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File: 566-02-974

Citation: 2011 PSLRB 40

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

COLIN MACLEAN

Grievor

and

DEPUTY HEAD
(Department of Public Works and Government Services)

Employer

Indexed as
MacLean v. Treasury Board (Department of Public Works and Government Services)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Paul Love, adjudicator

For the Grievor: Debra Seaboyer, Public Service Alliance of Canada

For the Employer: Pierre Marc Champagne, counsel

Heard at Vancouver, British Columbia,
January 26 to 29, 2010.

I. Individual grievance referred to adjudication

[1] The grievor, Colin MacLean, grieved a five-day suspension from his position as a clerk, classified CR-04, with the Department of Public Works and Government Services ("the employer"). He was suspended because he published an advertorial in the National Post newspaper on January 19, 2006.

[2] Employees of the employer drew the advertorial to the attention of Terrance P. Tétreault, Regional Director, Accommodation and Portfolio Management, Pacific Region. Mr. Tétreault suspended the grievor for five days by letter on March 15, 2006 (Exhibit 1, Tab 3). In that letter, Mr. Tétreault stated in part as follows:

. . .

> *This concerns the Advertorial you had published in the National Post on January 19, 2006, criticizing the employer, this Department, and some of its employees.*
>
> *In this Advertorial you criticized many of the employer's organizations and you targeted a number of individuals of this Department in a derogatory way. Specifically, you stated or implied that former Minister Goodale, your Regional Director and your former Regional Manager were culpable of abuse of power in relation to a Property Manager competition issue. I note that you had already received complete responses on these issues from the Minister or his delegates, and through the grievance process and the recourses you pursued with the Public Service Commission.*
>
> *It is unfortunate that you do not seem to be able to accept the conclusions of these various reviews. I consider your action in publicizing your allegations to be both irresponsible and inappropriate. Moreover, your action has created significant tension and disruption at your workplace.*

. . .

[3] Mr. MacLean asks that his suspension be reversed, that he be paid all lost wages and benefits retroactive to the date of his suspension, and that all documents related to his suspension be removed from his file and destroyed.

[4] The parties have no issue with my jurisdiction to decide this matter.

II. Summary of the evidence

[5] I heard testimony from Mr. Tétreault and from the grievor. Each party filed a number of exhibits.

[6] Mr. Tétreault testified that, at the relevant time, he was responsible for overseeing a large part of the federal government's real estate portfolio. He supervised 70 employees. Mr. MacLean worked in Mr. Tétreault's unit as a clerk and did not report directly to him but to an intermediate supervisor.

[7] The employer suspended Mr. MacLean for publishing his advertorial (Exhibit E-2), which was about an employment dispute that he had with the employer. It was published during the federal election campaign in 2005-2006, four days before the election. The advertorial is lengthy, but it is important to consider the full text, since it is the basis for the employer's discipline. Furthermore, the advertorial succinctly sets out the grievor's views, the facts from his perspective and his arguments as a justification for its publication. It reads as follows:

> *Open Letter to John Reynolds – merit principle is dead*
>
> *Dear Mr. Reynolds;*
>
> *Thank you, for your invaluable assistance over the past few years. You have persisted in representing my historic eight year fight against abuse of power by the Minister of Public Works and Government Services Canada, in which the ball was dropped by the Ethics Commission, Treasury Board President, and Auditor General. Your commitment was based on the conclusions of 'very good' lawyers within your party's Research Department. Legislation, policies and codes provided a fair employment standard, in the Federal civil service based on the merit principle. However, this is not reflected in practice, and indeed, the 2002 Public Service Employee Survey reports a staggering 28 % of respondents DO NOT believe that, " in (their) work unit, the process of selecting a person for a position is done fairly".*
>
> *The simplicity of this single case, and its overwhelming evidence, and hunt for justice, demonstrate that there is NO structural or political support for the merit principle, the merit principle is in writing only, and the merit principle is dead. The case is the hard evidence that management abuses the competitive staffing process, with impunity and without facing any risk of consequence. The Recourse system does not uphold either:*
>
> *1.) The Public Service Commission's commitment that, "Recruitment and career development is a transparent process based on the principle of merit". Nor*

2.) *The Treasury Board's Value and Ethics Code principle, " Appointment decisions in the Public Service shall be based on merit." This case represents the many wronged employees in the federal civil service.*

In early 1997, I competed in a Property Manager competition in Public Works and Government Services Canada. The Statement of Qualifications included mandatory eligibility for Real Property Administrator (RPA) designation conferred by Building Owner's and Managers Institute (the only designation applicable). BOMI confers the RPA designation upon (1) completion of their mandatory courses, and (2) three years property manager/management experience. BOMI accepts a candidate's experience in good faith upon receipt of an authorized RPA Experience Criteria Verification Form verified by the employer. No job description or further evidence of experience is required. The Regional Manager conducting the competition said that I, and a 'junior candidate', were being considered for the 'last position'. The junior candidate became the Appointee. I had received my RPA designation in 1992. I had all the required education and property manager experience. The Appointee received his designation in 1996, but had not been qualified due to his lack of experience. We were both scored as having passed the competition.

Documentation forwarded to Public Works and Government Services Canada Minister, Mr. Goodale, reviewed by your Research Department lawyers, indicates that the Appointee had only 8.5 months property manager experience and 9 years Building Services (i.e. Janitor) Inspector experience. The implication being that the Appointee had almost 10 years of qualifying experience, when he had less than 1 year. The Regional Director General reviewed the Appointee's career file and his work experience, and replied, "I am confident that (The Appointee) clearly meets this (RPA) qualification." This became the definitive statement of the Department along with the Public Service Commissions response below. Contrary to the Regional Manager's and Regional Director General's arguments, and Ministers Goodale's response to you that, "From the department's perspective, we are comfortable that BOMI has properly considered all of the (Appointee's) qualifications, not just a work description, and found him qualified for certification", BOMI determined that the Building Services Inspector job description (which I, not the department, sent to BOMI) does NOT qualify for the RPA experience requirement under the rules of the BOMI Institute. (BOMI later conducted a closed investigation at my request.) Building Service Inspectors inspected buildings for cleanliness and made recommendations to the Property Manager. Any further action was the Property Manager's responsibility. As Property Manager I hired and fired Cleaning contractors. Perhaps in the Public Sector but never in the Private Sector would a Janitor's responsibility be confused with a Property Manager's.

The Public Service Commission (PSC), Recourse Branch Investigation was satisfied that the Appointee met BOMI's RPA Occupational Certification requirements when they received a copy of his certificate issued by BOMI, effective October 1996. The Investigations Officer concluded, " I

cannot question or substitute my judgment for that of BOMI Institute in issuing the RPA Occupational Certification to the appointee as this is clearly outside of my jurisdiction. Therefore, I must accept the occupational certification on its merits and the department's assessment that the appointee is the most meritorious." So, regardless of any evidence of error, the PSC will not investigate an Appointee's RPA designation! This is a loophole all managers can exploit! If the Investigations Officer lacks jurisdiction then who has that jurisdiction? The answer is obvious. Jurisdiction defaulted to Management when the Investigations Officer refused to substitute her own better judgement when presented with clear evidence of Management error. Management thus became self-accountable, and therefore unaccountable, to the merit principle. This is a miscarriage of justice! Where is the 'Separation of Powers'? Does the Investigations Branch not have the jurisdiction to uphold its own mandate? The Investigation Officer's default decision in favour of Management makes a mockery of justices. This is a mock court. This is a mock investigation. The Department fiercely defends itself on the basis of the Investigations Officer's decision, claiming a thorough, transparent and ethical review. Where is the investigation of error?

The department's refusal to investigate the basis of the Appointee's RPA experience qualifications is analogous to the infamous mining company BREX, publishing false accounts of a huge gold find, and when challenged, defending their claims based on their false publications. This is wrong! In a later competition, the same Regional Manager NOW determined, that the appointee's longtime Colleague did NOT qualify for the same RPA experience requirement with 1 year Property Manager experience and a whopping 17 year Building Services Inspector experience. This is a direct comparable. Therefore, Public Works and Government Services Canada, acknowledged that Building Services Inspector experience does not qualify for BOMI's RPA designation. Had the Colleague appealed, the Regional Manager would have been forced to argue 'against' building Services Inspector experience, just as he had previously argued 'for' Building Services Inspector experience on behalf of the Appointee. The Regional Manager valued the 'same' experience oppositely. How does this satisfy Treasury Board Values and Ethics Code?

This case is further validated as follows:

1. *Harris & Company, Solicitors, provided a legal opinion stating, "Based solely on the job description you provided to BOMI, it appears they would not have granted an RPA status to someone with experience solely as a Building Services Inspector."*

2. *Assessments ordered in my successful Appeal were reviewed by a qualified third-party expert who concluded upon condition, that they were definitely biased in favour of the Appointee and against me.*

3. *Property Managers typically prepare annual building budgets for each building in their portfolio. A budget could exceed 100 date entry lines, without considering projects and repairs. The Building Services (i.e. Janitorial) Inspectors responsibilities are recognized by only 3 or 4 line entries they submit to each budget.*

4. *Appeal Documents show that Management brought information to the Appeal Board AFTER the appeal hearing was over! My case representative and I had no opportunity to respond.*

5. *Several months after the June 1997 competition the Regional Manager acknowledged having read my excellent Employee Performance Appraisal. Then he questioned why i hadn't accepted management's indication that I should find another career, other than property manager. Why should I? My record was excellent!*

6. *In previous years, the Appointee told me he had no real goals. One day someone offered him a job as a Cleaner and he took it. Years later some one offered him a job as Building Services Inspector, and he took it. The evidence shows that the Regional Manager had forseen upcoming job opportunities (prior to the 1997 competition), and that selecting 'me' for the appointment might affect the future opportunities of the Appointee but not vise versa (obviously, because I was more qualified). So, when the Regional Manager offered the Appointee a Property Manager position he took it, even though he was not qualified. WHO did verify the appointee's RPA Experience Criteria Verification Form! I can't find out.*

7. *In 1980 I left an excellent job in the automotive industry to become a manager. Over the years I achieved:*

    a. *A 3 year business diploma.*

    b. *University Bachelor of Arts Degree (Economics).*

    c. *Public Works' Property Management Accreditation (over several years, with one course taken on my honeymoon).*

    d. *BOMI's RPA designation with the required education and experience.*

    e. *My property manager record with Public Works was impeccable. I had many letters of reference, including my manager's.*

    f. *My 'current' Employee Performance Appraisal evaluated my performance as Property Manager. The Reviewing Officer's comments were, "Excellent Appraisal. Thanks for a job well done."*

In a more recent competition for Property & Facility Manager (Property Manager job renamed) the new Regional Manager changed unaccountably the policy requirement. Eligibility for a designation was not requested even though it was 'mandatory'. Experience requirements were restricted to 'within the past three years' instead of having 'no' restriction. This excluded me! The amount of recent experience was changed to a minimum of 6 months instead of 3 years, and a minimum of 4 courses instead of all 8! This meant that 'green' candidates could win a competition and become responsible for millions of dollars of federal assets, and life and limb, with virtually no experience! What if there was a fire, earthquake or environmental disaster? I was ruled out because my experience was 'too old', (because management earlier stole my career') Prior to the competition I requested one of several acting assignments but was refused for the same reasons. Which unqualified candidate did management want to promote this time?

Over the past ten years my own Regional Manager (not property management), refused me every opportunity to advance within the organization. This included acting assignments and in-house training (except as directly related to my duties). Across the country, jobs in our Work Unit were being reclassified. My manager's and each of my colleagues' jobs were reclassified (up). Mine was the only position the Regional Manager refused to be reclassified! Ten years ago when I first was assigned to this Work Unit, this Regional Manager refused me permission to take the last course I required for my Property Manager Accreditation, even though it had been approved months before, and was a two day course, beginning in a few days. My Regional Manager (recently retired) and colleagues take international trips, while my salary leaves me pinched.

How do Recourse decisions stack up? The January 16, 1998 Appeal Board Decision upheld my appeal and ordered an assessment. After repeated attempts to obtain the assessment, my case representative gave up trying, saying he was tired of winning Appeals only to have management ignore the order. On July 29, 1998, the assessment were finally made available. In the meantime, management simply reappointed the Appointee. I immediately required my Shop Steward to Grieve the assessments on my behalf. Evidence shows that I engaged and pursued the Shop Steward for five months without success, before taking on my own case. Months later a union investigation accused 'me' of delaying to file a grievance. I did not delay. It is my firm belief that the union did not investigate the basis of the Appointee's RPA designation, as requested, nor management abuse of the merit principle. The Assistant Deputy Minister and the Deputy Minister referred the case back to the Regional Director General. The Integrity Officer offered no assistance. PWGSC Fraud and Investigations said they had no jurisdiction. Treasury Board President forwarded the case to the Public Service Commission. The Auditor General cited existing studies but could not consider individual cases. Together, we, have proven that nowhere is the merit principle upheld in any of the following Recourse Levels: Regional Manager, Manager Human Relations, Union Representatives (Shop stewart, VP GEU, President PSAC), Regional Director General,

> *Assistant Deputy Minister, Deputy Minister, Minister, Public Service Commission, PS Integrity Officer, PWGSC Fraud Awareness and Investigations, and Treasury Board President (1st Time).*
>
> *Mr. Reynold, you are retiring and have closed your file on my valid case. An honourable politician will be greatly missed. Mr. Harper's office has returned my materials, after several months. His office dismissed my unprecedented case by 'encouraging me' to follow up with the Federal Labour Standards Board in Vancouver, which, of course has no jurisdiction, and wished me the best of luck. The simplicity of this case, along with the overwhelming evidence, prove that the integrity of Mr. Harper's public commitment to the merit principle is no greater than the legislation, policies, codes and institutions designed to uphold the merit principle. Photo-op politics, office wall-posters depicting Treasury Board's Values and Ethics Code, and Departmental Ethics Training courses are just window dressings. There is no political support for the merit principle. The hard evidence of this single case demonstrates that for all federal public servants that the merit principle is dead.*
>
> *Frema Engel's book, 'Taming the Beast, Getting Violence Out of the Workplace', portrays workplace trauma. Nothwithstanding an annual loss of $30,000, besides pension and benefits, my wife and I have suffered great hardship. We are just one story in a vast pariaplea of federal staffing scandals. Mr. Reynolds, on the basis of this extensive case which you have extensively pressed forward, I am requesting; (1) to be made whole of management errors damaging me, and (2) a public inquiry into Federal employment process and a toothless Recourse system, and (3) investigation of the RPA Experience Criteria Verification form required by BOMI before conferring the RPA designation upon the appointee to determine if management was complicit in the every error upon which they relied. The merit principle is dead.*
>
> *Yours truly,*
>
> *Colin F. MacLean, B.A., RPA, CTM* *EthicsFirst@look.ca*
>
> *(This letter was made possible by the financial contribution of friends.)*
>
> [*Sic* throughout]

[8] By way of background, at the relevant time the federal government was dealing with the "Sponsorship Scandal," specifically with the "Gomery Inquiry." Mr. Tétreault stated that the employer's morale was low. He stated that it was under a microscope with respect to ethical behaviour

[9] Mr. Tétreault stated that he was shocked and disappointed that a public servant would opt to publish such an advertorial. He had never seen anything like it in his 35 years with the federal public service. He said that he thought that the advertorial was

extremely unfair to a number of people, to the federal government and to the public service. He stated that a number of things "jumped out at him," including allegations that a minister was corrupt or incompetent and that the staffing process was corrupt or fraudulent. Furthermore, he was concerned with the apparent obsession and bitterness of an employee with a job competition that had occurred 8 to 10 years earlier and that had been scrutinized by appeal bodies. He said that, after examining the advertorial more thoroughly, he became concerned with its reference to violence in the workplace and its serious allegations against politicians, managers and employees involved in the staffing process. It seemed unusual or odd to him that someone would publish such an advertorial as he believed that it was not cheap to do so in the National Post and that it could cost the better part of an employee's annual salary.

[10] After the advertorial was published, Mr. Tétreault met with the Regional Director of Human Resources and a senior staff relations officer. After the meeting, Mr. Tétreault decided to escalate the matter to the regional director general level given its seriousness.

[11] A meeting was arranged with the grievor and a representative of his bargaining agent. Mr. Tétreault and the bargaining agent representative were concerned with statements that Mr. MacLean made at the meeting. Mr. Tétreault imposed an administrative leave on the grievor and requested a Health Canada assessment for him. After that assessment, Mr. MacLean returned to work.

[12] Mr. Tétreault testified that, in his view, the statements made in the advertorial adversely affected the employer. He said that the advertorial was an attack. He said that the timing of the attack, in which the minister at that time, The Right Honourable Ralph Goodale ("the Minister"), was accused of abuse of power, was not an example of the politically neutral behaviour set out as a requirement in the *Values and Ethics Code for the Public Service* ("the *Code*"). The *Code* states the following in particular:

. . .

> ***Professional Values:*** Serving with competence, excellence, efficiency, objectivity and impartiality.
>
> - *Public servants must work within the laws of Canada and maintain the tradition of the political neutrality of the Public Service.*

. . .

> ***Ethical Values:*** Acting at all times in such a way as to uphold the public trust.
>
> - *Public servants shall perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.*
>
> . . .

[13] Mr. Tétreault stated that the *Code* was a condition of employment and that employees were trained in it.

[14] As for the penalty imposed on the grievor, Mr. Tétreault testified that he believed that a five-day suspension would demonstrate to Mr. MacLean and to other employees that the misconduct was serious. He felt that a suspension of one or two days would not send a strong enough message. Some staff told Mr. Tétreault that they were experiencing anxiety.

[15] In his direct examination, Mr. MacLean testified that he had never seen the *Code*. He said that he might have had training about ethics, values and responsibilities but that he did not recall. In cross-examination, he admitted to receiving the *Code* in a training session on November 10, 2005. The employer demonstrated that Mr. MacLean had signed an oath of allegiance when he first started working in a term position with the Department of Indian Affairs and Northern Development. In cross-examination, the grievor said that, when he started working with the employer, he was never asked to sign an oath. In re-examination, he stated that he considered that the oath given at the Department of Indian Affairs and Northern Development did not apply to him at the employer.

[16] In cross-examination, the grievor was asked whether he believed that he had a duty of loyalty to the employer. Mr. MacLean indicated that he had a duty of "considerable loyalty, depending on the situation." The employer also demonstrated that Mr. MacLean had taken ethics training on February 18, 2004 (Exhibit E-4) and on November 10, 2005 (Exhibit E-5). The grievor admitted in cross-examination that ethics were important for the employer and for himself. Mr. MacLean felt that he had acted ethically at all times, that he had exhausted all internal processes and that the media was the only further recourse available to him.

[17] Mr. MacLean testified about his work history and about the truthfulness of the statements in the advertorial. His oral testimony was largely consistent with text of the advertorial. Mr. MacLean is currently employed as a payment-in-lieu-of-taxes clerk in the Accommodation and Portfolio Management Section of the employer. He started with the employer in June 1986 as a student and as a property management clerk. His position became indeterminate in 1989. During his work, he took on acting assignments, including an assignment as a property management trainee. He stated that he had had 17 acting assignments as a property manager. Until the incident at issue in this case, he had an unblemished work history and good performance appraisals (Exhibit G-2). His qualifications include a Real Property Administrator designation (RPA) (Exhibit G-24) issued in May 1992 by the Building Owners and Managers Institute (BOMI).

[18] Mr. MacLean testified that he wrote the advertorial as an open letter because he felt that his situation spoke to the need of every single public servant to be sure that competitions are fair and because justice had been denied him for all the wrong reasons. He saw his case as a litmus test for the perfect example of what was wrong with the federal government staffing process. He stated that the Public Service Commission (PSC) lacked jurisdiction to investigate and that his story was significant enough to be heard publicly.

[19] The grievor testified that, after publishing the advertorial, nobody ever asked him to withdraw what he wrote. He was not at work on the day it was published. Mr. MacLean testified that, when he arrived at the office after the advertorial was published, five to seven colleagues congratulated him for a job well done and thanked him for doing what they could not. No one expressed fear and concern to him about his comments of workplace violence in his advertorial. He testified that he made those comments in his advertorial as his wife was reading a book about workplace violence. He believed that he had experienced trauma and violence in the workplace by how the employer had treated him.

[20] Mr. MacLean outlined in detail the events set out in the advertorial. He explained that he responded to an email of April 2, 1997, soliciting applications for a one-year assignment as a property manager (Exhibit G-3). The grievor testified that the manager for the position must have been considering anticipated vacant positions. He submitted his cover letter and resume (Exhibit G-4). The competition resulted in a

candidate other than the grievor being appointed. The PSC notified Mr. MacLean that he could appeal the employer's decision (Exhibit G-8). The appeal period was from July 11 to 27, 1997.

[21] He testified that he appealed the appointment of the successful candidate and that his appeal was upheld in a PSC Appeal Board ("the Appeal Board") decision rendered on January 16, 1998 (Exhibit G-5). The grounds for the appeal, as set out at page 2 of the decision, were the following:

. . .

> *Through his representative, the appellant argued that the department had erred in its assessment of him in respect of the personal suitability factor. There was no evidence that any test of relative merit had been performed by the department.* [The Manager] *had completed an assessment document for* [the successful candidate]*, but had not done so for the appellant.*

. . .

> *Secondly, the appellant's representative maintained that the department had erred in concluding that the fact that the appellant had prior significant acting appointments precluded his being considered for the position in question.*

. . .

[22] The Appeal Board decision required that the employer revisit the selection process and reassess the qualifications of the grievor and the successful candidate. Part of the employer's argument to the Appeal Board was that the grievor had received many acting assignments and that the successful candidate ought to be given more acting assignments. It argued that giving the opportunity to the grievor might affect future opportunities for the successful candidate, which the Appeal Board determined was inappropriate unless the employer had fully and property assessed the relative merit of each candidate and had determined that they were equally qualified. The Appeal Board also found that ". . . there was no evidence to suggest that the department had anything but the best intentions in this case and had intended to act equitably between the parties." The grievor said that the Appeal Board determined that the employer should not have considered the number of acting assignments he had already received when considering the equitable distribution of acting assignments. Mr. MacLean also provided a printout of his training (Exhibit G-26) and his RPA certificate (Exhibit G-24).

[23] The employer reassessed the candidates. Mr. MacLean testified that the successful applicant was appointed to an acting property manager position. Mr. MacLean testified that the reassessment was done on January 16, 1998. The PSC notified Mr. MacLean that he could appeal the decision to appoint the successful applicant to an acting position as a property manager (Exhibit G-9). The appeal period ran from February 27 to March 12, 1998. The grievor never appealed the reassessment decision (Exhibit G-15).

[24] Mr. MacLean said that he became aware of the assessments on June 29, 1998. Mr. MacLean stated that his bargaining agent representative asked for a copy of the reassessment. The representative gave up after trying for a month and not receiving it. The grievor also said that the bargaining agent representative indicated that he was tired of winning appeals only to have the employer ignore the resulting orders. The bargaining agent representative was not called as a witness at the hearing.

[25] The grievor tendered the employer's assessment of him (Exhibit G-6) and the notes that he made of the assessment of the successful applicant (Exhibit G-7). His assessment indicated that, in the competition, he obtained 13 out of a maximum of 20 points for the knowledge category, 14 out of 20 points for abilities and 44 out of 65 points for personal suitability. He passed each category. The successful applicant obtained 14 points for knowledge, 14 for abilities and 48 for personal suitability. The successful applicant's information indicated that he had completed the qualifications for the RPA and that he had 9 years' experience in building services and 1.5 years as an acting property manager. Mr. MacLean believes that the successful applicant had only 8.5 months of experience and that the information about his experience provided in the competition was incorrect.

[26] Mr. MacLean said that, when he read the assessments, he knew that they were materially false, biased and doctored. He obtained an opinion to that effect from a person with a Ph.D. in linguistics and sought to tender the opinion in evidence. He believed that person was an expert (the person was not called as a witness). After hearing arguments on the admissibility of the opinion, I directed that the written opinion was not admissible without making the witness available for cross-examination by the employer. The griever did not call the witness.

[27] Mr. MacLean also sought to introduce a legal opinion that a person with the successful applicant's experience ought not to have been awarded an RPA certificate. After hearing the arguments, I determined that the opinion was not admissible.

[28] In 1999, the grievor applied to a competition for a position as an asset performance officer. He was unsuccessful. A number of others were successful. The successful persons did not include the successful applicant in the 1997 acting property manager position competition, but the employer's representative on the selection board was the same representative involved in assessing Mr. MacLean's application in the earlier competitions in which he had been unsuccessful. The grievor appealed to the PSC, alleging that the selection board had erred in determining that he did not meet the minimum standard on the knowledge qualification. In a decision dated February 25, 1999 (Exhibit G-19), the Appeal Board found that the selection board had properly evaluated the grievor's answer and did not conclude that he had been improperly assessed.

[29] It appears that, at least as of March 11, 1999, Mr. MacLean raised the issue of the successful applicant's occupational certification eligibility in a grievance. That grievance form is not before me. Bonnie MacKenzie, Regional Director General of the employer, emailed the grievor on April 1, 1999 (Exhibit G-13), referring to meetings on March 10 and an email on March 11, 1999. Ms. MacKenzie wrote the following:

. . .

> *Based on the information I have received, which included both a review of his career file and his work experience, I am confident that* [the successful applicant] *clearly meets this qualification. I thank you for having raised this concern, and I now consider this matter closed.*

. . .

[30] Ms. MacKenzie apparently followed up on the qualifications issue after the successful candidate was appointed to an acting property manager position. The grievor asked to be appointed in place of the successful candidate. Ms. Mackenzie provided the following response at the third level of the grievance process in a letter dated March 12, 1999 (Exhibit G-14):

. . .

> *Firstly, the APO competition did not have an occupational certification requirement so regardless of the outcome of number one above, it has*

> *no bearing on the APO competition. Secondly, you did not demonstrate to the selection board that you possessed the required knowledge qualifications. You were given an opportunity to appeal this result. You exercised your right to appeal and a third party determined that there was no evidence that the selection board erred in its assessment.*
>
> *Each selection process is completely independent and is neither a reflection of past performance on a process or future performance on a process. Results are based on the candidate's performance at a given point in time and therefore only results of the instant selection process are relevant.*
>
> . . .

[31] The employer issued a clarifying document about the requirements of a property manager position on June 22, 1993 (Exhibit G-10). The document stated in part that, as of April 1, 1994, all candidates for property manager positions had to be eligible for a departmentally recognized professional property management designation (i.e., Real Property Administrator ("RPA"), Certified Property Manager ("CPM ") or Gestionnaire immoblier accrédité ("GIA")).

[32] An odd point is that Mr. MacLean was grandfathered into the RPA designation without the requiried experience. It was not required when he applied for the designation. Ironically, he complained that the successful applicant could not have merited the designation because that applicant also did not have experience when it was required for the designation.

[33] Mr. MacLean questioned how the successful applicant ever obtained an RPA designation. He provided documents and testimony in support of his theory, including the following:

- A printout from the BOMI website indicating that an RPA designation requires three years of verifiable property management experience (Exhibit G-21).
- A blank RPA "Experience Verification Form" (Exhibit G-22), which requires the signature of the candidate and the employer providing verification.
- A BOMI letter of July 21, 1999 (Exhibit G-23), indicating that an RPA designation requires three years of verifiable property management experience.

- A printout of the successful applicant's assignment history to August 7, 1997 (Exhibit G-25), which the grievor stated indicates that the successful applicant had 8.5 months of property manager experience before June 1, 1997 and 10 months of experience after June 1, 1997.

- A printout of the successful applicant's employee training history (Exhibit G-26).

- A Position Description Certification for the Building Services Inspector position (Exhibit G-30).

- A letter from the BOMI dated April 14, 1999, setting out definitions for a Building and Property Manager (Exhibit G-28).

- A memo (Exhibit G-31) and a letter from the BOMI (Exhibit G-29), stating that the Building Services Inspector position would not meet the experience requirement for the RPA (Exhibit G-31).

- A "Business Classification of Accounts for Building O & M Costs" (Exhibit G-18), indicating that a cleaning inspector is responsible for only a fraction of the duties of a property manager.

- A rejection letter dated June 26, 2001 to another applicant in a different selection process for a Property and Facility Manager position who was unsuccessful because he did not have a departmentally recognized professional designation in the property management field such as the RPA qualification (Exhibit G-17).

[34] On or about August 12, 1999, Mr. MacLean complained to the BOMI, stating that it contravened its own policies since it awarded an RPA to the successful applicant (Exhibit G-32). The grievor requested that the BOMI investigate and that it immediately revoke the RPA certificate. He submitted documents that he believed showed that the successful applicant had only 8.5 months of experience as a property manager as of June 1, 1997 and that he had received the RPA designation in October 1996.

[35] He received a reply acknowledging his complaint from Amy McMonigle, Director of Operations, BOMI, dated September 16, 1999 (Exhibit G-33), which indicated in part the following:

. . .

> *The Institute is investigating this matter and has requested further documentation from the parties involved. I want to assure you that the Institute is taking this issue very seriously and will continue to do so until the matter has been resolved. However, as a matter of policy, the Institute does not discuss issues regarding students and/or graduates of the Institute's designation programs without the written consent of the student/graduate. As such, we are not at liberty to respond to you regarding the specific details of the complaint.*

[36] The grievor testified that he has not received an update from the BOMI about the status of its investigation. In cross-examination, he admitted that, as far as he knew, the successful applicant must still have the RPA qualification, as he still works as a property manager (now referred to as an asset manager).

[37] One of the grievor's concerns was that applicants from the United States for the RPA designation are required to submit a statement of experience, verified to be true and notarized by a supervisor. That is not a requirement for Canadian candidates. The grievor referred to it as a loophole. He stated that the manager and the successful applicant in this case have to be accountable for material submitted to the BOMI.

[38] The other loophole not mentioned by the grievor is the nature of the experience verification form (Exhibit G-22). It lists 24 different duties performed and a candidate must demonstrate that he or she has performed 15 of them. The form indicates that the BOMI reserves the right to verify all information provided on the form. However, the form itself does not require either the applicant or an employer to assert that the experience was obtained over a three-year period. It does not require stating the period over which the experience was obtained.

[39] It is sheer speculation as to why or how the BOMI granted certification to the successful applicant. The BOMI has never provided any documentation to the grievor, and the grievor has apparently not taken any legal steps to compel the production of the information from the successful applicant or from the BOMI. The grievor testified that he submitted a job description (Exhibit G-30) and the experience of the successful applicant to the BOMI. He was advised in a letter from Lorna McCormick, Executive Director, BOMI, dated April 20, 1999 (Exhibit G-29) that the Building Services Inspector job description did not meet BOMI's property management function definition to qualify for the RPA designation. He was advised by a memo dated May 12, 1999

(Exhibit G-31) that the experience would not meet the requirements for the designation.

[40] Mr. MacLean complained to the PSC about the successful applicant's appointment on or about May 28, 1999, alleging that the successful applicant did not have the required RPA designation. The essence of the complaint was that the successful applicant had 8.5 months of experience as a property manager and that his 9 years of experience as a building services inspector did not count towards the RPA designation, based on the BOMI criteria.

[41] On August 6, 1999, Lisa Imbesi, Investigations and Conciliation Officer Of the PSC Recourse Branch issued a report that found that Mr. MacLean's allegations were unfounded and that they warranted no further intervention by the Investigations, Mediation and Conciliation Directorate (Exhibit G-16).

[42] On or about July 22, 1999, according to Ms. Imbesi's report, she advised the grievor of the following:

. . .

> *I have reviewed all of the documentation on file and have noted that we are now in receipt of a copy of the appointee's certificate issued by the Building Owners and Managers Institute International in which the appointee was granted the designation of Real Property Administrator, effective October 1996.*
>
> *The scope of this investigation was to examine whether the appointee met the occupational certification. In view of the above information which indicates that the appointee meets the required occupational certification, in order to continue with the case, the onus is on you to provide me with evidence to the contrary. Please be advised that this information must be submitted to me in writing by 04 August 1999.*

. . .

[43] At page 5 of her report, Ms. Imbesi concluded as follows:

> *First of all, it must be clarified that my role in this matter is to investigate the complaint with respect to the allegation that a successful candidate in a recent competition was appointed while not meeting the occupational certification requirement for the position. My role in this matter is to ensure that the Public Service Employment Act was respected in that the selection of the appointment was consistent with the merit principle.*

> *The complainant, in his submissions, has provided a great deal of documentation to support his argument that the appointee,* [name deleted for privacy reasons], *should not have been eligible to receive the RPA Occupational Certification according to the published standards by the BOMI Institute. The complainant has also presented argument [sic] that the Public Service Commission should intervene in this regard. In spite of the arguments presented, there has been no evidence presented to indicate that the certificate is not valid. Further, there has been no evidence presented to indicate that the certification was issued under false pretences or in bad faith. I cannot question or substitute my judgement for that of the BOMI Institute in issuing the RPA Occupational Certification to the appointee as this is clearly outside of my jurisdiction. Therefore, I must accept the occupational certification on its merits and the department's assessment that the appointee is the most meritorious.*
>
> *Based on the information before me, in that the department was [sic] demonstrated that the appointee's RPA Occupational Certification was issued by the BOMI Institute in October 1996, I cannot find that the allegation in this matter is founded. The certification requirement, as listed for the position has been met by the appointee. Therefore, no further intervention by this directorate is warranted.*

[44] There is no apparent connection between Ms. Imbesi and either the successful applicant or the supervisor involved in the competition at issue. The grievor did not ask her to consider whether favouritism had occurred. Furthermore, he did not produce evidence of a false application for certification in which the successful applicant and the supervisor participated. He made those allegations at the hearing. He clearly did not make those allegations to the PSC at the time of the investigation.

[45] In cross-examination, Mr. MacLean stated that he was unhappy with the results of the investigation but that he did not seek judicial review with the Federal Court.

[46] The grievor did not call a witness from the BOMI and did not produce documents submitted by the successful applicant to obtain his RPA certificate. The grievor provided no evidence about the outcome of the BOMI's investigation. He has not sought documents from the BOMI using legal processes. He stated that he has not done so because the BOMI is in the United States, which means that legally compelling it to produce documents would be beyond his financial means.

[47] Mr. MacLean applied to a selection process for a property and facility manager position in 2001. On June 26, 2001, he was advised that the selection board had determined that he did not meet the eligibility requirements of occupational certification and experience (Exhibit G-17). He did not seek any recourse.

[48] Mr. MacLean sought the involvement of his Member of Parliament, John Reynolds, in a letter dated July 9, 2002 (Exhibit G-12). Mr. MacLean outlined his grievances and noted the following:

. . .

> *The real issue is that management knowingly and intentionally assisted an unqualified candidate*, (name omitted) *in that the candidate lacked the prerequisite experience, to obtain a mandatory (eligibility for) designation, RPA, from a private identity* [*sic*], *BOMI, in preparation for upcoming competitions in which management hoped that individual would be successful.*

. . .

[49] At that time, Mr. Reynolds was also the Opposition House Leader. He wrote a letter to the Minister on October 21, 2002 (Exhibit G-11), in which he forwarded the grievor's complaint materials. The letter indicates that Mr. Reynolds was unable to help the grievor and that the grievor asked him to forward the complaint to Mr. Goodale.

[50] Mr. Goodale responded to Mr. Reynolds on April 24, 2003 (Exhibit G-27) by letter. The letter noted that the information presented had been brought before the employer "several times." Mr. Goodale wrote, in part, as follows:

. . .

> *At the heart of the matter is Mr. MacLean's contention that another candidate in a competition did not met the occupational certification for the advertised position even though the candidate had a certificate from the Building Owners and Managers Institute (BOMI). At issue is the certification completed by that professional body. Mr. MacLean is taking issue with the validity of the certificate so it would seem that he should be presenting his case to BOMI for review. From the department's perspective, we are comfortable that BOMI has properly considered all of* [name deleted] *qualifications, not just a work description, and found him qualified for certification.*

. . .

[51] Mr. MacLean tendered a letter from Johanne Massicotte, Senior Counsel to the Commissioner of Canadian Elections, dated August 4, 2006 (Exhibit G-35), in which she opined that, "[a]lthough the Advertorial was published during the election period, its content does not amount to election advertising according to the *Canada Elections Act*. Consequently, the Commissioner will be closing his file on this matter."

[52] Again, Mr. MacLean raised the issue of the appointment of the successful applicant with the then-current Minister of Public Works and Government Services, by a letter written by John Weston on March 6, 2006. He received the following response from the Honourable Michael M. Fortier, PC. On July 12, 2006, the then-current Minister responded to him by letter as follows (Exhibit G-36):

. . .

> *With respect to the validity of another employee's Real Property Administrator (RPA) designation, you raised the issue with the Building Owners and Managers Institute (BOMI), Although you are not satisfied with BOMI's decision to either uphold or annul* [name deleted]*RPA following its review of your complaint. My department cannot question a professional body's decision.*
>
> *You have participated in several departmental selection processes and, as you are aware, there are proper redress avenues for staffing issues at the Public Service Commission (PSC), of which you have availed yourself. The authority to deal with this type of complaint rests squarely with the PSC, and departments must abide by its decision, having no review power over the Commission.*

. . .

[53] The grievor raised both in his advertorial and in his oral testimony that, as of at least March 11, 2003, the employer's requirements for the 2001 property and facility manager position changed to require recent experience within the last three years and fewer courses (Exhibit G-20). The grievor testified that he was unsuccessful in a competition in March 2003, as he did not have experience within the specified three-year period.

[54] In cross-examination, the grievor admitted that he signed an oath of allegiance on June 5, 1985 (Exhibit E-3), when he began working for the Department of Indian Affairs and Northern Development. He was not asked to provide another oath when he started with the employer. After being shown a sign-in sheet for an "Introduction to Ethics" course that was offered on February 18, 2004 (Exhibit E-4) and an "Ethics Awareness" course offered on October 11, 2005 (Exhibit E-5), both bearing his name, he admitted that he had attended those courses. He also admitted to attending training courses (Exhibit E-6).

[55] In cross-examination, the employer challenged Mr. MacLean's assertion that he had exhausted all reasonable options before the advertorial was published. Mr.

MacLean admitted that he did not appeal the appointment of the successful applicant to the acting property manager position in 1998 after the PSC ordered a reassessment of his qualifications. Mr. MacLean said that, by then, his career path had been destroyed, the successful applicant had continued to obtain acting positions, and it was not certain that the employer would reverse its position concerning the successful applicant. He did not seek judicial review of the PSC's Appeal Board decision concerning the asset performance officer competition. I note that that position is the equivalent of a property manager position, as the position title has changed. The grievor admitted that he did not allege that there was a bias against him in his original appeals. When the employer changed the requirements of the position at issue, he did not challenge its rejection of his application, because he did not want to be viewed as a pariah within the employer as there was no prospect of a successful review. Mr. MacLean admitted that he had never approached Mr. Tétreault about his failure to establish his career as a property manager. Although he filed a grievance about the successful applicant's appointment and the employer's failure to investigate, he did not consider whether he could have filed a complaint with the Public Service Labour Relations Board ("the PSLRB"). He never consulted a lawyer to determine the further steps available to resolve his problems.

[56] The employer challenged Mr. MacLean's assertion that other positions were reclassified but not his. He admitted that he did not file a grievance, even though he felt that the lack of reclassification of his position had been wrong. He indicated that he had not been aware that he could file a grievance. He did not discuss that situation with his bargaining agent.

[57] In cross-examination, Mr. MacLean admitted that he did not raise favouritism as a ground in his first appeal to the PSC because he was unable to ascertain whether it was a factor and he had no evidence to suggest that it was. However, he now believes that favouritism was a factor.

[58] In cross-examination, the employer challenged Mr. MacLean's assertion that the employer had deprived him of training opportunities. Mr. MacLean admitted that the courses that the employer did not allow him to take were for his chosen career path as a property manager and not for the duties of his position as a payment-in-lieu-of-taxes clerk. Mr. MacLean testified that the employer permitted him to take training courses but not training that would allow him to move out of his position or to get into

property management. Mr. MacLean stated that his salary limits paying for courses on his own.

III. Summary of the arguments

A. For the employer

[59] The employer submitted that most of the grievor's evidence in this case would make a very interesting Public Service Staffing Tribunal case as the grievor gave evidence concerning staffing processes that were unsatisfactory to him. The adjudicator should consider whether the employer had just cause to discipline Mr. MacLean and whether the discipline imposed was inordinate in the circumstances.

[60] The employer submitted that it had just cause to discipline Mr. MacLean. The employer found that the grievor had engaged in misconduct by publishing the advertorial, which was a breach of his duty of loyalty to the employer.

[61] In this case, it is necessary to balance the grievor's right to free speech with his duty of loyalty to the employer. When working in the public service, an employee must be vigilant not to advance a personal agenda that prejudices the employer's legitimate business interests.

[62] The grievor has not established wrongdoing on the part of the employer; he has simply advanced his own theory. The employer said that the grievor's bargaining agent attempted to establish that the grievor believed that the statements in his advertorial were true. In a case of this nature, the grievor must establish not that he believed that the statements were true but that, in fact they were true.

[63] The grievor provided details of his case in the advertorial. However, part of the advertorial personally attacks persons and organizations, such as federal government ministers and organizations, without evidence.

[64] Furthermore, the advertorial attacks the merit principle. The grievor advanced information about his own case. His attack on the merit principle for the whole of the public service was not supported by the evidence.

[65] The question is the proper legal balance as described as follows at page 2 of *Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455: "Central to this issue was striking an

appropriate balance between the right of the individual to speak freely and the duty of the individual, *qua* public servant, to fulfil his functions properly."

[66] The employer pointed out that the duties of loyalty and restraint in criticism of the employer are important values in the federal public service, as outlined as follows in *Fraser*, at pages 18-20:

> *The federal public service in Canada is part of the executive branch of Government. As such, its fundamental task is to administer and implement policy. In order to do this well, the public service must employ people with certain important characteristics. Knowledge is one, fairness another, integrity a third.*
>
> *As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty is owed 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 which was inconsistent with his duties as an employee of the Government.*
>
> *As the Adjudicator pointed out, there is a powerful reason for this general requirement of loyalty, namely the public interest in both the actual, and apparent, impartiality of the public service. . . .*
>
> . . .
>
> *. . . The tradition emphasizes the characteristics of impartiality, neutrality, fairness and integrity. A person entering the public service or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints. One of the most important of those restraints is to exercise caution when it comes to making criticisms of Government.*

[67] The employer's counsel submitted that it is important to consider the facts of the case and to rely on *Haydon v. Canada (Treasury Board)*, 2004 FC 749, and on Brown and Beatty, *Canadian Labour Arbitration*, 4th Edition, at para 7:3330. It is important to consider the content of the criticism, how confidential and sensitive the

information was, the manner in which the criticism was made public, whether the statements were true or false, the extent to which the employer's reputation was damaged, the impact on the employer's ability to conduct its business, and the public interest in having the information made public. At paragraph 49 of *Haydon*, the Court wrote the following:

> *In light of the above, the following factors are relevant in determining whether or not a public service employee who makes a public criticism breaches his or her duty of loyalty towards the employer: the working level of the employee within the Government hierarchy; the nature and content of the expression; the visibility of the expression; the sensitivity of the issue discussed; the truth of the statement made; the steps taken by the employee to determine the facts before speaking; the efforts made by the employee to raise his or her concerns with the employer; the extent to which the employer's reputation was damaged; and the impact on the employer's ability to conduct business.*

[68] The grievor presented himself as a property manager of some experience with the ability to hire, fire and discipline independent contractors. His position differed from a maintenance-supervision position. It was not a low-level position. In reality, the grievor was employed as a clerk, classified CR-04.

[69] The grievor presented himself as an important person who dealt with expensive public assets and who had to be above reproach.

[70] The grievor published an advertorial. He had other recourse open to him, including the Federal Court, pursuing remedies before the PSC and filing grievances. Further, he could have spoken to Mr. Tétreault about his complaint.

[71] The grievor's language in the advertorial was unacceptable. He referred to an abuse of power by the Minister, which was a severe criticism made without evidence.

[72] The grievor referred in the advertorial to the Ethics Commissioner, the Treasury Board President and the Auditor General as having dropped the ball with respect to his case. No evidence supports that assertion other than that those named persons did not apparently agree with the grievor.

[73] The grievor stated in the advertorial that management abused the competitive staffing process. No proof was included. The Appeal Board decided that there was no case. The grievor did not agree with that decision, but he did not seek its judicial review.

[74] In the advertorial, the grievor stated that he was not content with the certifications that the BOMI provided to another employee. That has nothing to do with the employer. The employer noted that the BOMI apparently investigated and found nothing wrong with the certification that it granted.

[75] The grievor has characterized the employer's actions as a miscarriage of justice, a mockery and a mock court but he did not establish that anything illegal was done and has not established an abuse of power.

[76] This is not a case in which freedom of speech outweighs the duty of good faith or fidelity. There is no issue of life, security or illegality. This case is purely payback or an aggressive attack against the employer. The grievor has not established that his advertorial falls within any of the exceptions set out in *Fraser*.

[77] The grievor engaged in highly visible conduct. He purchased a full page of a national newspaper, which demonstrates that his conduct was intentional.

[78] The grievor attacked federal government institutions or officers in print, without evidence.

[79] The grievor did not determine the facts before he published the advertorial. He was selective and used piecemeal information.

[80] The grievor did not raise his problem with Mr. Tétreault before going to the press.

[81] The advertorial was an attack on the federal government's reputation. It adversely affected its ability to conduct business.

[82] The employer relied on *Stewart v. Canada (Treasury Board)*, PSSRB File No.168-2-108 (19760826). Although a person may call attention to matters of conditions of employment, it is a grave misconduct for a person to publicly attack a minister. It is a breach of the duty of loyalty to make public comments that attribute questionable motives to a minister and his or her department; see *Chopra v. Canada (Treasury Board)*, 2005 FC 958, which upheld 2003 PSSRB 115. The grievor's suggestion that the merit principle is dead is theatrical. It appears that the grievor was interested in criticizing and attacking people because he felt that he suffered an injustice. However, his method was improper and derogatory.

[83] Making remarks that undermine public trust and confidence in public institutions is improper since they damage the employer's reputation; see *Simard v. Canadian Security Intelligence Service*, 2002 PSSRB 52. As in *Simard*, the grievor cannot be characterized as a whistle-blower, since he wrote of his own case and not of a matter of public concern; see *Stenhouse v. Attorney General of Canada*, 2004 FC 375.

[84] An adjudicator can infer negative effects to an employer's reputation from the nature, substance, form and visibility of statements; see *Labadie v. Deputy Head (Correctional Service of Canada)*, 2008 PSLRB 85, at para 221, and *Attorney General of Canada v. Tobin*, 2008 FC 740, at para 50.

[85] In considering the penalty imposed by the employer, it is important to note that the quantum of discipline to impose is not an exact science. There is a range in the case law of 5- to 10-day suspensions for similar circumstances. The employer considered the nature of the offence and the nature of the grievor's position within the public service. It decided that a week without pay was a serious punishment. The employer thought it important to send a clear message. Although an adjudicator has jurisdiction to adjust the penalty, it should be noted that the adjudicator should reduce the penalty only if it is clearly unreasonable or wrong; see *Hogarth v. Treasury Board (Supply and Services)*, PSSRB File No. 166-02-15583 (19870331).

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

[86] In reply to the employer's argument, the grievor stated that his point is not that absolutely no one was appointed by merit but that the merit principle was inconsistently applied and that it was not applied to him.

[87] The grievor stated that, although he was unhappy with the decisions, judicial reviews can be requested of the Federal Court only in particular circumstances. It is a time-consuming and expensive process, and the limited test for a review of patent unreasonableness must be met.

[88] Although the grievor won his battle on paper with the PSC and the employer redid the assessment, it did not have the desired outcome for the grievor. An appeal process has a problem if the employer can simply do it again and get what it wants.

[89] The grievor submitted that he is not asking the adjudicator to review and determine whether the staffing actions were conducted appropriately. However, the

grievor says that, to determine whether the employer should have disciplined him, it is important to consider the truthfulness of the statements in the advertorial. He did what a reasonable person would have done to make someone listen to his evidence.

[90] The employer's reasons for disciplining the grievor are set out in the discipline letter (Exhibit E-2, Tab 3). The employer did not prove that the grievor engaged in the actions set out in that letter.

[91] The grievor stated that the advertorial criticizes the employer and some individuals.

[92] The grievor spent 10 years attempting to redress the situation. He expressed frustration with the staffing processes in his advertorial. He truthfully believes the facts that he alleged in it. He went further in his evidence than he did in the advertorial, as he believes that the manager abused his power in the selection process as the selection board chair and that he advanced the successful applicant's career over the grievor's. He alleged that that conduct was fraudulent.

[93] The grievor used the phrase, "abuse of power." The Minister had the power to take action and conduct an investigation and did not. Ms. MacKenzie and the Minister simply rubber-stamped the employer's position and did not impartially examine the grievor's allegations against the manager. The employer has not significantly challenged the essentials of the case. The grievor published his advertorial because of those essentials.

[94] The grievor did not act recklessly manner; he acted reasonably. He used position titles rather than names for the persons he believed responsible.

[95] The grievor acted on what he believed to be his right to free speech under the *Canadian Charter of Rights and Freedoms*, Part 1 of *The Constitution Act, 1982* ("the *Charter*"). In the hierarchy of law, the *Charter* is at the top.

[96] The advertorial did not affect the grievor's ability to work for the employer.

[97] Furthermore, there is no evidence that the employer's reputation was damaged. The grievor hoped for a storm of public debate, which did not occur. Although four or five employees complained to Mr. Tétreault about the advertorial, it did not generate any comments from the public.

[98] It is clear that no one asked the grievor to retract his comments. The grievor made his criticisms sensitively and did not name names. Public entities or individuals are not entitled to the same degree of privacy as private entities or individuals.

[99] The grievor took all reasonable steps to exhaust internal processes before publicly communicating his concerns in the advertorial. His major point was the RPA designation. He went about it in a logical and orderly manner, which is key to his allegations.

[100] For example, the grievor identified requirements for obtaining the RPA, which are set out in a memo (Exhibit G-10). It becomes clear that the successful applicant in the competition did not have the qualifications when the requirements are considered.

[101] The grievor was not aware that the successful applicant's qualifications were an issue until the employer provided relevant evidence during the first appeal.

[102] A letter from the BOMI clearly indicates that the successful applicant did not have the experience requirements. A form was the only source for the experience requirements. The successful applicant submitted that form, which the manager signed. There should have been an investigation. However, the employer maintained its decision.

[103] Given everything, it is clear that, even when the grievor had collected and presented the information about serious wrongdoing, he could not get anyone within the employer to take his complaint seriously, which is why he went public.

[104] The reason for barring an employee from going public is fairness — the question needs to be asked as to whether the federal government had an opportunity to address the problem. The grievor identified serious misconduct in the selection processes and gave the federal government the opportunity to fix it. Therefore, he was justified in going public.

[105] If the adjudicator finds misconduct by the grievor warranting discipline, the grievor argued that the discipline was excessive in the circumstances. The grievor submitted that he did not name anyone. The grievor stated that a significant power imbalance existed between him and a system that thwarted an investigation of his complaint. There is no evidence that the grievor's conduct affected or impaired his ability to do his job, which is to accept payments.

[106] The grievor relied on *Chopra*, *Labadie*, *Haydon* and *Gendron v. Treasury Board (Department of Canadian Heritage)*, 2006 PSLRB 27. The grievor relied particularly on the analyses in *Gendron* of the duty of loyalty at paragraph 127 and of public servant neutrality at paragraphs 133 to 137.

[107] The grievor requested that the grievance be upheld and that the adjudicator remain seized of the implementation of his decision.

[108] There is no evidence that the advertorial negatively affected the employer's business reputation. The grievor received no negative comments from anyone. No one asked him to retract the advertorial. No evidence demonstrated that his advertorial affected the level of scrutiny on the employer during the Gomery Inquiry. This is simply a case of the employer reacting to the criticisms of an employee.

IV. Reasons

[109] In my view, I must consider the following questions:

1. Did the grievor commit misconduct?

2. Did the grievor's misconduct merit discipline?

3. Was the five-day suspension inordinate in the circumstances? If so, what is the proper discipline?

[110] I have considered each question in turn.

A. Did the grievor commit misconduct?

[111] I am satisfied that the grievor was trained in the *Code* and that he was bound by it. He has a duty to abide by its conditions, which bear repeating:

. . .

> ***Professional Values:*** Serving with competence, excellence, efficiency, objectivity and impartiality.
>
> - *Public servants must work within the laws of Canada and maintain the tradition of the political neutrality of the Public Service.*
>
> . . .

> ***Ethical Values:*** Acting at all times in such a way as to uphold the public trust.
>
> - *Public servants shall perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.*
>
> . . .

[112] To determine whether the grievor engaged in misconduct, it is important to consider freedom of speech and the grievor's duty of loyalty to the employer. Although the employer is entitled to a loyal employee, that entitlement is not absolute. Free speech is also not an absolute right. At paragraph 45 of *Haydon*, the Federal Court set out as follows the nature of the problem:

> *[45] That being said, a balance must be struck between the employee's freedom of expression and the Government's desire to maintain an impartial and effective public service. The common law duty of loyalty is sufficiently precise to constitute a limit "prescribed by law" under section 1 of the Charter. The objective of the duty of loyalty owed by public servants is to promote an impartial and effective public service which is essential to the functioning of a democratic society; therefore, it constitutes a pressing and substantial objective. However, the duty of loyalty does not demand absolute silence from public servants; it encompasses exceptions or qualifications where, for example, the Government is engaged in illegal acts or where its policies jeopardize the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his ability to perform effectively his duties or on the public perception of that ability. The exceptions to the duty of loyalty are in place in order to embrace matters of public concern and to ensure that the duty of loyalty impairs the freedom of expression as little as possible in order to achieve the objective of an impartial and effective public service. . . .*

[113] It is clear that the facts must be analyzed case by case to determine whether the duty of loyalty has been breached, since free speech is also at issue.

[114] This case is not of the whistle-blower type. This case is about how the grievor was treated in a selection process. It does not have any of the elements of urgency, such as illegality or jeopardy to life, health or safety, as set out at page 19 of *Fraser* as follows:

> . . .
>
> *. . . 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. . . .*
>
> . . .

[115] Although the grievor supplied a copy of *Gendron*, his *Charter* argument was not fully developed in this hearing. In *Gendron*, an employee at the Department of Heritage was dismissed because of a refusal to resign from a voluntary position as the president of an organization promoting Quebec sovereignty. The organization had very different aims from Ms. Gendron's employer, which had as its objective advancing Canadian unity. In *Gendron*, it was argued that there was no cause to dismiss the employee and that the punishment was excessive in the circumstances. In that case, the adjudicator applied the *Oakes* test and found that a dismissal from employment was extreme and that it did not permit the employee in that case to exercise the right to free speech.

[116] In *Gendron*, the duty of loyalty was held to be a reasonable limit on the fundamental rights of public servants, as follows:

> . . .
>
> *142. Subject to the exceptions to the duty of loyalty noted in* Fraser, *freedom of expression may be limited only to the extent necessary to pursue the objective of an impartial, effective public service. That said, the limit must be minimal in order to ensure that the right is affected only to the extent necessary.*
>
> *143. Recently, this Board discussed the duty of loyalty in* Haydon v. Treasury Board (Health Canada), *2002 PSSRB 10 and* Chopra v. Treasury Board (Health Canada), *2003 PSSRB 115. In* Haydon v. Canada (Treasury Board), *[2001] 2 F.C. 82 (TD), the Federal Court confirmed at page 110 that:*
>
> > . . . the common law duty of loyalty as articulated in Fraser sufficiently accommodates the freedom of expression as guaranteed by the Charter, and therefore constitutes a reasonable limit within the meaning of section 1 of the Charter.
>
> . . .

[117] Unlike *Gendron*, this grievance is about an advertorial that directly attacked individuals, including the Minister, and that suggested that the Minister had abused his authority. The advertorial also suggested that the Ethics Commissioner, the Treasury

Board President and the Auditor General dropped the ball with respect to the grievor's issues. It also mounts an unfounded attack on the merit principle. Applying *Fraser and Stewart*, it is apparent that alleging unfounded wrongdoing by a Minister is serious misconduct in the form of a breach of loyalty.

[118] In *Haydon*, at paragraph 49, the Federal Court set out the factors relevant when determining whether a public servant who publicly criticizes his or her employer breaches a duty of loyalty. Those factors can be paraphrased as follows:

- the working level of the employee within the government;
- the nature and content of the expression;
- the visibility of the expression;
- the sensitivity of the issue discussed;
- the truth of the statement made;
- the steps taken by the employee to determine the facts before speaking;
- the efforts made by the employee to raise the concerns with the employer;
- the extent to which the employer's reputation was damaged; and
- the impact on the employer's ability to conduct business.

[119] I will now examine some of the factors listed above.

1. <u>The grievor's working level</u>

[120] I note that the advertorial appears to state that the grievor was a property manager, when in fact he was and is a clerk who accepts payments. He notes his professional RPA qualifications under his signature in the advertorial. That tends to lead readers to believe that he held a position of some responsibility. The grievor stated that his position at the lower end of the public service reduced the impact of what he had to say. Therefore, he was entitled to say it. The heart of his advertorial is that, because of misfeasance and lack of application of the merit principle, he was

prevented from obtaining a higher position within the public service. Although he was not in a management position within the employer, the grievor alleged that he was denied opportunities for advancement to management based on merit. Therefore, the nature of his position is critical to the nature of the advertorial.

[121] While the nature of his statements would not ordinarily affect his job duties, which were to accept payments, they affected persons in the workplace. The employer devoted time to investigate and to sort everything out. After publishing his advertorial, the grievor went on leave awaiting an opinion from Health Canada, sought given his conduct at the meeting held after the advertorial was published.

2. <u>The nature and visibility of the advertorial</u>

[122] The nature of this dispute is that the grievor did not accept the employer's hiring decisions. Those decisions were adverse to him, and he considers them unfair and damaging to his career. The decisions were governed by the merit principle and were immune from political meddling. The grievor has attempted to politicize the appointment process by seeking political redress, rather than properly accessing the recourse mechanisms available to him. The advertorial impugns motives to persons or institutions. Some of those individuals had no power to consider his problem, and some had no direct involvement with him. The advertorial also unnecessarily attacks the integrity of officials.

[123] The advertorial is in the form of a letter directed to a retiring Member of Parliament, published days before an election. The grievor must have known that that Member had no ability to assist him. That factor leads me to conclude that the advertorial was an attack rather than a plea for assistance from the grievor, who had exhausted all reasonable options. I accept that the advertorial was not election advertising, as opined in Exhibit G-35, but that does not answer why the advertorial was published when it was published.

[124] The National Post has high visibility. The nature and content of what the grievor expressed in his advertorial is of concern, regardless of his public service position.

3. <u>The sensitivity of the issues raised</u>

[125] The advertorial raises the sensitive issues of abuse of power, lack of integrity and fraud. For example, it refers to the "Bre-X" case, well-known for fraud. Also

sensitive is that it was published when the employer was under scrutiny during the Gomery Inquiry and during the closing days of a federal election campaign. Its allegations are extremely serious and sensitive.

[126] In *Hayden*, the Federal Court suggests that the burden of proof rests on an employee to establish the truthfulness of his or her communications. The grievor alleged that the Minister abused his power and that the Ethics Commissioner, the Treasury Board President and the Auditor General dropped the ball with respect to his case. He alleged that the successful applicant and the manager committed fraud. He also alleged systemic fraud or employer abuse of the appointment process by writing that the merit principle is dead.

[127] I accept that Mr. McLean honestly believes his allegations. I think that he honestly believes that he should have been appointed to the property manager job because he was more qualified than the successful applicant. I accept that he honestly believes that the successful applicant was not qualified and that the BOMI should not have recognized his qualifications.

[128] He believes strongly that the successful applicant committed fraud in obtaining his RPA qualifications and that the supervisor participated in the fraud. Mr. MacLean has gone further than pointing out to the public that he was unsuccessful. He alleged that the employer knew or was wilfully blind to that fraud since it did not pursue an investigation. He suggested improper motives. He suggested that he was targeted and that the employer took steps to have someone other than him appointed to a position, essentially fraudulently.

[129] However, an honest belief is not proof of the facts. The grievor made serious allegations in the advertorial, which must be supported by evidence. The grievor bears the burden of establishing fraud. Although the standard is proof on a balance of probabilities, serious allegations require cogent evidence. There is no cogent proof of the substantial truth of the allegations. I note that he called none of the persons as witnesses whom he alleges acted fraudulently. The employer does not bear that burden. He was unable to offer cogent proof that the successful applicant or the manager committed fraud. For example, he did not tender the qualifications statement, which was how the successful applicant obtained the RPA credentials. Furthermore, it cannot be inferred from the oral testimony or the exhibits that Mr. MacLean demonstrated that the successful applicant's appointment was fraudulently obtained.

Finally, the issue of fraud or favouritism was not raised in any recourse process. At best, the grievor has raised a suspicion as to why the BOMI issued the RPA qualifications.

[130] No evidence was tendered of a systemic problem — a problem beyond Mr. MacLean's personal circumstances — affecting all public servants. Even if Mr. MacLean is correct in his assertion that he was mistreated in a selection process, that does not lead to the conclusion that the merit principle is dead. Such rhetoric tends to bring the public service into disrepute and is an attack.

[131] This is not a case in which an employee visibly criticized federal government policy, such as in *Fraser*, *Chopra* or *Labadie*. The grievor raised an issue about his conditions of employment in the federal public service — particularly his treatment in a merit-based competition. It is not a breach of good faith to bring the facts of an employment-related dispute to the public's attention. I see nothing wrong per se with Mr. MacLean communicating to the public that he was unsuccessful in a selection process. However, it is trite to note that it is a point of little public interest as to whether an applicant is unsuccessful in a public service selection process. What creates an interest, a sensation or a sensitivity are allegations of an abuse of power, a lack of integrity, a fraud and the death of the merit principle.

[132] However, it is clear that employees can be disciplined for what they say about conditions of employment and how they say it. For example, in *Simard*, the employer in that case suspended the grievor for 10 days for statements referring to the workplace as a "rat hole." As pointed out at paragraph 39 of *Stenhouse*, the whistle-blower defence and the right to free speech must be used responsibly and are not a ". . . licence for disgruntled employees to breach their common law duty of loyalty or their oath of secrecy."

4. <u>The efforts made by the grievor to raise the concerns with the employer</u>

[133] In my view, it is reasonable that an employee seeking to publicly criticize a minister exhaust all reasonable alternatives and that the criticisms be tempered and grounded in evidence. However, that criticism still might not be supportable unless it falls within the exceptions laid out in *Fraser*. The grievor has repeatedly stated that he exhausted all avenues. It is clear that he has gone to great steps to involve others in his

cause, such as his Member of Parliament, the Opposition House Leader, the Opposition Leader, the Auditor General and the Integrity Officer.

[134] The grievor's statement that he exhausted all avenues is not accurate. That statement would lead any reasonable person to conclude that something was very wrong with federal government institutions in general and with the Minister in particular. A reader might have come to a very different conclusion had the grievor fully disclosed the truth about the actions that he did not pursue. He did not exhaust all the avenues that might have meaningfully affected the outcome of his grievances. I note that, in particular, he did not pursue appeals, grievances or judicial review applications. He had access to those procedures. In particular, in his several appeals, he never advanced favouritism as a reason he was not appointed. He never formally advanced the fraudulent obtaining of qualifications as a ground for review. He did not seek a review of his grievance about the appointment of the successful applicant in Federal Court or before the Public Service Staff Relations Board. He did not seek a Federal Court review of the PSC's report.

[135] The publication of the advertorial, without evidence supporting all its statements, is a breach of the grievor's duty of good faith to the employer. In particular, I find that he cast too large a net in his assertions of wrongdoing and that he did not adduce evidence supporting his allegation of wrongdoing. In my view, he should have properly exhausted all internal recourse available to him. Failing to file an appeal of a hiring decision and then suggesting that the system is corrupt and that the Minister abused his authority tends to undermine public confidence in the federal government as an employer.

5. The impact on the employer's ability to conduct its business

[136] There is no evidence that the grievor's statements had much of an impact on the employer's business. It appears that the grievor was not successful in galvanizing public support for his cause. Mr. Tétreault suggested that some employees were upset. However, the issue consumed some resources in that meetings were called. Therefore, it can be inferred that it had some effect, which is sufficient for a finding that there was interference in the employer's ability to conduct its business.

6. The employer's business reputation

[137] In my view, the fact that the grievor published his advertorial raises an issue of the public perception of his ability to carry out his duties, as public service employees are expected not to publicly criticize a minister or to impugn the motives of public individuals or organizations. From the nature, substance, form and visibility of the statements in the advertorial, I infer damage to the reputations of the employer and the Minister.

[138] Unlike in *Gendron*, *Fraser and Haydon,* this grievance is about an advertorial that directly attacked individuals, including the Minister, and that suggested that the Minister abused his authority. The advertorial also suggested that the Ethics Commissioner, the Treasury Board President and the Auditor General dropped the ball with respect to the grievor's case. It also mounts an unfounded attack on the merit principle. Applying *Fraser and Stewart*, it is apparent that alleging unfounded wrongdoing by a minister is serious misconduct in the form of a breach of loyalty.

[139] I am not satisfied that publishing the advertorial is a protected right of free speech under the *Charter*. I am satisfied that it is a reasonable limit on the right of free speech that an employee not make allegations that there was abuse of power, that the merit principle is dead in selection processes and that the Ethics Commissioner, the Treasury Board President and the Auditor General dropped the ball, without a factual basis, provable on a balance of probabilities. The grievor put his personal interest in pursuing his employment dispute ahead of the public interest. Therefore, I conclude that the employer has proven on a balance of probabilities that Mr. MacLean engaged in misconduct. In my view, the fact that the grievor was unsuccessful in causing much damage is just one factor, and not the sole factor. In my view, it is more important that the issues were sensitive, raised visibly and not truthful.

B. <u>Did the grievor's misconduct merit discipline?</u>

[140] The full-page advertorial appeared on page 2 of a national newspaper and attacked public individuals and institutions. In my view, as drafted it would tend to bring unwanted, unwarranted and unfair attention to certain individuals. In particular, the grievor alleged that the Minister abused his power and that the Ethics Commissioner, the Treasury Board President and the Auditor General dropped the ball with respect to his case. The grievor alleged that the merit principle was dead. Without using the word "fraud," the grievor implied that the appointment of the successful applicant and the employer's failure to investigate were fraudulent. He alleges that the

merit principle was not upheld, but he failed to take reasonable steps, including failing to appeal the results of the selection process. In my view, his conduct deserved discipline. Although Mr. MacLean's actions were unusual and unprecedented, it was a deliberate and unwarranted attack. I note that the grievor's conduct was not in keeping with what would ordinarily be expected of public servants. Mr. Tétreault's comment that he was astonished by the publication of the advertorial is well founded. I note the following comments from paragraph 43 of *Fraser* on the notion of restraint:

> *There is in Canada, in my opinion, a similar tradition surrounding our public service. The tradition emphasizes the characteristics of impartiality, neutrality, fairness and integrity. A person entering the public service or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints. One of the most important of those restraints is to exercise caution when it comes to making criticisms of the Government.*

[141] Cases such as *Chopra* (see paragraph 44 of that decision) make it clear that, even if an employee exhausts internal recourses before going public, certain communications may still breach the duty of loyalty, if they attribute inappropriate motives to a minister and his or her department.

[142] In my view, the employer has proven grounds to discipline the grievor for misconduct.

C. Was the five-day suspension inordinate in the circumstances? If so, what is the proper discipline?

[143] The only mitigating factors in this case are the grievor's good work record and his long service, which are important. The grievor was not a new employee; he had many years of public service. His comments were not off the cuff or made in the heat of the moment. The grievor's conduct was premeditated because he drafted the advertorial, consulted a media lawyer who suggested that it be toned down and who arranged for its publication. His actions were deliberate. He had opportunities to desist. I note that Elections Canada did not consider that the advertorial violated the *Elections Act*, S.C. 2000, c. 9. In my view, the timing of the publication is also evidence of premeditation as it has occurred when the grievor hoped that it would have the most impact. One would have expected more cautious and restrained conduct by the grievor, given his lengthy public service employment.

[144] In *Gendron,* the adjudicator applied a *Charter* analysis in considering whether the discipline imposed in that case was excessive because the employer applied the ultimate sanction of dismissal in a case involving freedom of expression. In *Gendron*, termination was not a sufficiently nuanced employer response in a case where a grievor was terminated for exercising freedoms protected under the *Charter*. Other less-draconian solutions would have eliminated the conflict between Ms. Gendron and her employer.

[145] In *Labadie*, the PSLRB upheld a termination in which the grievor in that case wrote about the employer. In this case, there is a degree of deliberateness, as writing the advertorial involved drafting a letter and submitting it to a media lawyer for scrutiny before submitting it along with payment to the newspaper. The advertorial referred to a minister as having abused his power in the context of the ongoing Gomery Inquiry and during an election campaign, which can be viewed as a deliberate act.

[146] The grievor used a very visible forum to make critical and unsupported statements about the Minister and about others. The employer's suspension of the grievor was a nuanced response, which took into account the circumstances of the grievor and the circumstances of the misconduct. In cases such as this, it is also important to consider deterrence, both to the grievor and to other like-minded persons. A balanced approach or a measured employer response would deter Mr. MacLean and other like-minded persons from participating in similar activities. Imposing discipline is not an exact science. The discipline imposed does not appear to have been excessive or unreasonable given the circumstances of this case.

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

(*The Order appears on the next page*)

V. Order

[148] The grievance is dismissed.

April 04, 2011

Paul Love,
adjudicator