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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

MICHEL SIMARD

Grievor

and

CANADIAN SECURITY INTELLIGENCE SERVICE

Employer



Before: Guy Giguère, Deputy Chairperson

For the Grievor: Jacques Béland, Counsel

For the Employer: Gérard Normand, Counsel

Heard at Ottawa, June 21 and 22, 2001,
at Montreal from October 29 to 31, 2002, and at Ottawa, February 26, 2002;
written submissions filed on March 12, 2002.

DECISION

[1] Michel Simard, an analyst at the Canadian Security Intelligence Service (CSIS), filed a grievance on October 10, 2000 against a two-week suspension without pay he received on September 12, 2000. Mr. Simard explained in his grievance that a *Globe and Mail* journalist had tricked him into making some statements and that he should not be penalized for what the journalist wrote. Mr. Simard stated that, subsequently, he was not allowed to perform his work for several months, that he was denied access to his office and that his employer treated him like an outcast. For these reasons, he requested that the disciplinary measure be removed and that he be reimbursed his salary and all other benefits of which he was deprived as a result.

[2] His grievance was dismissed at the two levels of the grievance procedure because the employer found that the 10-day suspension without pay was justified. The grievance was referred to adjudication and is the subject of this decision.

Summary of Relevant Facts

[3] Mr. Simard began work with the Security Service of the Royal Canadian Mounted Police (RCMP) in 1969, which following the recommendations of the MacDonald Report became the Canadian Security Intelligence Service in 1984. He was transferred to CSIS.

[4] Mr. Simard explained that, when the RCMP officers were transferred to the CSIS, they were told that they would not lose pay or benefits as a result of the transfer. He stated that, in the late 80s, following a tribunal decision, RCMP officers received a bilingualism bonus. For a short period the employees of the CSIS received this bonus and a certain amount covering interest, but after that they no longer received the bonus. Several officers, including Mr. Simard, were dissatisfied as they did not receive the same benefits that they would have received had they remained with the RCMP and they decided to form a group called "XMP" in order to seek legal action against the employer for compensation. The XMP group was subsequently incorporated and Mr. Simard is one of three directors.

[5] In October 1999, documents related to the CSIS were stolen from a car in Toronto. Several articles appeared in the *Globe and Mail* about this incident, which led the employer to issue two directions regarding personnel communications with the media. The first direction was issued by E. J. Corcoran, Deputy Director of the CSIS and is dated November 16, 1999.

In the English version, Mr. Corcoran specified:

...

As you are aware, the events surrounding the loss of a Service document were the subject of extensive media reporting in the last few days. We are also aware that the media has confirmed the identity of certain Service employees and their alleged involvement in this matter, although employee identities have not yet been made public. In light of the above the Service has commenced an internal investigation as it appears some of the information that is now in the public domain could only have originated from within the Service. In particular the identity of Service employees. I WISH TO REMIND YOU THAT ALL RELATED MEDIA INQUIRIES ARE TO BE REFERRED TO COMMUNICATIONS BRANCH INCLUDING THOSE RECEIVED BY EMPLOYEES AT HOME. As well employees should remain cognisant of their obligations under the CSIS Act and other related Service policies and procedures. I thank you for your cooperation in this matter.

...

[The passage in capital appears as such in the original]

In French, he wrote:

...

Comme vous le savez sans doute, les événements entourant la perte de documents du SCRS ont fait l'objet d'une vaste couverture médiatique au cours des derniers jours. Les médias ont aussi confirmé l'identité de certains employés du Service et leur implication présumée dans cette affaire, malgré le fait que leurs noms n'avaient pas encore été communiqués. À la lumière de ce qui précède et puisqu'il semble qu'une partie de l'information rendue publique ne peut provenir que d'ici, tout particulièrement les noms des employés en question, le Service a entamé une enquête interne. JE DÉSIRE VOUS RAPPELER QUE VOUS DEVEZ DIRE AUX JOURNALISTES QUI VOUDRONT VOUS POSER DES QUESTIONS, MÊME À VOTRE DOMICILE, DE S'ADRESSER À LA DIRECTION DES COMMUNICATIONS. De plus, les employés doivent connaître leurs obligations en vertu des politiques, des procédures et de la Loi sur le SCRS. Merci de votre collaboration.

...

[The passage in capitals appears as such in the original]

[6] On November 24, 1999, T.J. Bradley, Assistant Director, Secretariat, wrote a memorandum to all employees indicating that *Globe and Mail* journalists had tried to circumvent Mr. Corcoran's direction regarding requests for information from journalists. The memorandum specified that, if a journalist called an employee at work or at home, the employee was not to answer any questions but to refer the journalist to a CSIS spokesperson.

[7] On April 10, 2000, upon returning from an annual holiday in Florida, Mr. Simard received a call around 6:00 p.m. from Andrew Mitrovica, a *Globe and Mail* journalist. Mr. Simard testified that Mr. Mitrovica began the conversation by saying that he wanted to speak to him about the CSIS and the recent leaking of CSIS information. Mr. Simard told him that he did not want to talk about CSIS operations, his work or other employees.

[8] Mr. Mitrovica told him that he had learned about the XMP group and had found Mr. Simard's name on the group's incorporation papers at Industry Canada. Mr. Simard described to Mr. Mitrovica the background of the XMP group's claim. Under cross-examination, Mr. Simard explained that he had agreed to talk about the XMP group with Mr. Mitrovica because he felt that these details were public and Mr. Mitrovica wanted to confirm the information with him.

[9] Mr. Simard stated that he is bilingual but that the interview took place in English and that he was less familiar with some English expressions. He was thrown off-balance by the journalist's call and, at some point during the interview, he used the expression "rat hole", which he said he was not very familiar with. Mr. Simard explained, under cross-examination, that the subject of the XMP group was very emotional for him and that in speaking with Mr. Mitrovica he lost his temper and started speaking without thinking first.

[10] The following day, April 11, 2000, Mr. Simard went to the Internal Security Branch to report that he had been contacted by journalist Andrew Mitrovica. He met with an investigator and told him he was unhappy with the situation because he was not looking for publicity around the claims of the XMP group. He then met with AB, Chief of Personnel Security.

[11] AB asked Mr. Simard if he had given the journalist information about the CSIS' internal operations or affairs. Mr. Simard said he had not, but that he had provided

information on the XMP group. Mr. Simard said that he told Mr. Mitrovica that he would have to draw his own conclusions about the morale of the CSIS given that 120 employees had joined the XMP group.

[12] Mr. Simard testified that he told AB that he had been careful but that the incorporation of the XMP group was public and that a legal suit would be filed. He also told AB that he would cooperate with the Internal Security Branch on this matter.

[13] AB informed Mr. Simard that Rick Bennett, Assistant Director, Corporate, at the time, would be informed of their conversation. AB suggested to Mr. Simard that he apprise his director general of the interview with Mr. Mitrovica.

[14] Acting on AB's suggestion, Mr. Simard met the same day with CD, the then Acting Director General, Counter-Terrorism Section. Mr. Simard told him of the telephone conversation that he had had with Mr. Mitrovica on April 10, 2000. Mr. Simard explained that the questions related to the XMP group. Mr. Simard also stated that Mr. Mitrovica had asked him questions about the morale of the CSIS employees and that he had answered that 120 employees had joined the XMP group and that Mr. Mitrovica could draw his own conclusions.

[15] CD testified that he was not particularly concerned at that time because although there were clear directions from Mr. Corcoran and Mr. Bradley on contact with the media, nothing had happened. Under cross-examination, CD explained that he did not discuss the directions on communication with the media from Mr. Corcoran and Mr. Bradley with Mr. Simard on April 11, 2000. CD stated in his testimony:

It was not a concern for me that Michel Simard talked to a journalist about the XMP issue. No concern from policy side, no concern in respect to conduct.

[16] Mr. Mitrovica called Mr. Simard on April 11, 2000, in the evening, to ask him if he would send a photograph because he wanted to publish a picture of him. Mr. Simard refused and told him not to call him again.

[17] On April 12, 2000, the *Globe and Mail* published a front-page article entitled "Canadian Spies Revolt Over Wages". This article was the result of Mr. Mitrovica's conversation with Mr. Simard.

[18] *CD* explained that he read this article early in the morning at home and considered it to be extremely critical of the CSIS. The article troubled him and Mr. Simard had disappointed him. After consulting with the CSIS' Director General, Staff Relations, he concluded that Mr. Simard had failed to comply with the directions on media relations. He asked *EF*, from the CSIS, to investigate this matter.

[19] Mr. Simard explained under cross-examination that when he read the April 12, 2000 article he felt that Mr. Mitrovica had exaggerated and that he had added facts that Mr. Simard had never discussed with him. Mr. Simard testified that he was embarrassed when he read it as he felt he was linked in some way with the leaking of CSIS information.

[20] Mr. Simard stated that the conflict between the employer and the XMP employees had never made any public waves. He was embarrassed to have been the one to expose it publicly, even if it was inevitable. He explained that none of his comments had been intended to discredit the CSIS. Mr. Simard testified that he regretted that his statements had caused damage to the CSIS' image. However, he believed that his statements as published in Mr. Mitrovica's article did less to damage the CSIS' image than the information that had been published previously. Mr. Simard testified that, had he had an opportunity to read the article before it was published, he would have asked Mr. Mitrovica not to publish it, and that he regretted having spoken to him.

[21] Mr. Simard met with *AB* on the morning of April 12, 2000 to tell him that Mr. Mitrovica had called him the night before to get a picture of him and that he had refused. *AB* asked Mr. Simard if Mr. Mitrovica had correctly quoted him in his article and Mr. Simard responded affirmatively.

[22] On the morning of April 13, 2000, *CD* met with Mr. Simard to inform him that what he had told Mr. Mitrovica was misconduct and that he had violated the CSIS' Conduct policy. He gave him a memorandum that specified the allegations against him. In this memorandum, *CD* indicated that:

[Translation]

... More specifically, it is alleged that you violated the CSIS' policy on Conduct (HUM-201), articles 3.3 (Integrity), 3.4

(Compliance with Directions), and 3.5 (Outside Activities) by making misleading and/or inaccurate statements outside CSIS regarding administrative matters of the Service that are likely to unfairly and unnecessarily discredit the Service or damage its reputation, and that you took this action in spite of the direction from the Director (Acting) and that of the ADS published on the RHS on 99-11-16, which stated that all media inquiries should be referred to the Communications Branch, even requests received at employees' homes.

In accordance with the policy on Breaches of Conduct (HUM-205), I am appointing EF to investigate the stated allegations. EF will contact you shortly to begin the investigation.

You will be informed of the findings when the investigation has been completed and you will have an opportunity to present any extenuating circumstances within the prescribed period, that is, 10 working days following receipt of the investigation's findings. You will also have an opportunity to consult with a representative of the employees' association during the process.

[23] Mr. Simard was very upset by this meeting but returned to his office to continue his work. EF then called him and Mr. Simard told him that he wanted to consult with an employees' association representative before talking and he would call him back.

[24] CD explained that Mr. Simard's supervisor was about to go on leave and that he had made arrangements for Mr. Simard to replace his supervisor on an acting basis.

[25] Around noon on April 13, 2000, CD received a telephone call from GH, who wanted to know if it was the same Michel Simard quoted in the recent newspaper articles who would be replacing the supervisor. CD explained that it was then that he realized the full impact of Mr. Simard's statements to the media. He decided at that time that Mr. Simard's presence in the workplace was counter-productive and interfered with the effective operation of the CSIS.

[26] After consulting with the Staff Relations Branch, CD decided that Mr. Simard would be placed on special leave during the investigation. CD called Mr. Simard to his office and explained the reasons why he was asking him to take special leave: Mr. Simard had violated the CSIS' policy; his ongoing presence interfered with the

effective operations of his branch. CD gave Mr. Simard a memorandum in which he stated:

[Translation]

...

This memorandum is further to our meeting this morning in which I informed you in writing that an investigation would be initiated following allegations of misconduct on your part. I am hereby informing you that you will be on special leave during that investigation.

In accordance with the CSIS' policy on Breaches of Conduct and Discipline (HUM 205), you will be informed of the findings of the investigation as soon as possible.

Note that for the duration of this special leave, you will still be required to comply with the policies, procedures and directions of the CSIS.

...

[27] Mr. Simard was devastated to find himself suspended from his duties. He reiterated to CD that he was extremely disappointed by the way the CSIS was treating him.

[28] CD indicated to Mr. Simard that he was to leave the office and take his personal belongings. CD expected a timely resolution of the matter. He explained that he had respect for Mr. Simard's service record and that he wanted him to leave the office with dignity. Mr. Simard no longer had access to his office or the CSIS security room, but only to the interview room. His security clearance was maintained during this special leave as were his salary and benefits.

[29] Mr. Simard testified that his suspension by the employer from his duties was very difficult for him and that he felt rejected by the employer when he had given his life to the CSIS. He was treated like an outcast when he contacted some colleagues during his suspension. His colleagues told him that they did not want to speak with him. One individual even told him he was considered a threat by the CSIS and preferred to have no further contact with him.

[30] On Tuesday, April 18, 2000, EF contacted Mr. Simard to meet with him. Mr. Simard told him that he wanted some information from his representative first.

[31] On April 26, 2000, Mr. Simard's representative wrote to *CD* indicating that Mr. Simard wanted an answer to some questions before meeting with *EF*. He indicated that Mr. Simard wanted to know the status of his security clearance during the special leave. Moreover, Mr. Simard wanted written explanations of the reasons why he was placed on special leave.

[32] On April 27, 2000, *CD* replied to Mr. Simard's representative that Mr. Simard's security clearance was unchanged and that the correspondence given to Mr. Simard on April 13, 2000 explained the entire situation.

[33] *EF* called Mr. Simard again at the beginning of May 2000 and they met on May 5, 2000 with his representative. Mr. Simard testified that he was responsible for the delay at the start of the investigation because he wanted clarification of certain information before meeting with *EF*. During this meeting, Mr. Simard asked *EF* for a copy of his draft report in order to be able to respond. There was a further meeting on June 13, 2000 between *EF*, Mr. Simard and his representative.

[34] Mr. Simard testified that the meeting on June 13, 2000 lasted about half an hour and he was able to read *EF*'s draft report at that time.

[35] Under cross-examination, *EF* testified that he apologized to Mr. Simard for the delay in holding the meeting and that Mr. Simard had told him that he was retiring in September 2001 and that [Translation] "if the CSIS wants to keep me on leave until then, I have no problem with that".

[36] On June 22, 2000, *EF* submitted his investigation report to the CSIS. *EF*'s report was submitted to the Director General, Staff Relations, because disciplinary matters fall under his jurisdiction. *EF* concluded in his report that Mr. Simard had violated the CSIS' policy on contact with the media when he spoke with Mr. Mitrovica because it was impossible to talk about the XMP group without talking about the CSIS. *EF* noted that Mr. Simard acknowledged describing the CSIS as a "rat hole" although he had actually wanted to describe it as a "rat race". Mr. Simard denied telling the journalist that CSIS managers did not know what was going on in the Service and that new recruits were afraid to show their support for the XMP group. Rather, Mr. Simard said, in response to a question from Mr. Mitrovica, that Mr. Corcoran might not have been aware of everything that was going on at CSIS and that if 120 people had decided to join the XMP group to sue the Service, Mr. Mitrovica could draw his own conclusions about the

morale of employees. *EF* concluded that these comments by Mr. Simard regarding morale at CSIS constituted a breach of conduct, that Mr. Simard's statements could only embarrass the CSIS and undermine the trust that the Service required to effectively fulfil its mandate.

[37] Mr. Simard admitted telling the journalist that members of the XMP group felt threatened by the employer and that management wanted employees to keep quiet and not take the Service to court. Mr. Simard explained to *EF* that there was a perception of threat because he had been warned not to use his e-mail for XMP group activities. Further, Mr. Simard was questioned in connection with the investigation of the loss of the Service's documents in the fall of 1999. *EF* found that Mr. Simard's statements to Mr. Mitrovica were misleading because they were not supported by facts that constituted either verbal or physical threats.

[38] *EF* reported that no operational matters had been disclosed, Mr. Simard did not intend to talk about the Service when he spoke about the XMP group, and there were extenuating circumstances surrounding the breach of the directions.

[39] At the end of April 2000, *KL* replaced *CD* as Director General, Counter-Terrorism. He spoke with *EF* in early June 2000 to find out the status of the Simard investigation because he felt it was taking a long time. *KL* explained that he received the report from *EF* in mid-July when he returned from holidays.

[40] On July 20, 2000, *KL* wrote to Mr. Simard that he had recently received *EF*'s report and that *EF* had concluded that Mr. Simard had violated the CSIS' Conduct policy (HUM-201). *KL* asked Mr. Simard to provide his comments on the report within 10 days of receipt of the memo. *KL* informed him that he would decide on the appropriate administrative measure given the circumstance once he had received Mr. Simard's comments.

[41] On July 28, 2000, Mr. Simard sent a memo to the Director General, Staff Relations, to ask for an extension of the 10-day period given by *KL* in his memo dated July 20, 2000. Mr. Simard explained that he did not have a copy of *EF*'s investigation report. He had had to make a request under the *Access to Information Act* to obtain all documents related to the investigation, which meant it would take longer to reply to *KL*.

[42] On August 3, 2000, the Director General, Staff Relations, wrote to Mr. Simard giving him 10 working days once he had received the documents requested under the *Access to Information Act*.

[43] On August 29, 2000, Mr. Simard wrote to the Director General, Staff Relations, in response to *KL's* July 20, 2000 memo. In his reply, Mr. Simard stated that the circumstances that led him to speak to the journalist were beyond his control and that the sole purpose of the XMP group is to submit the claim of its 120 members to the Federal Court. Mr. Simard explained that he saw the directions from Mr. Corcoran and Mr. Bradley as to relate solely to the disappearance of the classified documents and therefore could not apply to his comments on the lawsuit by the XMP group. As for his comments to the journalist on the Service's morale and the threats against members of the XMP group, Mr. Simard indicated that it was a matter of perception and interpretation. Lastly, Mr. Simard stated that the exceptional measure taken against him was out of proportion to the incident.

[44] On September 12, 2000, *KL* wrote to Mr. Simard suspending him for 10 days without pay as of September 18, 2000. He asked Mr. Simard to report to his office on October 2, 2000 to resume his duties. *KL* explained the reasons for the suspension as follows:

[Translation]

...

As previously mentioned, it has been determined that you violated the Service's policy on Conduct, and more specifically, the sections relating to Integrity, Compliance with Directions and Outside Activities.

I have fully reviewed all of the facts and extenuating circumstances in this case. I find unacceptable your view of the directions from Mr. Corcoran and Mr. Bradley, which clearly stipulated that employees were to refer all media inquiries to the Communications Branch. Further, although it was not your intention, the misleading and/or inaccurate statements that you made to the journalist definitely discredited the Service unfairly and damaged its reputation. I find it inconceivable that an employee with your work experience did not realize that it was practically impossible to discuss the actions of the XMPs without discussing administrative matters of the Service. Lastly, I am concerned by the fact that you do not appear to accept the investigation findings.

[45] Under cross-examination, *KL* stated that the fact that Mr. Simard spoke about the XMP group to the journalist did not violate the CSIS' rules. However, what Mr. Simard did not consider was that [translation] "talking about the XMPs would lead to talking about administrative issues, especially with an experienced journalist".

[46] On October 10, 2000, Mr. Simard filed a grievance against the 10-day suspension imposed by *KL* on September 12, 2000. He indicated that, in reality, the *Globe and Mail* journalist had tricked him into making statements that he did not want to make and he should not be penalized because of the journalist's actions and writings, which he did not control. He added that the events that he had been subject to since the start of this whole matter were ample punishment. He had been prevented from performing his work for several months, denied access to his office and felt that the employer had treated him as an outcast.

[47] Upon his return to work, he discovered that his duties had not been continued in his absence and had been completely neglected. His immediate colleagues, his supervisor and management ignored him; he felt completely left out. In the following months, he celebrated 35 years of service. He was invited by the Staff Relations Branch to a ceremony honouring the long service of employees with other colleagues. Two days before the ceremony, he was informed by an employee of the Staff Relations Branch that he was no longer invited. One month after his return, his office was changed and he was placed in the former office of his section chief's secretary. It was an office containing the section's printer where 25 to 30 employees came to get their copies and were constantly entering his office. He felt that this was a way of making him an example for other employees. He consulted the Employee Assistance Program and then saw a physician; he was placed on sick leave because of stress. This leave extended from January 16 to October 18, 2001; he retired on October 19, 2001.

[48] Mr. Simard stated that after speaking to Mr. Mitrovica, he felt ashamed of having made the statements that he did. Mr. Simard testified that he would no longer do this and that he certainly regretted what had happened.

ArgumentsFor the Employer

[49] Mr. Normand argued that Mr. Simard acknowledged making statements that damaged the reputation of the CSIS. However, Mr. Simard justified his comments by saying that they did less harm to the Service's image than the previous articles by Mr. Mitrovica. Further, Mr. Simard stated that the journalist had tricked him into making some statements upon his return from holidays. Mr. Normand argued that given Mr. Simard's calm and stoic nature and his experience, he could not have been deceived. Mr. Simard could have discontinued the conversation with Mr. Mitrovica by saying that he was just returning from holidays. Moreover, he never asked Mr. Mitrovica not to publish the article nor even sent a letter asking for a retraction.

[50] Mr. Normand submitted that an employee has an obligation not to discredit his employer. This is not a case of whistleblowing because it is not a matter of the public interest. It will be up to the courts to determine the merit of the claims of the XMP group. On this basis, the XMP group's claim cannot damage the Service's image and Mr. Normand argued that the only conclusion was that Mr. Simard was trying to harm his employer.

[51] Mr. Normand argued that the CSIS was an agency with a unique mandate and that it was very important to keep the public's trust in the Service. In addition, Mr. Simard was aware of the context and there had been several articles published by this journalist. In Mr. Mitrovica's article, Mr. Simard is described as an experienced investigator, which only added credibility to his comments.

[52] For these reasons, Mr. Normand argued that the 10-day suspension without pay was fully justified. He therefore asked that Mr. Simard's grievance be dismissed.

[53] In support of his decision, Mr. Normand referred to the following Board decisions: *Stewart* (166-2-2000); *Stewart* (168-2-108); *Goyette* (166-2-2914 and 2915); *Trevena* (166-2-27769) and *Vaillancourt* (166-2-710 to 716). Mr. Normand did not have copies of these decisions with him at the hearing on February 26, 2002 and was authorized to send them in the following days. Further, it was agreed that Mr. Béland could send his written comments on the employer's case law in the days following receipt.

For the Grievor

[54] Mr. Béland stated that Mr. Simard was suspended for the reasons set out in *KL*'s letter of September 12, 2000. *KL* explained in that letter that he found unacceptable Mr. Simard's view of the directions from Messrs. Corcoran and Bradley stating that all media inquiries should be referred to the Communications Branch.

[55] Mr. Béland argued that these directions applied only in the context of the disappearance of the CSIS' documents, which received media coverage in October 1999, as indicated in Mr. Corcoran's direction and according to the actual wording of the direction. Moreover, when *CD* met with Mr. Simard on April 11, 2000, he did not reprimand Mr. Simard; he asked to be informed of any development but he did not tell Mr. Simard that the direction had been violated or that there was a direction preventing him from speaking to Mr. Mitrovica. The same thing occurred when Mr. Simard met with *AB*. In addition, during his testimony, *KL* stated that Mr. Simard could speak about matters relating to the XMP group with journalists. Therefore, it is not appropriate to mention a violation of the directions in question in the disciplinary letter.

[56] The employer reprimanded Mr. Simard for damaging the Service's reputation but, according to Mr. Béland, there was no evidence submitted on this fact. Indeed, *KL* acknowledged in his letter of September 12, 2000 that Mr. Simard did not mean to discredit the Service or damage its reputation by his comments. Mr. Béland argued that the evidence showed that Mr. Simard acted in his capacity as a representative of a group of employees - XMP - and that, in that capacity, he should have some immunity for his comments to the media.

[57] Mr. Béland submitted that the fact that it was Mr. Mitrovica who called Mr. Simard when the latter was returning from holidays should be considered. Mr. Simard then alerted the employer to what had occurred; he did not hide from *AB* that he had spoken to Mr. Mitrovica about the morale of the employees of the XMP group.

[58] Following the April 12, 2000 article, Mr. Simard was not immediately suspended from his duties by *CD*. On the morning of April 13, 2000, *CD* met with Mr. Simard and told him there would be an investigation but Mr. Simard returned to his duties afterwards. It was not until *CD* spoke with *GH* that Mr. Simard was suspended.

Mr. Simard did not work with *GH* as part of his regular duties; management of the unit could therefore have been transferred to someone else and Mr. Simard could have continued to perform his duties.

[59] Mr. Béland argued that the employer used the terms "special leave" or "administrative leave" to describe Mr. Simard's suspension with pay during the investigation. However, according to the wording of section 11 of the Service's policies and procedures (HUM-205), it is actually a "temporary dismissal" with pay while awaiting the results of the investigation. Mr. Béland stated that the suspension with pay is a disciplinary measure. Mr. Simard was forced out of his office and no longer had access to his telephone or the computer system. Mr. Simard was treated like an outcast by the employer in order to serve as an example to other employees. Mr. Béland submitted that the suspension with pay lasted five months, which, in his view, is a denial of justice. In his letter to Mr. Simard, dated April 13, 2000, *CD* indicated that Mr. Simard was on special leave for the duration of the investigation only. When the investigation report was filed on June 22, 2000, Mr. Simard could easily have resumed his duties.

[60] Mr. Béland argued that the employer should have considered the following elements when determining the severity of the disciplinary action: Mr. Simard has no disciplinary record; he has always had excellent service records; it was the first breach of conduct alleged by the employer in 35 years of service; Mr. Simard acted spontaneously to Mr. Mitrovica's provocation when he had just come back from holidays and he was tricked into making some statements he did not want to make; this breach of conduct was a spontaneous reaction when Mr. Simard let his emotions get the better of him while talking about the XMP group's situation; the disciplinary measure has a financial impact on Mr. Simard; Mr. Simard regretted his conversations with Mr. Mitrovica and the next day he took steps to alert the employer; this attitude showed Mr. Simard's regret even if he never told his employer that he regretted his comments.

[61] Mr. Béland argued that the disciplinary measure was disproportional to the offence. He therefore requested that Mr. Simard's grievance be allowed and that he be reimbursed his wages and benefits.

[62] In support of his arguments, Mr. Béland referred to the following cases: *International Association of Machinists and Aerospace Workers, Lodge 1148 v. Frigidaire Canada (Assomption plant)*, [1997] T.A. 292; *Gilmour v. Canada*, Federal Court Trial Division, T-1883-95 (November 17, 2000); *Matthews* (Board file no. 166-20-27336); *Canada (Attorney General) v. Matthews*, Federal Court Trial Division T-618-97 (December 8, 1997); *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Chopra*, 2001 PSSRB 23 (166-2-29385); *Stevenson v. Canadian Security Intelligence Service*, (2001) D.T. 16/01.

[63] On March 12, 2002, Mr. Béland submitted a written response to the case law referred to by Mr. Normand at the hearing. Mr. Béland informed the Board that he had given a copy to Mr. Normand.

Reply of the Employer

[64] Mr. Normand submitted that the delays in delivering the investigation report and imposing the 10-day suspension are not solely attributable to the Service. Throughout the process, Mr. Simard asked for time to obtain certain information. Mr. Normand stated that, in the employer's view, the length of the investigation included the period after the submission of the investigation report up to the disciplinary measure.

Reasons for Decision

[65] The reasons given by the employer for suspending Mr. Simard for 10 days without pay are found in *KL's* letter dated September 12, 2000. *KL* began his letter by reprimanding Mr. Simard for his interpretation of the directions from Mr. Corcoran and Mr. Bradley, which state that all media inquiries must be directed to the Communications Branch.

[66] However, based on the testimony of *CD* and *KL*, it appears that the Service believed that Mr. Simard could speak to a journalist about the XMP group and the legal action he was preparing to take against the Service. Moreover, a reading of the English version of Mr. Corcoran's direction shows that it is media inquiries related to the loss of the Service's documents that must be referred to the Communications Branch. Mr. Corcoran wrote as follows in the direction dated November 16, 1999:

As you are aware, the events surrounding the loss of a Service document were the subject of extensive media reporting in the last few days [...] I WISH TO REMIND YOU THAT ALL RELATED MEDIA INQUIRIES ARE TO BE REFERRED TO COMMUNICATIONS BRANCH INCLUDING THOSE RECEIVED BY EMPLOYEES AT HOME [...]

...

[The passage in capitals appeared as such in the original]

[Underlining added]

[67] Moreover, *KL* referred to the sections of the Service's Conduct policy on Integrity and Outside Activities and indicated in the letter that Mr. Simard, although it was not his intention, made misleading and/or inaccurate statements to a journalist that discredited unfairly the Service and damaged its reputation. *KL* added that Mr. Simard should have realized that it was practically impossible to discuss the actions of the XMP group without discussing administrative matters relating to CSIS.

[68] The evidence shows that Mr. Simard admitted to the investigator and in his testimony having made several statements that were attributed to him in Mr. Mitrovica's article. It was on the basis of this report that the employer imposed the 10-day suspension. Mr. Simard admitted during the investigation that he described morale in the Service as a "rat hole", when in fact he wanted to say a "rat race". He also admitted saying to Mr. Mitrovica that the members of the XMP group had been threatened and that the employer wanted them to be quiet and not take the CSIS to court.

[69] Mr. Normand argued that an employee has an obligation not to discredit his employer and that this was not a whistleblower situation where the public interest might justify making a statement to the media. He further stated that it is important for the CSIS to maintain the public's trust.

[70] Mr. Béland, for his part, argued that Mr. Simard, as a representative of the XMP group, should have some immunity as an "employee representative" and that there was no evidence from the employer that Mr. Simard's comments impacted the Service's reputation.

[71] I believe that Mr. Simard's comments were such as to damage the Service's reputation. Describing the Service as a "rat hole" or a "rat race" is a statement that definitely undermines the public's trust in the Service. Mr. Simard told Mr. Mitrovica that members of his group had been the subject of threats and that the employer was trying to muzzle them, to prevent them from taking legal action against the CSIS. During the investigation, he stated that it was a matter of perception and that he did not have any concrete examples to prove the truth of his statements. I believe that Mr. Simard did not act responsibly by making such statements. Since it was a matter of perception, he could not tell a journalist that members of his group had actually been threatened.

[72] However, I believe that Mr. Simard did not intend to harm the Service and that he simply got carried away when he began discussing his case with Mr. Mitrovica. Although Mr. Simard is an experienced officer, that does not mean that he was used to talking with journalists and it could have been relatively easy for an experienced journalist to get Mr. Simard to say more than he intended. Mr. Simard reported to the Internal Security Branch and told them about the interview with Mr. Mitrovica. He met first with an investigator whom he told he was unhappy with the situation because he was not looking for publicity. He then met with *AB* to whom he offered his full cooperation. It is my view that these actions and words showed to his employer that he regretted the interview with Mr. Mitrovica.

[73] In addition, the evidence showed that it was not Mr. Simard who initiated the conversation with Mr. Mitrovica. Mr. Simard did not want to make this matter public and, according to the testimony of *CD* and *KL*, he was entitled to discuss matters relating to the XMP group. Were it not for these factors, I would have understood that a suspension was appropriate but for a shorter period than was imposed by the employer.

[74] In *Haydon*, 2002 PSSRB 10 (166-2-30636), Vice-Chairperson Joseph W. Potter determined that a 10-day suspension was excessive because Dr. Haydon had not contacted the journalist herself. It was the journalist who called Dr. Haydon to ask her opinion on the ban against the importing of beef from Brazil. Consequently, Mr. Potter reduced the penalty to a five-day suspension.

[75] I believe, however, that Mr. Simard was suspended from his duties for such a long time that I must consider it when assessing the appropriate disciplinary measure. The employer used the expressions "special leave" and "administrative leave" to describe what was in fact a suspension with pay imposed on Mr. Simard. This suspension with pay constituted a "weighty penalty" for Mr. Simard (see *Gaw* (Board file 166-2-3292) and *Nolan* (Board file 166-2-25229)). He felt treated like an undesirable by his employer, an outcast by a group he had been a part of for more than 30 years. It was more likely a jest than a fact when he told the investigator that the employer could leave him on special leave until his retirement. In actual fact, he was deeply hurt.

[76] Mr. Béland argued that Mr. Simard's suspension with pay was a form of disciplinary action and that at the very least he could have resumed his duties once the investigation was completed. Indeed, CD's letter indicated that Mr. Simard would be on special leave during the investigation only.

[77] Mr. Simard's suspension with pay lasted five months and while some of the delays were attributable to him, there was nothing preventing him from resuming his duties much earlier. The second letter dated April 13, 2000 from CD stated that Mr. Simard would be on special leave only during the investigation. Mr. Simard could have been reinstated in his duties at the end of the investigation on June 22, 2000. It is the responsibility of the employer during a suspension to consider the employee's reinstatement in his position based on new facts or new circumstances brought to the employer's attention. There was nothing in the investigation that warranted the continuation of the suspension with pay. The employer did not submit any evidence to me showing that Mr. Simard's return to work, after the investigation report was submitted, presented a reasonable risk to its interests.

[78] The delay between the production of the investigation report (June 22, 2000) and the imposition of the disciplinary sanction (September 12, 2000) was very long and cannot be attributed to Mr. Simard. The employer cannot explain this delay by claiming that Mr. Simard wanted a copy of the investigation report. I believe that, in these circumstances, the suspension with pay constituted a disciplinary measure.

[79] To summarize, Mr. Simard, by some of his comments to Mr. Mitrovica, discredited and damaged the reputation of his employer. Disciplinary action was warranted and the suspension with pay imposed on him is sufficient under the

circumstances. Accordingly, the 10-day suspension without pay was not justified and Mr. Simard's grievance is allowed. The employer is ordered to remove the 10-day suspension and to reimburse Mr. Simard his salary and benefits for that period.

[80] I did not take into consideration in my decision the following facts because they happened after the grievance. I am disturbed by the situation described by Mr. Simard upon his return to work and I do not understand why the invitation to a ceremony celebrating his long service with the employer was cancelled. I did not hear the employer's version of this matter but I would like to draw its attention to these facts because I do not believe that such actions lead to good labour relations. I believe that mediation of this grievance from the start of the grievance procedure might have led to restore the dialogue between the parties and avoided the situation described by Mr. Simard upon his return to work.

**Guy Giguère,
Deputy Chairperson**

OTTAWA, May 16, 2002.

PSSRB Translation