty of loyalty in the special circumstance where a public servant performs union duties. The case law recognizes that union representatives should enjoy latitude in making comments against the interests of employers but that they have no immunity from discipline if they act beyond the "bright line test" of appropriate union activity:

> . . .
>
> *[29] In the decision of the arbitration board in* School District No. 22 (Vernon) and C.U.P.E., Local 5523 (Hegler) *(2002), 104 L.A.C. (4th) 435 (Taylor), the majority of the board also suggested (at pages 443-444) that there are limits on the latitude enjoyed by a union officer:*
>
> . . .
>
> The authorities do not stand for the proposition that a union official is immune from discipline for acts of insubordination. They make the point that union officials must be free to properly and fully represent their members in grievance, arbitration and collective bargaining matters without being subject to discipline for acts which fall within the exercise of those and other legitimate union duties. The protection does not extend to conduct which falls outside the proper scope of union responsibility.
>
> . . .

[117] The employer reiterated its view that the grievor went well outside ". . . the proper scope of union responsibility. . ." by the combination of writing to Secretary Ridge and saying what he did in his letter, viewed in the volatile context of the Canadian-American border relationship. According to the employer, the grievor strategically dropped union issues into a "toxic vehicle" and sent it to a foreign government.

[118] The distinction between "internal speech" and "external speech" is important: *National Steel Car Ltd. V. U.S.W.A., Local 7135,* (2001), 101 L.A.C. (4th) 316, as quoted in *Shaw* at para 34. The grievor's actions exhibited bad faith because he knew, with the words that he used and the external recipient that he chose, that he could incite fear. The grievor instead could have demonstrated good faith by choosing to raise the union's issues with the Canadian government using appropriate internal channels.

[119] Should I not accept that the grievor's letter comprises speech beyond the proper scope of union activity, the employer submitted that I should find in the alternative that he placed himself outside immunity from discipline by making statements to a third party that were "malicious or knowingly or recklessly false": *Shaw,* at paragraph 41.

[120] The employer referred me to definitions of "malicious" and "reckless" drawn from *The Canadian Oxford Dictionary,* Oxford University Press, Don Mills, Ontario, 1998, and *Black's Law Dictionary,* 6th ed., West Publishing Co., St. Paul, Minnesota, 1990. The employer maintained that the grievor's actions were malicious because he knew that writing about weaknesses in the border had the potential of causing harm, and he intended to do so. That intention can reasonably be inferred from the content of the letter itself. Its subject line — "Public Safety and Security – International Borders" — spoke volumes. The message was that "we're not doing a very good job over here."

[121] The grievor's statements were also knowingly or recklessly false. He played fast and loose with the facts, neglected to provide the full context about the citizenship and student issues, misled with the quotations that he selected to contrast Canadian and American priorities, and compared "apples and oranges." His omissions regarding security clearances for non-citizens and the nature of training given to students were examples of being reckless with the truth.

[122] On that basis, the employer submitted that following the test in *Shaw*, I must conclude that the latitude normally given to union representatives for free expression ended in the grievor's case when he made statements in the letter of May 25, 2004, that were malicious and knowingly and recklessly false. Those statements placed him outside any immunity from discipline. Ms. Hébert's disciplinary response of a 30-day suspension was appropriate given how far the grievor's letter went beyond the scope of his union duties and was well within the range of proportionate disciplinary responses.

[123] As to the *Charter* issues raised by the grievor in his second grievance, the employer argued that there is no case law to support the proposition that section 7 of the *Charter* ("life, liberty and security of the person") may arise in an employment context: *Forgie v. Treasury Board (Immigration Appeal Board)*, PSSRB File No.

166-02-15843 (19861119). (At that juncture of the hearing, the grievor stipulated that he would not press an argument based on section 7.)

[124] With respect to paragraph 2(b) of the *Charter* ("freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication"), the employer cited *Read v. Canada (Attorney General)*, 2005 FC 798 and 2006 FCA 283, to the effect that the duty of loyalty to an employer has been recognized as a reasonable limit prescribed by law on freedom of expression that "can be demonstrably justified in a free and democratic society" within the meaning of section 1 of the *Charter*: see also *Haydon v. Canada*, [2001] 2 F.C. 82; *Haydon v. Canada (Treasury Board)*, 2005 FCA 249; *Chopra v. Canada (Treasury Board)*, 2005 FC 958; and *Grahn v. Canada (Treasury Board)*, [1987] F.C.J. No. 36 (C.A.) (QL). The employer contended that paragraph 2(*b*) of the *Charter* was never engaged in the circumstances of this case.

[125] The employer submitted, nonetheless, that there is no need to go to the *Charter* in the decision. If I find that the discipline levied by the employer was warranted, there can be no breach of the *Charter* and no need for a *Charter* remedy.

[126] The employer also submitted that there are no cases where damages of the type sought by the grievor have been ordered.

[127] The following are further cases submitted by the employer: *Almeida v. Canada (Treasury Board)*, [1991] 1 F.C. 266 (C.A.); *Canada Post Corp. v. C.U.P.W. (Van Donk)* (1990) 12 L.A.C. (4th) 336; *Cassellholme Home for the Aged (District of East Nipissing) v. C.U.P.E. Local 146* (2004), 128 L.A.C. (4th) 425; *Chopra v. Treasury Board (Health Canada)*, 2003 PSSRB 115, 2005 FC 958 and 2006 FCA 295; *Fugère v. Québecair* (1987), 88 C.L.L.C. 16; *King v. Treasury Board (Revenue Canada – Customs, Excise and Taxation)*, 2003 PSSRB 48; *Lewicki v. Treasury Board (Canadian Grain Commission)*, 2002 PSSRB 37; *Nowoselsky v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2001 PSSRB 18 and 2004 FCA 418; *Bell Canada v. Communications, Energy and Paperworkers Union of Canada* (1996), 57 L.A.C. (4th) 289; *Burns Meats Ltd. v. Canadian Food and Allied Workers, Local P139* (1980), 26 L.A.C. (2d) 379; *Chedore v. Treasury Board (Post Office Department)* (1980), 29 L.A.C. (2d) 42; *Newfoundland and Labrador School Boards Association (District 5) v. Newfoundland and Labrador Association of Public and Private Employees* (2004), 137 L.A.C. (4th) 180; *Simon Fraser University v. Association of University and College Employees, Local 2* (1985), 18 L.A.C.

(3d) 361; *Snow Lake School District No. 2309 v. United Steelworkers of America, Local Union No. 8262*, [2001] M.G.A.D. No. 66 (QL); *Scott v. Canada Customs and Revenue Agency*, 2001 PSSRB 82; *Scruby v. Staub (Employment and Immigration Canada)*, PSSRB File No. 161-02-420 (19870616); and *Stewart v. Canada (Treasury Board)*, PSSRB File No. 168-02-108 (19760826), and [1978] 1 F.C. 133 (C.A.).

**B. <u>For the grievor</u>**

[128] The root issues in this case, according to the grievor, are his right to represent his members and his constitutional right to freedom of expression. The *Fraser* line of decisions about "whistle-blowing" is thus not helpful. The subject matter before me is union expression or union free speech, and the case should appropriately be decided by reference to the case law summarized in *Shaw.*

[129] According to *Shaw*, and accepted by the employer in its submissions, the grievor cannot be disciplined while functioning as a union representative unless his behaviour is malicious or his statements are knowingly or recklessly false. The evidence in this case showed that the grievor's statements in the letter of May 25, 2004, were neither malicious nor knowingly or recklessly false. The employer's witnesses conceded that there was nothing factually false in the letter and that the information cited by the grievor was already in the public domain. The employer, therefore, cannot meet the *Shaw* test and establish that it had cause to levy so serious a disciplinary penalty, or any disciplinary penalty at all.

[130] It is clear that the employer's problem with the letter was not its content but, rather, to whom it was addressed. The grievor noted, in particular, the employer's statement in argument that had the letter been sent to a Canadian minister, "we wouldn't be here." The grievor submitted that it does not matter to whom the letter was sent. The case law recognizes that "the public is the public." A representative of another government is as much a part of the public as any other person external to the employer-employee relationship. If the content of the letter does not offend the *Shaw* test, to whom it was sent makes no difference.

[131] In applying *Shaw*, there must be an objective assessment made through an informed lens: *Threader v. Canada (Treasury Board)*, [1987] 1 F.C. 41 (C.A.). The question that must be posed is, "Would an informed person aware of the relevant facts

find that the statements made by the grievor were either malicious or knowingly or recklessly false?"

[132] The grievor argued that the evidence concerning the events surrounding the letter, viewed objectively, did not support the employer's allegations. The grievor made the following points:

> (1) other than the issue concerning students, neither Mr. Sheridan nor Mr. Herd expressed any specific concern to the grievor about the contents of the letter at the only fact-finding meeting that occurred (on July 8, 2004);
>
> (2) the grievor offered to send a second letter to Secretary Ridge to clarify any misimpression concerning the issue of students that might have been left by his letter, but the employer told him not to do so;
>
> (3) the grievor did not refuse to answer any question put to him at the fact-finding meeting;
>
> (4) the grievor testified that he had nothing to hide with the letter, he freely copied it to Minister McLellan and he never disseminated the letter to anyone else or otherwise made it public;
>
> (5) there is no indication that the American authorities were concerned about the contents of the letter or that they took any action in response to the letter other than to bring a copy to Mr. Lavergne's attention;
>
> (6) there is no evidence that the letter had any impact on the Canadian-American relationship despite the employer's contention that the grievor intended to cause harm;
>
> (7) there is not in evidence a single memorandum or communication between Canadian and American authorities about the letter, nor is there any indication that Secretary Ridge even received it; and
>
> (8) CBSA officials, for all of their stated concerns about the potential impact of the letter, did nothing to follow up on the matter with their American counterparts.

[133] As to the letter itself, the grievor asserted the following:

(1) none of the employer's witnesses testified that any statement in the letter was knowingly or recklessly false;

(2) Ms. Hébert alleged that the grievor's discussion of citizenship denigrated non-citizens, but the letter contained nothing but factual statements about the citizenship requirements for border service workers in the two countries;

(3) the issues raised in the letter regarding the use of students and the arming of officers had been "live" matters for a considerable period of time and fell clearly within the scope of legitimate health and safety concerns for which the grievor held special responsibility on behalf of the CEUDA;

(4) the information conveyed about the training received by students was factually accurate;

(5) contrary to Mr. Sheridan's suggestion that the grievor's comments on the "arming" issue suggested that there was no scrutiny at the border, the letter stated only, and accurately, that Canadian officers did not have the tools and training to fully implement the IMIM (Exhibit E-1, tab 1); and

(6) the letter was written on union letterhead, and the grievor clearly identified himself as the First National Vice-President of the CEUDA.

[134] The grievor argued that the standards used by Ms. Hébert in disciplining the grievor, reflected in her letter of discipline (Exhibit E-1, tab 35), were inconsistent with the test in *Shaw*. She stated, essentially, that it was not the grievor's business to contact Mr. Ridge. Other than the concerns that she expressed about the citizenship issue, the letter of discipline identified no factual errors in what the grievor wrote. Her testimony revealed that she was "incensed" at the letter and that she imposed discipline because of her assessment that the letter could potentially harm the bilateral border relationship. The grievor contended, however, that even if the potential for damage was huge, the comments in the letter were protected because they were true, the information conveyed was already in the public domain and the grievor was acting in his union role.

[135] The grievor referred to the employer's *Code of Conduct and Ethics* (Exhibit E-1, tab 5) and particularly to the following bullet from the section entitled "Public Criticism of the [then] CCBSA":

> - *You are to refrain from making, through any public medium, either directly or through a third party, any public pronouncement critical of CCBSA policies, programs and officials, or on matters of current political controversy where the statements or actions might create a conflict with the duties of your position or the programs of the CCBSA.*

The grievor noted that Ms. Hébert referenced the *Code of Conduct and Ethics* in her letter of discipline. She testified that, in her view, the direction to refrain from publicly criticizing the employer applied to all employees regardless of their union duties.

[136] According to the grievor, that was exactly the standard that Ms. Hébert used in condemning his conduct, rather than the test in *Shaw*. She disciplined the grievor on her conviction that he was not entitled to make public statements critical of his employer. Were that the case, however, any employee acting in a legitimate union role would be found to have violated the *Code of Conduct and Ethics* and would be subject to discipline every time he or she said something critical about the employer.

[137] The grievor summarized what he considered to be the applicable legal principles and their application to this case, referring to a written submission tabled at the hearing. I have drawn the following excerpts from that submission:

> . . .
>
> *5. In addition to his duty of loyalty to the employer, Mr King's role as a union representative carries with it a duty of representation owed to the members of CEUDA that is integral to the labour relations scheme established by the* Public Service Staff Relations Act. *The law is clear that, in order to fulfil this role, union officials must be able to candidly and openly challenge the employer in matters affecting the employees they represent. In order to do this effectively, union officials are accorded protection from retribution for raising concerns or speaking out publicly against an employer. The rationale for this is clearly expressed in* Re Firestone Steel Products of Canada and U.A.W., Local 27*, (1975), 8 L.A.C. (2d) 164 (Brandt) at 167-68:*
>
> > For the purposes of assessing whether or not conduct is insubordinate the standard of conduct that the company is entitled to expect should be different when applied to the acts of union committeemen engaged in the legitimate discharge of their duties. A committeeman is, while attempting to resolve grievances between employees and company

> personnel, always functioning on the borderline of insubordination. His role is to challenge company decisions, to argue out company decisions and, if in the discharge of that role he is exposed to the threat of discipline for insubordination, his ability to carry out his role will be substantially compromised.
>
> *Firestone Steel Products of Canada* . . .
>
> *Re Metropolitan Toronto (Municipality) and C.U.P.E., Local 79* (Dalton) (1998), 70 L.A.C. (4th) 110 [*"Metropolitan Toronto"*] at 7
>
> . . .

*7. It is recognized that, as part of their efforts to influence the course of labour relations and collective bargaining, both parties may resort to other strategies away from the bargaining table. In* Van Donk*, the arbitrator cited a number of labour board decisions recognizing that communication with the public and the media is now clearly accepted as a standard component of labour disputes, and that protection must be offered to union officials speaking in this context as well as at the bargaining table. In* Burns Meats*, arbitrator Picher held that:*

> If union stewards are to have the freedom to discharge their responsibilities in an adversarial collective bargaining system, they must not be muzzled into quiet complacency by the threat of discipline at the hands of their employer.
>
> *Burns Meats* . . .
>
> *Canada Post Corp. (Van Donk)* . . .
>
> *Fugère* . . .
>
> *Shaw* . . .

*8. In this regard, Arbitrator Burkett cites* Samson*, in which the CLRB held that "'representation of employees by a trade union' includes not only representations to the employer, but to the public as well and in any forum where the union feels it is in the interest of its members to do so." This broad interpretation of the scope of a union's representational activities comports with the Supreme Court's jurisprudence concerning the importance of public expression by unions in* Pepsi-Cola*. In this regard, the Board's finding in* Chopra #1 *is also noteworthy:*

> . . . the public is the public wherever it sits and if a public servant is not violating his duty of loyalty to

> his employer when he or she is complaining of racism and discrimination before the CHRC, then there is no logical reason to say that he or she is violating his or her duty of loyalty when he or she is complaining of discrimination in front of the public at a conference.
>
> *Chopra* . . .
>
> *Van Donk* . . .
>
> *Samson v. Canada Post Corp.* (1987), 87 C.L.L.C. 16,060 . . .
>
> *Re Canada Post Corporation* (1987), 71 di 215 at 228, cited in *Fugère, supra* . . .
>
> *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156.
>
> *Payne v. Ontario (Minister of Energy, Science and Technology),* [2002] O.J. No. 1450 (Ont. Sup. Ct.) (QL) at para. 15.
>
> *Shaw* . . .
>
> . . .

*10. In* Pepsi-Cola*, the Supreme Court held that "free expression is particularly critical in the labour context," citing Justice Cory's observation in* K-Mart *that "[f]or employees, freedom of expression becomes not only an important but an essential component of labour relations." These principles, and the resultant standard, are clearly set out by the Court in* Pepsi-Cola*:*

> [34] . . . It is through free expression that employees are able to define and articulate their common interests and, in the event of a labour dispute, elicit the support of the general public in the furtherance of their cause: *K-Mart*, *supra.* As Cory J. noted in *K-Mart, supra*, at para. 46: "it is often the weight of public opinion which will determine the outcome of the dispute".
>
> [35] Free expression in the labour context benefits not only individual workers and unions, but also society as a whole. In *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, the reasons of both La Forest and Wilson JJ. acknowledged the importance of the role played by unions in societal debate (see also *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, and

> *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016). As part of the free flow of ideas which is an integral part of any democracy, the free flow of expression by unions and their members in a labour dispute brings the debate on labour conditions into the public realm.
>
> [36] This said, freedom of expression is not absolute. When the harm of expression outweighs its benefit, the expression may legitimately be curtailed. Thus, s. 2(b) of the *Charter* is subject to justificative limits under s. 1.
>
> [37] The same applies in interpreting the common law to reflect the *Charter*. The starting point must be freedom of expression. Limitations are permitted, but only to the extent that this is shown to be reasonable and demonstrably necessary in a free and democratic society.
>
> *Pepsi-Cola* . . .
>
> *U.F.C.W., Local 1518, v. K-Mart Canada Ltd.*, [1999] 2 S.C.R. 1083, cited in *Pepsi-Cola* . . .
>
> *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation,* [2005] B.C.J. No. 179 (C.A.).
>
> . . .

*14. In* Van Donk, *the grievor, acting in his capacity as local union president, informed the press of security problems at a Canada Post contractor's facility. Arbitrator Burkett held that the grievor's actions were intended to apply public pressure on the issue of contracting out, an issue of ongoing concern to the union. In these circumstances, the grievor's termination was deemed improper, as his union activities were protected under the* Canada Labour Code. *Arbitrator Burkett concluded that "it is inconceivable that a trade union official could ever be disciplined for just cause for exercising his/her right to represent employees as this right has been defined".*

*Van Donk, supra* . . . .

*15. In* Metropolitan Toronto, *arbitrator Burkett held that "the bright line test . . . is that malicious or deliberately false statements are not protected and if made by a steward or other union official may attract a disciplinary response." Thus, Arbitrator Burkett held in* Van Donk *that the analysis requires a determination of:*

*1) whether the grievor was acting in his capacity as a union official when he made the public statements that he did; and, if so*

*2) whether his actions are within the bounds of protected activity.*

*Metropolitan Toronto . . .*

*Van Donk . . .*

. . .

*21. In* Van Donk, *Arbitrator Burkett concluded that the grievor's actions were properly characterized as union activity, as they were "designed to bring attention to security gaps . . . and as such to call into question the decision of the corporation to contract out," and they were accurate and factual. Accordingly, the grievor was found to have acted under the protection of the* Canada Labour Code.

*Van Donk, supra . . . .*

*22. By contrast, Arbitrator Picher in* Burns Meats *articulated several examples of types of expression by union officials that would not elicit protection:*

> A steward who openly exhorts employees to participate in an unlawful strike obviously cannot expect that his union office will shield him from discipline for his part in engineering the breach of both a collective agreement and the *Labour Relations Act*, R.S.O. 1970, c. 232. Similarly, a steward may not use his union office and a union newsletter to recruit and direct employees in a deliberate campaign to harass a member of management: *Re City of London, supra*. Conduct so obviously illegal or malicious is outside the bounds of lawful union duty and can have no immunity or protection.
>
> If the statements . . . were malicious, the board must find that there was just cause for discipline. In other words, <u>if the account of the facts</u> . . . <u>were written with the knowledge that they were false, or out of a reckless disregard for their truth or falsehood, the company would be justified in imposing some measure of discipline</u> . . . The responsibilities and privileges of [the grievor's] union office would not justify or excuse that kind of <u>deliberate and destructive fabrication</u>. If, on the other hand, his statements, rendered as they were in the course of his duties as chief steward, were motivated out of a belief, which he held in good faith, that they were a

> true and accurate reflection of the facts, there can be no just cause for his discipline.
>
> *Burns Meats*
>
> See also *Cassellholme* . . . and *CUPE, Local 5523* (2002), 104 L.A.C. (4 ) 435.
>
> . . .
>
> *25. In the present case, it is clear that Mr King's statements were not malicious in the sense of being knowingly or recklessly false. Rather, Mr King's statements were designed to communicate facts that he believed in good faith to be relevant to issues of legitimate concern for both the safety of customs officers and broader security issues on both sides of the border. Moreover, it is clear from the evidence tendered in this case that there is no serious challenge to the factual accuracy of the statements addressed in the Ridge letter. In particular, there is no challenge to the fact that (a) Canadian citizenship is not a requirement for appointment to a Border Service Officer position; (b) students are widely used to perform Border Service Officer duties in circumstances where formal training at the CBSA Learning Centre in Rigaud, Quebec is not required; and (c) Border Service Officers are not armed and, therefore, have no lethal force capability within the meaning of the IMIM.*
>
> *26. Moreover, there can be no challenge to the fact that all of the issues raised by Mr King in the Ridge letter are matters of legitimate health and safety concerns to members of the bargaining unit.*
>
> . . .
>
> *28. . . . the appropriate test by which to assess whether Mr King's letter to Mr Ridge, written in his capacity as First National Vice President of CEUDA, appropriately gives rise to discipline is whether or not his statements were malicious or knowingly or recklessly false. In light of the fact that Mr King's letter consists only of facts that accurately reflect the circumstances at CBSA, it is the grievor's submission that his actions fall squarely within the scope of protected expression by union officials. On this basis, there was no cause to impose discipline of any kind upon the grievor.*
>
> . . .
>
> [Emphasis added]
>
> [Footnotes omitted]

[138] At the conclusion of the grievor's arguments, I asked whether he was maintaining his claim for damages given that there did not appear to be any direct evidence to qualify or quantify such damages. In response, the grievor withdrew his request for *Charter* damages or for damages at large. As corrective action, he submitted that he must be placed in the exact same position he would have been, with respect to all terms and conditions of employment, had there been no suspension.

[139] In addition to submitting some of the same case law offered by the employer, the grievor referred me to the following additional cases: *Gendron v. Treasury Board (Department of Canadian Heritage)*, 2006 PSLRB 27; *King and Waugh v. Canada Customs and Revenue Agency*, 2005 PSSRB 3; *King v. Treasury Board (Revenue Canada – Customs and Excise)*, PSSRB File No. 166-02-28585 (19990819); *Canada Post Corp. v. Canadian Union of Postal Employees*, [1988] B.C.J. No. 3139 (QL); *Fording Coal v. United Steelworkers of America, Local 788A* [1998] B.C.C.A.A.A. No. 159 (QL); *CN/CP Telecommunications v. Canadian Association of Communications and Allied Workers* (1981), 1 L.A.C. (3d) 204; and *Douglas Aircraft Co. of Canada v. United Automobile Workers, Local 1967* (1975), 8 L.A.C. (2d) 118.

**C. <u>Employer's rebuttal</u>**

[140] While agreeing that *Shaw* is the most recent test, the employer submitted that *Shaw* does not answer all of the issues that arise on the facts of this case. In particular, the case law does not encompass a situation where the target of union expression is a foreign government. In that regard, the employer disputed the grievor's contention that "the public is the public." Secretary Ridge, according to the employer, cannot be treated as being the same as the "public" within the meaning of the case law. It is true that the jurisprudence does not limit the proper scope of union activity to what happens at the bargaining table and does, instead, embrace a range of other undertakings and forums. Writing to the U.S. Secretary of Homeland Security is nonetheless quite a different matter.

[141] Following *Canada Post Corp.*, there are indeed times when management's feelings will be hurt by what union officials say or do. Managers need to develop a thick skin. Ms. Hébert in her testimony clearly acknowledged that union representatives enjoy a wider latitude of expression when acting in their union roles. Where the parties differ is on the nature and extent of that latitude. The question that must be answered is whether the grievor acted within the proper scope of union

activities when he sent his letter to Secretary Ridge. In the context of the Canadian-American border relationship, the employer strongly maintains that the grievor went well beyond the latitude to which he was entitled and that the case law recognizes.

[142] *Threader*, cited by the grievor, should be distinguished because its subject matter was a conflict of interest. The "reasonable objective person" lens advocated in *Threader* is nonetheless useful but should also be applied in assessing the reasonableness of Ms. Hébert's conclusion that the grievor was guilty of misconduct. The employer noted as well that the circumstances in *Threader* involved information, all of which was publicly available. Despite what the grievor argued, not all of the information conveyed in his letter was in fact public. In cross-examination, the employer asked him to identify any union document before his letter that addressed the citizenship issue. He could not. He was unable, in particular, to point to any content relating to citizenship in the excerpt from the CEUDA's website that he reviewed during his examination-in-chief (Exhibit G-8). Ms. Hébert testified that the union had not previously raised citizenship as a concern at any level of union-management consultation, and the grievor could not, when asked, provide copies of the minutes of any such meeting where the union pursued that subject.

[143] The employer submitted that the grievor also did not tender any evidence that proved that there had been earlier joint discussions of staffing and recruitment. The absence of such evidence should be considered in assessing the reasonableness of the grievor writing to Secretary Ridge. In any event, even if they were "live" issues, that does not bring the grievor's letter within the proper scope of union activities.

[144] As to the grievor's contention that his letter did nothing more than flag information for the attention of Secretary Ridge, that may be what the grievor believes but a reasonable person would conclude otherwise by looking at the whole letter in context. Following *W.C.P. v. C.P.*, 2005 BCCA 60, Secretary Ridge was not an appropriate constituency to whom the union should speak.

[145] The grievor argued that it was significant that the CBSA made no inquiries to Secretary Ridge or to other American officials following the letter. Ms. Hébert's response on that point was entirely reasonable. She testified that senior CBSA officials did not want to do anything that might draw further attention to the letter from their American counterparts.

[146] The grievor also tried to make a point of the fact that Ms. Hébert's letter allegedly raised no issue other than citizenship. Ms. Hébert testified, however, that she referred twice in her letter to areas where the grievor intended to identify weaknesses in the CBSA's border security. Those two references, in the employer's submission, cover the other issues the grievor raised in his letter.

## IV. Reasons

[147] The principal task for an adjudicator in a grievance involving discipline is to determine whether the employer has met its burden to prove that it had cause to discipline the grievor. If the employer proves its case to the appropriate standard, the adjudicator then must decide whether the disciplinary penalty levied by the employer was appropriate and proportionate to the seriousness of the proven misconduct.

[148] The basic tests in a discipline grievance apply here, but the circumstances of this case give the required analysis special texture. The dispute before me is essentially about the limits on public speech critical of the employer by an employee who is an elected full-time bargaining agent representative. It has the further unusual dimension of involving communication with an official of a foreign government. The employer imposed a serious disciplinary sanction on the grievor because, in its view, the grievor's criticism of the CBSA in his letter of May 25, 2004, to Secretary Ridge seriously violated his duty of loyalty to the employer. The grievor, for his part, maintained that sending the letter was an exercise of his right to free expression and an act that was fully consistent with his duties as an elected representative of the union.

[149] As the extensive case law introduced by the parties well attests, discipline in the context of an employee's performance of union duties, viewed against the interplay of free speech rights and the duty of loyalty, can raise substantial and sometimes difficult issues. The parties in this case have made my task somewhat easier, however, by accepting that the line of arbitral decisions summarized in *Shaw* should inform these reasons. The grievor embraces the *Shaw* approach without reservation. The employer's acceptance of *Shaw* is perhaps more cautious. The employer notes that there is no decision in the *Shaw* line of cases that examines union activity involving a contact with a foreign government. It suggests that the case law led by *Fraser* concerning employee free speech and the duty of loyalty also remains relevant, particularly given the alleged

"extreme" nature of the grievor's criticism of the CBSA. The *Fraser* line of decisions, in the grievor's submission, does not apply.

[150] In *Shaw*, the adjudicator considered a ten-day suspension imposed on an employee after he made comments critical of the manner in which his government department was delivering services in a speech given before a public audience that included representatives of community organizations affected by those services. The employee at that time was the local president of the union that represented employees in the department. The comments in his speech were linked to a campaign by the union to draw public attention to the effect of the employer's decision to contract out work previously performed by members of the bargaining unit. The employee's director determined that discipline was necessary because, among other concerns, the employee's speech had conveyed a political viewpoint on issues on which the employee was required to maintain political neutrality and was disrespectful to the management of his workplace.

[151] The adjudicator in *Shaw* reviewed case law about the duty of loyalty owed by an employee to the employer, about limitations on employee free speech and about protected union activity and expression. She found that bargaining agent representatives should not be subject to discipline for making public comments critical of the employer as part of their union roles provided that their statements are not malicious or knowingly or recklessly false. The adjudicator summarized the required test as follows:

. . .

> *[40] Counsel for the parties provided a number of decisions in which criteria were considered for assessing the conduct of employees who are openly critical of the decisions and policies of their employers. Counsel for the employer argued that the most compelling of these cases are those that emphasize the duty of loyalty owed by an employee to an employer and that strictly limit the circumstances in which an employee will be permitted to openly criticize the decisions made by the employer. Counsel for the grievor, on the other hand, suggested that I should be most influenced by those cases that outline more generous protection for the statements made by a bargaining agent representative. I have concluded that the appropriate standard to apply is that represented by the line of cases put forward by counsel for the grievor, which suggest that representatives should*

> *not be subject to discipline unless they make statements that are malicious or knowingly or recklessly false.*
>
> *[41] The value of this standard is that it makes it possible to take into account the realities of collective bargaining relationships. It is fundamental to such a relationship that those who speak for the bargaining agent chosen by employees to represent them must be able to raise questions about decisions made by the employer that affect the terms and conditions under which those employees work and must be able to challenge the wisdom or legitimacy of those decisions. The responsibility that an officer has to represent employees forcefully and candidly may sit uneasily with the duty of obedience and fidelity such an officer, like other employees, owes to the employer. This makes it necessary to articulate a standard of conduct that does not unfairly expose the officer to discipline for on occasion placing his duties towards the employees he represents ahead of deference to the employer. On the other hand, this standard makes it clear that no officer is shielded from the disciplinary consequences for making statements that are false or malicious.*
>
> . . .

[152] I find that the analytical framework outlined in *Sha*w is the appropriate departure point for my assessment of the employer's decision to discipline the grievor. As summarized in *Shaw*, the thrust of the case law is that an employee performing union duties will not normally be disciplined while functioning as a union representative unless his or her behaviour is malicious or unless the statements that he or she makes are knowingly or recklessly false. Given that test, the employer asks me to examine the following questions: (1) Was the grievor acting within the scope of his union duties when he sent his letter to Secretary Ridge? (2) Did the grievor act maliciously, or were his statements knowingly or recklessly false? I will look at these questions in turn.

**A. <u>Was the grievor acting within the scope of his union duties?</u>**

[153] The employer argues that the grievor was not acting within the legitimate scope of his union duties when he sent his letter to Secretary Ridge. Should I accept that argument, the consequence would be that the grievor did not enjoy the wider latitude of expression that the case law has generally recognized for employees performing union duties.

[154] As the party asserting that the grievor was not acting within the scope of his union duties, the employer bears the onus of proof.

[155] There is no dispute in the evidence that the grievor occupied an elected union position at the time he sent his letter. Both Mr. Sheridan and Ms. Hébert acknowledged in their testimony that the grievor was working full-time as the First National Vice-President of the CEUDA during the period pertinent to his grievance and was not performing the duties of his substantive customs inspector position with the employer at Pearson. The grievor confirmed that he had been continuously engaged in the work of an elected bargaining agent official since 1996. While there apparently remained a link throughout that period to his workplace position for certain administrative purposes that remain somewhat unclear to me, the evidence was that he never performed duties for the employer once he began his full-time role with the CEUDA, with the exception of a very few shifts worked at Pearson on statutory holidays many years ago. Although still technically an employee of the CBSA, I find that the evidence establishes that the grievor's status at the times material to his grievance was much more the equivalent of a full-time employee of the union. This case, then, differs from many that have been examined in the case law where the grievor who has been disciplined acts as a union representative in the workplace but continues, while doing so, to perform duties for the employer. I note, however, that *Shaw* holds that there is no distinction between the two situations and that the test to be applied to determine when the employer may discipline a union representative is the same.

[156] The grievor's letter at the centre of this dispute bears the letterhead and logo of the CEUDA. Under his signature, the grievor identifies himself as "1st National Vice-President, Customs Excise Union Douanes Accise." The employer correctly observes that the letterhead and signature are not sufficient to prove that the grievor was acting within the legitimate scope of his union role. It is not, however, the grievor's onus to prove that writing the letter was a proper union function within his role. As stated above, it is the employer's burden to prove that it was not.

[157] The employer's argument effectively begins with the proposition that the grievor's actions must be understood in the context of the "extreme sensitivity" of border issues in the wake of 9/11. It is within that context, according to the employer, that writing the letter of May 25, 2004, to one of the highest officials of the Government of the United States was not an activity within the proper and appropriate

scope of the grievor's union role. The employer goes further to state that the grievor could not accomplish his union's goals by writing to American officials because they "had no power or authority regarding the issues raised by the grievor." Instead, he should have communicated "domestically with Canadian authorities" to further the objectives of his union. Moreover, the grievor had no knowledge of international relations and, critically, no responsibilities as an employee that would require discussing border security with senior officials of a foreign government.

[158] There seem to me to be two key elements in what the employer argues about the context. The first is that the political and security climate of the day should be considered when weighing whether the grievor was acting within the appropriate scope of his union role. The second is the "to whom" issue. It is not just that the grievor sent his letter in the highly sensitive context of border security issues that caused the problem, according to the employer, but that he sent it to a foreign government and specifically to the United States' Secretary of Homeland Security.

[159] On the first element, the evidence adduced at the hearing clearly supports the contention that border security issues were very sensitive at the time the grievor wrote his letter. Ms. Hébert, in particular, provided instructive testimony about the climate of Canadian-American border relations in the post-9/11 period, about the involvement of Secretary Ridge, about the Ridge-Manley Plan and about some of the other initiatives that have been undertaken on both sides of the border to improve the integration of border security programs and to enhance bilateral security cooperation. The evidence also suggests that the CEUDA and its members were closely focused on border security issues in the wake of 9/11. The grievor, to be sure, served as the chairperson of his union's Joint Management of the Canada/US Border Accord Committee (Exhibit G-4). At the hearing, he agreed with the proposition that 9/11 had changed the world and testified that the customs inspectors that he represented also had strong reasons to address the heightened fears of the public about security and to strive to "ensure confidence in the border."

[160] Where does the evidence about the sensitivity and seriousness of border security issues take us? By invoking that context, the employer is essentially arguing that had the grievor factored the sensitivity of the environment into his decision about how to represent his members in May 2004, he would have realized that it was not appropriate for him as a union representative to write his letter.

[161] I am troubled by that argument. In the circumstances of this case, it means that the legitimate scope of what the grievor could have done as a union official in May 2004 to advance what he may well have believed to be the interests of the membership should have been circumscribed, to some important degree, by the political and security reality that emerged after the events of 9/11. By inference, sending a letter of the type addressed by the grievor to Secretary Ridge might have been acceptable union activity in the pre-9/11 world, but it fell outside the scope of legitimate union activity or expression in the post-9/11 environment. The employer's argument suggests more generally that there is a positive obligation on the part of a union official to avoid taking actions that could complicate or "compromise" what someone — the employer, the government or an adjudicator — judges to be a sensitive political or security situation affecting the employer. In the logic of the employer's submissions, a union official may be considered to be operating outside the appropriate scope of his or her union duties where an act of representation is deemed to hold the potential of causing political harm to the employer in that sensitive situation.

[162] It would be imprudent, in my view, to ignore entirely the sensitivity of the political and security climate in evaluating whether the employer had cause to discipline the grievor. I believe, however, that concerns about the political and security context are probably more relevant, if anywhere, to evaluating the content of what the grievor wrote (the second part of this analysis) than to determining whether sending a letter *per se* exceeded the scope of his union duties. I am concerned to avoid, without clear support in the case law, what might be interpreted as a "political or security sensitivity" standard for evaluating whether an act forms a legitimate part of a union representative's role. If one did so, the definition of the appropriate scope of union duties could then vary with the political and security circumstances of the day. Particularly in a jurisdiction where the exercise of employer authorities is not entirely isolated from the political world of government, the risk of linking what is acceptable as part of a union representative's role to a political evaluation of the context in which a union official acts is not inconsequential.

[163] Part of the dilemma in this case may well be the emotive nature of the post-9/11 context to which the employer refers. Few observers would disagree that many things changed in the wake of the terrorist attacks of September 11, 2001, or that issues regarding border security appropriately acquired heightened visibility and sensitivity. Some people hold very strong views about the nature of the security threat that they

believe has since existed. The evidence certainly indicates that Ms. Hébert, for one, felt strongly from the beginning that sending a letter of the type written by the grievor was absolutely inappropriate in the context. Her testimony at the hearing, almost three years after the fact, expressed views that were still notable in their intensity. She stated that she was "incensed" by the letter when she learned about it. In her view, the letter was a "betrayal." She continues to describe the letter today as "completely inappropriate" in the circumstances and as a "reprehensible" act.

[164] I am convinced that Ms. Hébert, as author of the discipline imposed on the grievor, held those views with confidence and sincerity in 2004 and continues to do so today. I am persuaded that she was personally satisfied from the outset that the grievor's letter went beyond the pale in the context of her understanding of the "extreme sensitivity" of Canadian-American border relations. Her convictions about the seriousness of sending a letter in that context, however, comprise opinion evidence, as do the similar convictions expressed by other employer witnesses. Someone else might legitimately have a different view. In general, adjudicators must treat opinion evidence with caution.

[165] The employer did not present any other substantial evidence on which I might depend to find either that a critical letter of the type authored by the grievor as a union official has caused harm to the employer in the past within a comparably sensitive context or that, in this case, the letter actually did cause harm to the employer. In any event, it remains problematic in my view whether such evidence could prove on its own that the grievor's letter necessarily fell outside the legitimate scope of what he could undertake as an elected union official. I do not read the case law as prohibiting full-time union officials from choosing activities or expressing criticisms that have the potential to affect an employer in a sensitive political or security context as long as their actions are not malicious or they do not make statements that are knowingly or recklessly false (the second part of the *Shaw* test). To the contrary, it may sometimes be that the intent of a union official's actions or words is to take advantage of a sensitive political or security situation to leverage a desired outcome from the employer. If the employer is to prove that the grievor acted outside the proper scope of his role in that context, I believe that something more is required than just the conviction that the context was sensitive, however well-founded that conviction.

[166] That leads me to the second element underlying the employer's argument about context — the "to whom" issue.

[167] In my opinion, the "to whom" element is the real crux of the employer's concern. Mr. Lavergne's testimony was that he had "no quarrel" with the factuality of the grievor's letter but was, instead, concerned that such a letter was sent to another government. Mr. Sheridan stated that it was inappropriate to send a letter to Secretary Ridge, the American partner in the Ridge-Manley Plan. Mr. Herd maintained that the grievor should not have been critical of his employer "particularly to a senior official of a foreign government." Ms. Hébert maintained that it was not the grievor's responsibility to write Secretary Ridge. In final argument, the employer stated that had the letter been sent to a Canadian minister, "we wouldn't be here" (but then pulled back to some degree from the point).

[168] Whether stated directly or not, I judge that the employer's case depends in significant part on the proposition that writing to an official of a foreign government necessarily transcends the limits of proper union activity. The impact of the employer's argument is that the grievor did not enjoy the enhanced protection against discipline that is normally recognized for a union official because writing a letter to a foreign government was inherently outside the scope of his union role. It is the "to whom" issue, in my view, that underlies the employer's contention that the grievor could not accomplish his union's goals by writing to American officials. The employer's argument that the grievor had no expertise in international relations and no responsibility to discuss border issues with "the second-ranking" official of the United States government is also part of the "to whom" question.

[169] The grievor counter-argues that "the public is the public" and that the case law supports the right of union representatives to express views to the public as a means of furthering the interests of their members. Secretary Ridge, according to the grievor, was part of the public legitimately open to union representations. For the grievor, it does not matter to whom the letter was sent.

[170] The employer has the onus to establish what it is about writing a foreign government official that takes a union representative's actions outside the legitimate scope of his union role.

[171] For assistance in assessing the "to whom" issue, I reviewed in the first instance the decisions submitted by the employer that focus on expressions or activities undertaken in the context of union representation. That subset of cases includes the following: *Almeida*, *Canada Post Corp.*, *Cassellholme Home for the Aged*, *Fugère*, *King*, *National Steel Car Ltd.*, *Bell Canada*, *Burns Meats Ltd.*, *Chedore*, *Scruby* and *Stewart*.

[172] As it turns out, almost all of the foregoing decisions can either be distinguished or provide only limited assistance for evaluating "to whom" union representatives may properly address their representations. (None, as the employer noted, deals directly with a situation where a foreign government is implicated.) *Almeida*, *Bell Canada* and *Scruby* all focus on union representatives' conduct vis-à-vis persons within the workplace rather than expressions or activities external to it. In *Stewart*, a decision dating back to 1976, a panel of the Public Service Staff Relations Board ("the former Board") found it unnecessary ". . . to express any opinion as to what principle should be applied to an employee on leave of absence engaged in full time activity on behalf of an employee organization." In both *Fugère* and *Casselholme Home for the Aged*, the findings turned about whether critical statements to the press and, in the latter case, to a city council were made recklessly or "without reasonable care" rather than whether they formed a legitimate part of the union representatives' roles.

[173] *Burns Meats*, now almost three decades old, is cited as an important case in *Shaw* and elsewhere. Its principal importance, however, also lies in its focus on the contents of the statements made by a union representative — whether the statements were false or made "out of a reckless disregard for their truth" — rather than to whom they were made or whether the speaker was acting within the scope of his union duties. The case centres about allegedly "false and defamatory" statements made about company officials by the chief steward of a union in a union newsletter, a form of communication that largely targets an internal workplace audience. To the extent that there is any sense in the decision of limits to the scope of union activity other than the "recklessness" standard, it is that the protected acts of a union representative must ". . . reasonably be regarded as a legitimate exercise of that function" (that is, the generally recognized functions of a union representative).

[174] In *King*, an earlier decision involving the grievor, the former Board examined letters that he sent externally to the Prime Minister and to two members of Parliament. The core of that decision, however, focused on a notice posted internally in the

workplace that the employer alleged had the effect of counselling union members represented by the grievor to participate in an illegal work slowdown or strike. I note that the case law is essentially uniform in finding that union representatives enjoy no enhanced immunity from discipline where illegal acts are proven. In this case, no illegality is alleged.

[175] *Canada Post Corp.* is one of the few cases cited by the employer that addresses somewhat more directly the "to whom" issue, although in a limited way. The arbitrator, citing several other related cases, concluded that union representatives can legitimately adopt tactics targeting a person or persons outside the collective bargaining relationship to achieve an objective related to collective bargaining, although the arbitrator did express reservations about such tactics:

. . .

> *Labour relations matters most often are best dealt with directly between the parties. The airing of such matters in a public forum often impedes resolution by inflaming the situation and encouraging posturing. However, where the parties hold intransigent positions that may affect the public interest they may seek to advance their respective positions through public pressure. This facet of labour relations, especially as it pertains to service industries, is recognized in the jurisprudence cited in this award. It is recognized that union officials may decide to "go public" with such matters. It is stipulated, however, that having made such a decision public statements must not be malicious or knowingly or recklessly false.*

. . .

The arbitrator in *Canada Post Corp.* did not distinguish among the targets properly available to a union representative who "goes public."

[176] *National Steel Car Ltd.* offers the following comment about the distinction between "internal" and "external" speech and conduct, thus also to some degree touching on the "to whom" issue:

. . .

> *After reviewing the decided cases and after considering the difficult role of Union officials, who are also employees, in representing the interests of Union members, I am of the view that considerable leeway should be given to*

> *employee/officials in performing their proper Union responsibilities. Such employee/officials are entitled to be sheltered from discipline and discharge for their acts and conduct and protection may range from immunity in some instances, to requiring an employer to strictly prove either malicious or reckless conduct on the part of the employee/union official in other instances.*
>
> *Also, some distinction should be made between internal and external speech and conduct. Thus, where an employee/official, acting within the scope of his/her authority as a Union official, engages in abusive speech in a closed door meeting, he/she may be immune from discipline. However, speech or statements made outside to third persons, such as the press, by a Union official, may attract discipline only if the speech or conduct is malicious or reckless.*
>
> . . .

[177] *Chedore*, now quite dated, contains comments that suggest that a union representative has an obligation to exhaust the available internal channels in the collective bargaining relationship before choosing to take criticisms of the employer public:

> . . .
>
> ***58*** *Has Mr. Chedore any immunity from penalties because of his status as president of a C.U.P.W. Local at Campbellton? There is no doubt that Mr. Chedore was acting as president of the Local at the time when he made the statements. There is evidence that he was on the negotiating team in Ottawa when the statements were made, however, no effort was made by Mr. Chedore to bring the particular concerns of the Campbellton Local to the attention of the Postmaster-General or the management negotiators at the bargaining table. Mr. Chedore would have me believe that writing a letter to the Postmaster-General at the same time as he sends out the releases to the press gives an indication that he has made an attempt to go through internal channels. I do not consider that he has at all. A responsible union leader would have made all efforts, and not just perfunctory attempts, to try to resolve the issues with respect to Mr. Savoie by internal means, without resort to use of the media. Whether it would be permissible for a Local union president and his union to go to the press when all other avenues of approach have been tried internally and have failed, I leave to a future reference to adjudication. In the instant case, I do not think that the grievor and the Local exhausted internal appeals. Mr. Chedore did not even attempt to make the factor of the*

> *unrest at the Campbellton Post Office a matter for collective bargaining. There is no evidence that he brought it to the collective bargaining table in negotiations, and he had ample opportunity to do so while he was in Ottawa. Instead, he had decided to make it a political affair by bringing the matter to the public.*
>
> . . .

[178] In sum, the case law offered by the employer provides some limited assistance but nothing that I found to be definitive regarding the "to whom" issue.

[179] I then turned to the additional authorities submitted by the grievor. Among those decisions, I note in particular the Supreme Court ruling in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.,* [2002] 1 S.C.R. 156, the Canada Labour Relations Board (CLRB) decision in *Samson v. Canada Post Corporation, Arichat, N.S.,* 87 CLLC 16, 060, and *Shaw* itself.

[180] In *Pepsi-Cola*, the Court, dealing with the issue of secondary picketing, forcefully states the proposition that union expression targeting a public outside the direct collective bargaining relationship must be protected unless there is tortious or criminal conduct. While the case before me does not involve any allegation of tortious or criminal conduct, I read the Court's decision as nevertheless relevant in its more general finding that the presumption should be in favour of union free expression unless there is clear justification for interfering with that expression. While the Court does not define what the full scope of free union expression includes, its reasoning suggests, I believe, that a wider rather narrower range of targets for union expression is possible, provided that the expression relates to the union's representational mandate and does not otherwise comprise conduct that may be impugned for other legal reasons.

[181] In *Samson*, the CLRB more explicitly and expansively defined the field in which union representational activities may occur:

> . . .
>
> *We are of the view that* [the term "representation"] *should not be interpreted restrictively and that "representation of employees by a trade union" includes not only representations to the employer, but to the public as well and in any forum where the union feels it is in the interest of its members to do so.*

. . .

> *It appears as reasonable to this Board . . . that a union can take recourse to the media, the government and other influential bodies such as the public in an attempt to influence the employer with relation to matters that directly concern its membership, particularly, as here, during collective bargaining.*

. . .

[182] In *Shaw* itself, the adjudicator rejects the contention that statements made to a public audience can be distinguished from the normal role of a union in collective bargaining and in the handling of grievances:

. . .

> *[43] The other distinction drawn by counsel for the employer is between bargaining agent activity in a narrow sense, primarily the negotiation of collective agreements and the handling of grievances and the kind of conduct that is at issue here, that is, statements critical of the employer made by an officer of the bargaining agent to a public audience. Again, this seems to me to be a questionable distinction. Collective bargaining is a process in which the parties attempt to bring persuasive pressure to bear on each other in order to bring about or resist change in the terms and conditions of employment of members of the bargaining unit. Though the most common venues for this are the bargaining table and union-management meetings of various kinds, it has been recognized that both parties may resort to other strategies in an attempt to influence the course of bargaining. . . .*

. . .

*Shaw* does not distinguish between types of "public audiences."

[183] *Pepsi-Cola, Samson* and *Shaw* are all useful but, like the cases cited by the employer, they do not in my view establish a clear test for deciding the "to whom" issue raised in the case before me. Not surprisingly, much more of the case law appears to be concerned with evaluating the content of union expression — to which a "bright line test" is applied — than with the question of where that expression occurs or "to whom." To the extent that the "to whom" issue is addressed, I take from the case law that there are several general guidelines that should normally be observed as follows:

(1) that the balance in defining the range of legitimate public targets for union expression should favour free expression unless there is clear justification for limiting that expression;

(2) that the onus on proving the need for such a limitation falls to the party seeking the limitation;

(3) that the types of union expressions and activities that warrant protection are those that relate to labour relations issues within the representational mandate of the union, without necessarily restricting that mandate narrowly to traditional collective bargaining and grievance handling processes; and

(4) that there may be a requirement to attempt to address labour relations issues within internal channels before turning to alternate strategies that target public audiences and actors.

[184] Questions associated with points (3) and (4) above can largely be resolved with evidence. In this case, I do not believe that there is substantial evidence to dispute that the issues raised by the grievor were labour relations issues within the representational mandate of the union on whose behalf he spoke. The grievor's testimony, in that regard, was that there had been a lengthy history of union-management discussions focussing on the main issues that he raised in the letter, with the possible exception of the citizenship matter if Ms. Hébert's evidence on the point is accepted. The grievor outlined the positions that he personally held as a full-time union official, including those that related to occupational safety and health. He situated his letter as part of the pattern of representations conducted within the responsibilities of his union position and his committee assignments, emphasizing the occupational safety and health dimensions of the issues that he advocated. At least with respect to three issues —arming officers, using students and standardizing training requirements — he testified that consultations with the employer had not resulted in their resolution and that the employer and the union were "on opposite ends of the spectrum." He indicated that, in such circumstances, the union sometimes opted for strategies involving wider public audiences. The grievor's evidence on these points was largely uncontested. If anything, there was corroborating testimony given by several employer witnesses. With the possible exception of the prior status of the citizenship issue, therefore, I believe that points (3) and (4) above are not substantially at issue in this case.

[185] The employer argues that the grievor could not accomplish his union's goals by writing to American officials because they "had no power or authority regarding the issues raised by the grievor." It is certainly trite to stipulate that Secretary Ridge was not the employer, nor were any other American officials. No American government representative, however elevated the position that he or she occupied, had direct authority over the course of labour-management relations at the CBSA. The employer's own evidence, however, casts significant doubt on what is a quite different proposition — that an American official such as Secretary Ridge "had no power . . . regarding the issues raised by the grievor." Ms. Hébert's evidence, in particular, underscored the degree to which the CBSA tried to tailor its initiatives after 9/11 to a new reality where cooperation and collaboration with American authorities was a fundamental precept. Her testimony indicated that the Canadian and United States border administrations were marching in tandem on a number of fronts, with Canadian officials closely attuned to accommodating the sensitivities of their American counterparts to maximize the possibility of maintaining a relatively "thin" border. In that context, it stands to reason that American officials could potentially influence Canadian decisions regarding border operations and programs. Moreover, union representatives might reasonably have judged that they needed to adopt representation tactics recognizing the possibility that the views of American officials in the post-9/11 world could factor prominently into Canadian decisions about issues of importance to the union.

[186] As reported above, the grievor testified that the result he sought in writing Secretary Ridge was a discussion of issues for the purpose of achieving change, for example, the arming of officers. He stated his view that his letter would link to ongoing discussions between the two countries about standardizing border policies and programs. For purposes of this section, it is not necessary that I accept or reject the grievor's evidence of why he sent his letter. I also need not agree that the tactic that he chose of writing a letter to Secretary Ridge was either good, prudent or one that held a reasonable promise of success. The point, I believe, is that there is at least a plausible theory, based on the evidence, as to why it might make sense for a union representative cognizant of the issues of his membership in the CBSA to select a powerful American official who was strategically involved in border management questions as the target of his representations.

[187] The employer argues that the grievor had no knowledge of international relations and no responsibilities that would require discussing border security with

senior officials of a foreign government. The first point, in my view, has little consequence. Some observers might ruefully comment that a knowledge of international relations has not universally been a competence required of all of those persons who have tried to represent Canadian interests in dealings with other governments. The more serious point to address is that the grievor had no responsibility to discuss issues with a senior official of a foreign government.

[188] I accept the employer's point but only in the sense that the evidence proves that the employer did not assign the grievor any employment responsibilities that might require him to contact a senior official of the American government, that is, the grievor did not address Secretary Ridge with any authority given him by the employer. That fact, however, only has bearing on my decision if it can be established that the employer has the exclusive right to authorize employee contacts with foreign government officials even when an employee is acting as a union representative. No proof to that effect was adduced at the hearing by the employer. The employer did not argue, for example, that the former *Act* or any other statute precludes a union official from making a representation to a foreign government. There is no mention in the employer's *Code of Ethics and Conduct* of a prohibition against contacts with foreign government officials (Exhibit E-1, tab 5). Both Mr. Lefebvre's letter to the grievor of January 2, 2002 (Exhibit E-9), and Ms. Hébert's letter to the grievor of February 22, 2002 (Exhibit E-1, tab 13), are silent on the point, as is the "Gerry Troy" memorandum (Exhibit E-1, tab 3) invoked by Ms. Hébert in her letter.

[189] That said, I understand the employer's concern about the propriety of any employee writing to an official of a foreign government about issues of direct importance and sensitivity to the employer. I suspect that most readers of this decision would intuitively react that there is something worrisome, if not wrong about that scenario. The issue to be determined in this section, however, is whether the employer has proven its argument that the grievor was acting outside the proper scope of his union duties when he sent his letter to Secretary Ridge. My assessment, on the balance of the evidence and arguments placed before me, viewed in the light of the case law offered by the parties, is that the employer has not met its burden. It has not proven that a prohibition exists against union representatives contacting foreign government officials. It has not convinced me that I would be justified in this case to place a limitation on the grievor's union expression or activities that would necessarily confine his legitimate union role to activities that occur within our national borders

and that involve only a domestic public audience. Absent that proof or justification or other compelling reasons, I cannot make a finding that the grievor was acting outside the proper scope of his union role when he sent his letter to Secretary Ridge.

[190] As a result, my analysis must proceed to the second part of the test in the *Shaw* line of decisions — whether the grievor acted maliciously or made statements that were knowingly or recklessly false.

[191] Before turning to the second test, I wish to note a related concern based on the evidence given by Ms. Hébert. Her testimony, in my view, cast reasonable doubt on whether she turned her mind substantially at any point to consider whether sending a letter to a foreign government official could possibly fall within the proper scope of a full-time union representative's role. Critically, she stated in cross-examination that the fact that the grievor was on leave for union business "was not a relevant consideration for her" in her decision to discipline him. Given an opportunity in re-examination to clarify her comment, Ms. Hébert stated simply and directly that "she addressed the situation from the perspective that the grievor was an employee."

[192] I conclude from Ms. Hébert's comments that she was probably never open to the possibility that writing a letter to Secretary Ridge could have been a legitimate act on the part of a union representative. The grievor was, for her, first and foremost, an employee. Although she referred in her testimony to various employer documents that, using her words, "articulated the fact that union representatives do enjoy more latitude in the statements that they make," her actual decision making appears not to have factored-in that distinction. To that extent, I concur with the grievor's argument that the standards used by Ms. Hébert in disciplining the grievor were inconsistent with the test in *Shaw*. She disciplined the grievor as if he were the same as any other employee. Notably, her letter of discipline fails to make any direct reference whatsoever to the grievor's status as an elected union official or to the standards established in the line of decisions summarized in *Shaw* (Exhibit E-1, tab 35). In an important sense, whether or not the grievor was acting within the proper scope of his union role seems to have been irrelevant to her conclusion that a serious disciplinary penalty — even termination — was warranted in the circumstances.

[193] While I have based my finding in this section on other considerations, I am concerned that the employer's principal decision maker in this matter seems not to have incorporated the fact of the grievor's union role into her disciplinary analysis. At

the very least, little weight should be given to the employer's argument that it informed the grievor in the past what was expected of him as a union representative (Exhibit E-1, tabs 3, 5 and 13) when Ms. Hébert did not give express consideration to that distinction in deciding and stating the reasons for his suspension.

**B. Did the grievor act maliciously? Were his statements knowingly or recklessly false?**

[194] The second part of the test from the *Shaw* line of decisions requires that I determine whether the grievor acted maliciously or made statements that were knowingly or recklessly false. If I find in the affirmative, the employer had cause to discipline the grievor even though he was acting within his full-time elected union role. As an employee on leave for union business from the CBSA, the grievor, according to *Shaw*, remained under an obligation not to act maliciously towards the employer or to make statements aimed at the employer that were reckless or that he knew were false. Having done so, his conduct would be exposed to discipline.

[195] If I find in the negative, the employer did not have cause to discipline the grievor.

**1. Maliciousness**

[196] The employer argues that the grievor acted maliciously when he sent his letter because he knew that writing about weaknesses in the border had the potential of causing harm, and he intended to do so. The employer maintains that the grievor's purpose was to inflame the Canadian-American relationship and "to incite fear." He knew the impact that his words would have as would his choice of recipient. All of that, according to the employer, can be reasonably inferred from the content of the letter.

[197] The grievor argues that the intention behind his letter was exactly as indicated in its introductory paragraph:

. . .

> *The intent of this letter is to provide you with information, which may prove useful when assessing risk to public safety and security and which will hopefully attribute the further enhancement of border protection.*

. . .

The grievor's testimony also suggested that the objective of his letter was to link into ongoing discussions between the two countries about standardizing border policies and programs with the hope of achieving change on issues of importance to the union.

[198] The employer referred me to *Black's Law Dictionary* which defines "malicious" as follows:

> *Characterized by, or involving malice, having, or done with, wicked, evil or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse or as a result of ill will.*

[199] The employer also referred me to *The Canadian Oxford Dictionary* which defines "malicious" as something "characterized by malice; intending or intended to do harm." The definition of "malice," in turn, refers to "the intention to do evil or to injure another person."

[200] The "maliciousness" element in the *Shaw* test is primarily about motive and state of mind. Has the employer proven, on a balance of probabilities, that the grievor's intention or state of mind in writing the letter exhibited malice within the ordinary and normal sense given that term?

[201] The difficulty of making judgements about motive and state of mind is well-known. The evidence on which judgements are made is seldom direct and rarely unequivocal. In this case, the employer urges that I infer maliciousness principally from the contents of the letter itself.

[202] Examining that letter, I find the employer's negative depiction of its intent plausible although not in the more extreme sense of it having substantial potential to inflame the Canadian-American relationship or to incite fear. Such descriptors strike me as exaggerated relative to the actual tone and content of the text. The evidence did indeed establish that the climate of Canadian-American relations on border management issues was sensitive. Would a reasonable person accept, however, that the grievor's letter could potentially have such a serious impact that the Canadian-American relationship would be "inflamed"? Could the letter in and of itself incite fear? If so, on whose part? Secretary Ridge's?

[203] The evidence indicated on balance that all or most of the information contained in the letter was already in the public domain. This is not, then, a case about betraying

secrets or disclosing confidential or proprietary information. How does information already in the public domain inflame bilateral relations or incite fear? Did the same information have that effect when previously placed into the public domain?

[204] In the circumstances, and given the available evidence, I doubt that a reasonable person would accept as probable the more severe impacts that the employer argues could be associated with the grievor's letter. Nor, in my view, is this is a situation where the manner of expression in the letter is itself so egregious or vitriolic that the malicious intent of the author cannot be mistaken.

[205] If there is a plausible argument that the intent of the letter was malicious, based on its content, it lies more in the possibility, in my view, that the grievor's motivation was either to embarrass the CBSA or to make the tasks of CBSA senior managers more difficult by subjecting their positions on the issues cited by the grievor to a level of critical scrutiny by their American counterparts that might not otherwise have occurred. The latter seems somewhat more likely than the former. Had the grievor's intent been to embarrass the CBSA publicly, it is not unreasonable to expect that he might have given his letter wider dissemination, sent it to multiple recipients or shared it with the media. The evidence is to the opposite effect. The only other person to whom he copied the letter was the Deputy Prime Minister. Although I do not accept the grievor's suggestion, made first at the fact-finding meeting of July 8, 2004, that his letter was a private matter, his treatment of the letter once he sent it was relatively private, despite any threat to do otherwise.

[206] Having conceded that it is plausible to impute what might be viewed as a degree of ill will to the grievor's motives, I find that I am unable to take the further step of ruling that the employer has proven maliciousness on a balance of probabilities. I believe that the letter can alternatively be read as motivated by an intent to try to place pressure on the employer in a situation where the parties were "on opposite ends of the spectrum" regarding difficult and contentious issues in the labour-management relationship. The case law has recognized that appeals to external audiences can be used as legitimate pressure tactics in the context of an interest dispute. Judged through the contents of the letter, as the employer urges, I believe that it is as possible to view the grievor's action as a pressure tactic as it is to depict it as having malicious intent. As stated earlier, I might agree that it was neither a particularly prudent nor effective pressure tactic, but that is not the issue. To sustain the employer's position, I

must be convinced that it is more likely than not that the grievor acted with the conscious intent to injure or to harm or was motivated principally by an element of ill will. On balance, I am not convinced that the employer has made the case to that effect.

**2. <u>Knowingly or recklessly false</u>**

[207] The primary evidence for determining whether the grievor made statements that were knowingly or recklessly false is again the text of the grievor's letter. The following sections of Ms. Hébert's letter of discipline outline her concerns about the contents of the grievor's representations to Secretary Ridge:

. . .

> *. . . the content of your letter causes me significant concern. I am profoundly disturbed by both the message you convey to the Department of Homeland Security with respect to non-Canadian citizens and your references to our operations that are intended to, or could be construed as, pointing to weaknesses in Canada's border management practices.*
>
> *Your statements regarding non-Canadian citizens imply that, solely by virtue of the fact that an individual is not a Canadian citizen, but instead a permanent resident or in possession of a work permit, he or she constitutes a security risk. I find these statements offensive and contrary to the values adhered to by the CBSA and the Canadian government as a whole. Furthermore, these statements are without foundation, since all candidates for employment in the public service undergo an appropriate security screening process, regardless of the status of their citizenship. Had you raised this issue through the appropriate internal channels, prior to writing Mr. Ridge, you would have been aware of this information.*

. . .

> *I find that, by writing a letter about our operations that is intended to, or could be construed as, pointing to the weaknesses in Canada's border management practices to the Department of Homeland Security, you have breached the above-noted duty and obligations. Such behaviour cannot be tolerated.*

. . .

[208] Ms. Hébert clearly identifies one specific issue in her letter of discipline — citizenship. On citizenship, she challenges the truthfulness of what the grievor wrote.

She states not only that she found the grievor's comments offensive but that they were "without foundation," thus implying that the comments were false. Does the employer have a basis for arguing that the grievor made statements about the citizenship issue that were knowingly or recklessly false?

[209] I believe that Ms. Hébert's own testimony undermines that argument. In examination-in-chief, she stated that the statements made by the grievor about citizenship were offensive, and why. They implied, in her view, that non-citizens posed a security risk. She also testified that the grievor failed to mention that the CBSA required security clearance at the "enhanced reliability" level for all employees. She stated further that, to her knowledge, the union had not previously raised the citizenship issue in labour-management consultations. Notably, however, she did not say in examination-in-chief that the grievor made a false statement.

[210] In cross-examination, Ms. Hébert testified that the grievor's statement that CBSA officers did not have to be citizens was true. She at first challenged the accuracy of a second statement in the letter that a citizenship requirement did exist in the American border administration but then conceded that she was not certain about the point. She also testified that she had not checked the accuracy of that information herself when she issued her letter of discipline. (There is no evidence before me that the grievor's statement about the citizenship requirement in the United States is in fact false.)

[211] The employer in final argument contended that the grievor played "fast and loose" with the facts. On the citizenship issue, however, I can only find, based on Ms. Hébert's testimony, that the grievor failed to mention a fact rather than stating something that he knew to be factually false. By failing to mention a fact, or by allegedly failing to provide other context for the statements that he made about citizenship, could it still be said that the grievor was reckless with the truth?

[212] Recklessness implies rash, incautious, careless or heedless behaviour. In my view, the grievor's failure to provide the contextual information that all employees must acquire security clearance at the enhanced reliability level may well have been an unfortunate omission and probably undermines the credibility of his message, but it does not rise to the level of recklessness. The omission is not demonstrably rash or incautious. If careless, the seriousness of the omission must be weighed against the probability that the omitted information was already in the public domain. Certainly, it seems very unlikely that American officials would not have known the security

classification requirements for employees in the Canadian border administration. The seriousness of the omission should also be weighed against the evidence that no one from CBSA management took any subsequent step to correct the omission with his or her American counterparts.

[213] What is left, then, is that Ms. Hébert was offended by what the grievor stated about non-citizens. The grievor's letter, according to her, left the offensive implication that non-citizens pose a security risk. I agree that the implication may be offensive, but that implication is not sufficient proof within the meaning of the *Shaw* test that the grievor made statements that were knowingly or recklessly false.

[214] If I am wrong in that conclusion, I note that Ms. Hébert herself stated in cross-examination that "the issue of the factual accuracy of the reference to citizenship requirements was not a significant factor in [her] decision to render discipline." That testimony tends to belie the importance of what Ms. Hébert wrote in her letter of discipline about the lack of "foundation" for the grievor's comments about citizenship. By the measure of her own words at the hearing, it is difficult to find a recklessness towards the facts in what the grievor wrote on the citizenship issue.

[215] I turn, then, to the other concerns about the contents of the letter as argued by the employer — and I encounter a problem. An employer should normally be held to the reasons stated in its disciplinary letter when an adjudicator evaluates the merits of its disciplinary decision. The fundamental principle is that the grievor should know the reasons that the employer disciplined him or her with sufficient precision that he or she may prepare and present an informed defence. I see no reason to adjust the normal approach here.

[216] With that in mind, I am concerned that Ms. Hébert's letter of discipline does not specifically identify any content issue other than that of citizenship. To counter the concern about the letter's lack of specificity, the employer argues that there are two other references in the letter about "weaknesses in border management practices" that are sufficient to import into the reasons for discipline the other concerns that Ms. Hébert had with what the grievor wrote. While that might be the case, the problem that I have is that I cannot determine from the generality of those two references in the letter what it is about the grievor's comments pointing to "weaknesses in border management practices" that caused Ms. Hébert to decide that discipline was required. Did Ms. Hébert discipline the grievor because she concluded that he made statements

about "weaknesses in border management practices" that were knowingly or recklessly false? Or, instead, did she discipline the grievor for other reasons, for example, that the comments were critical of the CBSA?

[217] The distinction is very important. I read the *Shaw* line of decisions as holding that a union official may be critical of the employer in public, at least on labour relations matters, and nonetheless be protected from discipline provided that his or her critical statements are not knowingly or recklessly false. Comments that are critical, but not knowingly or recklessly false, normally do not violate "the bright line test" summarized in *Shaw*. If Ms. Hébert disciplined the grievor for his comments about "weaknesses in border management practices" because she judged that those comments were critical of the employer, then she did not have cause for discipline in that regard.

[218] The evidence given by Ms. Hébert in her examination-in-chief focused on concerns about what the letter failed to say, about context allegedly not given or comments that she believed to be misleading (see, in particular paragraph 59 above). In cross-examination, she conceded that the statements made by the grievor in the letter about students and about arming customs inspectors, as well as the excerpts that he took from the Canadian and American mission statements, were all accurate. Ms. Hébert also stated in cross-examination that the *Code of Ethics and Conduct* (Exhibit E-1, tab 5) communicates an obligation not to criticize the government's policies or programs. Pressed further on the point by the grievor, she stated that it was "possible" for a union official to be disciplined for speaking truthfully about matters in the public domain if his or her statements are critical of government programs. That is <u>not</u> my understanding of the *Shaw* test.

[219] In my opinion, Ms. Hébert's testimony suggests that it is more probable than not that her concern about comments in the letter that pointed to "weaknesses in border management practices" was not primarily about the factuality of those comments. Her evidence does not tend to reveal substantial untruths. Instead, I am persuaded that it is more likely that her concern lay elsewhere, and probably reflected her judgment that the grievor's letter criticized the CBSA in a manner that she found unacceptable. The employer, in my view, came very close to conceding that point when it stated in final argument that the letter's message was, "we're not doing a very good job over here."

[220] I find it notable that the employer in final argument attempts to reframe the issue of factuality or truthfulness as a matter of what the grievor did not say rather than what he did say. The employer argued, for example, that the grievor neglected to mention that students receive exactly the same training as full-time employees for the primary inspection duties that management assigns to students. By not providing the whole picture in that regard, the employer maintained that the grievor's depiction of the situation was "an untruth." Along the same lines, the employer later argued that the grievor's omissions regarding security clearances for non-citizens and the nature of training given to students were examples of being "reckless with the truth."

[221] I accept that a person can be reckless with the truth by omitting information but the omission, in my opinion, must be of such a nature that the truthfulness of what is actually said cannot reasonably be known or appreciated without being accompanied by the omitted information. Moreover, it must be shown that the omission was more than just inadvertent. There should be an element of rashness, incaution, carelessness or heedlessness in the omission to substantiate that it was reckless.

[222] My conclusion is that the employer has not proven recklessness on the grievor's part in his omission of information in the letter. The information that the employer argues should have been provided by the grievor was, according to the evidence, already all or mostly in the public domain. It was certainly information that might have put the employer's practices or policies in a more favourable light in the letter, but it is not information the absence of which reasonably leaves the reader unable to evaluate the truth of what was stated for himself or herself. Moreover, the grievor, acting as a union representative, was not required to provide information in his letter favourable to the employer's position. He was free to provide the information that he judged supported the message that he wished to convey, as long as he did not knowingly misstate the truth or otherwise show reckless disregard for the truth. I find that he did neither.

[223] Before leaving this analysis of the contents of the letter, I wish to comment on the inference in the employer's argument, also echoed in Ms. Hébert's letter of discipline, that there existed some obligation on the grievor's part to have provided management with an opportunity to review the contents of his letter before he sent it to Secretary Ridge or that he should have done so in the circumstances. I find no support for either proposition in the *Shaw* line of decisions. Just as the employer is

entitled to express its views about labour relations in a public forum without first vetting its statements with the union, so too is a union representative, and particularly a full-time union official, entitled to public expression without prior vetting by the employer. The grievor's failure to consult with management is not an element that enters into evaluating whether the employer had cause to discipline the grievor.

**C. The *Fraser* line of decisions and the issue of constitutional rights**

[224] These reasons are based on the *Shaw* line of decisions. I believe that that case law is most appropriate given the issues raised in this case and that it provides a sufficient and full basis to decide the issues before me.

[225] The employer argues that I should also consider the case law led by *Fraser* in view of the alleged extreme nature of the grievor's criticism of his employer and of his consequent violation of the duty of loyalty that he owed the CBSA.

[226] I do not agree. The grievor's status as a full-time elected union official is central to the circumstances of this case. The *Fraser* line of decisions does not address whether, or the extent to which, that status alters the legal principles at play. To that extent, *Fraser* and other decisions in that line can be distinguished.

[227] As to *Fraser* itself, I wish also to note that the Court based its finding that the public statements of the appellant in that case impaired his ability to perform his public service job on evidence of a "pattern of behaviour." The Court found that a public servant ". . . must not engage . . . in sustained and highly visible attacks on major government policies." If he or she does so, there is a violation of the duty of loyalty.

[228] There is no evidence in the case before me of a pattern of writing to foreign government officials on the grievor's part or that he engaged in "sustained" or "highly visible" attacks on government policy. The subject of this case is a single act. The parties stipulated that the grievor's disciplinary record is clear for purposes of this decision. His letter was visible only to a very small group of people and not to the public. It is even unproven that the intended recipient ever received it.

[229] Concerning the issue of a possible violation of constitutional rights, I note that the grievor in argument withdrew his request for *Charter* damages. No issue remains, in my view, that requires that I address any constitutional issue in this decision.

**D. Summary findings**

[230] I have found that the employer has not proven on a balance of probabilities that the grievor acted outside the proper scope of his union role when he wrote and sent his letter to Secretary Ridge.

[231] I have also found that the employer has not proven on a balance of probabilities that the grievor's conduct in writing and sending his letter to Secretary Ridge was malicious or that the statements that he made in his letter were knowingly or recklessly false.

[232] Following the *Shaw* line of decisions, I find, therefore, that the employer did not have cause to discipline the grievor.

[233] In the absence of demonstrated cause for discipline, I do not need to consider whether the employer's choice of a 30-day suspension as the disciplinary penalty was appropriate and proportionate.

**E. Corrective action**

[234] As of the end of the evidence phase of the hearing, the following elements formally remained from the grievor's original request for correction action:

> (PSLRB File No. 166-02-36572)
>
> *ii) That a letter by Barbara Herbert clearing me of any related wrongdoing and which reflects her (as requested by self)* [*sic*] *personal apology, be posted in my workplace;*
>
> *vii) That I be reimbursed all salary and potential income lost as a result of this suspension, including statutory holiday pay, shift premium. Etc.;*
>
> *viii) That I be reimbursed all leave credits that would normally have been earned during this 225 hour suspension;*
>
> *ix) That said discipline and all related notes on file by the employer be removed from all my working files;*
>
> *xi) That I be made whole.*
>
> (PSLRB File No. 166-02-36573)
>
> *iv) That I receive an appropriate monetary award for damages resulting from this violation to my fundamental*

> *rights and freedoms. This amount being no less than ten times the initial discipline imposed on me;*
>
> *vii) That I be reimbursed all incurred expenses associated with this complaint;*
>
> *viii) That I be made whole.*

[235] At the conclusion of his final argument, the grievor further clarified his position on corrective action. He withdrew his claim for *Charter* damages and for damages at large. He stated that I should place him in the exact position he would have been, with respect to all terms and conditions of employment, had there been no suspension. The grievor, however, did not withdraw his request that Ms. Hébert issue an apology or his claim for "expenses associated with this complaint."

[236] I do not grant the request that Ms. Hébert issue an apology. Publication of this decision will provide adequate public notice of these findings. Moreover, while I have found in this decision that Ms. Hébert's disciplinary analysis erred by not taking into adequate consideration the grievor's role as a full-time union representative, I did indicate that I was convinced that she acted out of a sincere and deeply-felt conviction that the grievor breached his duty of loyalty to the employer. In the prevailing context of greatly increased sensitivity over border security issues at that time, I believe it likely that other reasonable persons could have reacted to the grievor's action in a similar way. That does not justify in legal terms the decision to impose a disciplinary suspension, but it does make that decision at least somewhat understandable. In those circumstances, an apology is not in order.

[237] As to "expenses associated with this complaint," the grievor did not present any evidence to specify the types and amounts of expenses that he incurred. Even had he done so, I do not believe that the grievor established a basis for such a claim. Adjudicators in this jurisdiction have not routinely awarded expenses when they have upheld a grievance. Corrective action of that nature has been exceptional. A grievor must, at the very least, demonstrate that there are circumstances specific to his or her situation which justify an award related to costs. That did not occur in this case.

[238] In the circumstances, the appropriate corrective action is to make the grievor whole in respect of salary and other payments and benefits that he would normally have received during the 30-day period of suspension. It is also appropriate to remove

from the grievor's personal file references to the discipline that I am rescinding by virtue of this decision.

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

*(The Order appears on the next page)*

**V. Order**

[240] The grievance is allowed.

[241] The employer shall restore to the grievor the salary as well as any other payment or benefit to which he would have been normally entitled during the 30-day suspension.

[242] The employer shall remove the references to the 30-day suspension and any directly related documents from the grievor's personal file.

[243] I will remain seized of this matter for a period of 60 calendar days for the purpose of resolving any issues that might arise in implementing this order.

August 8, 2008.

**Dan Butler,**
**adjudicator**