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*Federal Public Sector
Labour Relations and
Employment Board Act and
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Labour Relations Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

GRIEVOR X

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as

Grievor X v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Amanda Montague-Reinholdt, counsel

For the Employer: Spencer Shaw, counsel

Heard at Ottawa, Ontario,
April 9 to 12, 2019
Written submissions filed April 29, 2020.

REASONS FOR DECISION

I. Background

[1] The grievor began working at the Canada Revenue Agency (“CRA or the Agency”) in 2009 as a call centre clerk. He worked his way up through several positions with increasing responsibility to an acting manager position within the CRA’s Security and Internal Affairs Directorate. In that position, he supervised the processing of security clearance requests.

[2] On March 3, 2016, just before starting in that acting position, the grievor was charged with impaired driving. He disclosed this to management, as required by CRA policy. The disclosure did not interfere with him taking up the new position, but it did constitute adverse information that brought his security clearance into question.

[3] CRA policy and procedure lays out a series of steps that must be taken when adverse information is received about an employee, from any source. These steps were taken, and on July 21, 2016, the Agency revoked the grievor’s reliability status. His secret clearance was administratively revoked as an employee cannot hold a secret clearance without reliability status. The grievor’s employment was terminated as reliability status is an essential condition of employment for any job at the CRA.

[4] He grieved the revocation of his reliability status and his termination. On April 28, 2017, both grievances were referred to the Public Service Labour Relations and Employment Board (now the Federal Public Sector Labour Relations and Employment Board) for adjudication.

[5] It is now well established that in termination cases, the Board has jurisdiction to inquire into the employer’s reasons for revoking a security clearance, without resorting to the notion of disguised discipline (see *Canada (Attorney General) v. Féthière*, 2017 FCA 66; *Canada (Attorney General) v. Heyser*, 2017 FCA 113 and *Jassar v. Canada Revenue Agency*, 2019 FPSLREB 54). The Board must determine whether the termination was for cause, which means considering whether the CRA had proper and legitimate grounds to revoke the grievor’s reliability status.

[6] For the reasons that follow, I conclude that the CRA had proper and legitimate grounds, and accordingly, the termination was for cause. Therefore, I dismiss the grievances.

II. The CRA's security concerns

[7] All government departments have security concerns; however, several Agency witnesses testified that the CRA has a heightened level of such concerns. They said that Canada's taxation system is one of voluntary compliance, it is fundamentally important to such a system that Canadian taxpayers have a high level of trust in the Agency. Taxpayers are expected to provide the Agency with a great deal of personal information and must be assured that it is safe in Agency hands. If that trust erodes, Canadians will not be willing to provide their personal information to the Agency.

[8] In March 2016, André St. Pierre was Director, Personnel Security Screening and HQ Security Division, Security and Internal Affairs Directorate. He testified that trust is very important to the CRA because the Agency brings in a great deal of money. He described the CRA as the engine for Canada. The security program is a key piece that makes it possible for the CRA to deliver on its mandate to collect tax. The Agency holds the largest repository of personal information in Canada, which makes it susceptible as a target for organized crime. It also deals with witness protection issues. Processes and systems are in place to manage informers who provide information about changed identities and tax evaders.

[9] Michel Lafleur, Manager, Investigation Support and Analysis Section, Internal Affairs and Fraud Control Division, testified that the employer has seen several serious risk situations materialize through employees' associations with criminals. One incident arose when a CRA employee became romantically involved with a biker gang member and used her access to give the gang personal information about their debtors and their lawyers. Another employee involved with a biker gang used his access to provide gang members with personal information about members of the police force; for example, child care locations. Mr. Lafleur noted that these scenarios clearly illustrate how an employee failing to protect client information can lead to serious danger and that such risks are unacceptable. He stressed that the risks are real, as evidenced by the fact that, in his words, "We've seen it happen."

[10] Due to these and other security concerns, when adverse information about an employee comes to light, further data is collected and a preliminary risk assessment is done to determine if the information could impact the employee's trustworthiness. If so, the Agency begins a review for cause of the employee's reliability status. This

entails weighing the information obtained against the Agency's *Code of Integrity and Professional Conduct* (the Code).

[11] The Code lays out the expected standards of conduct for CRA employees, including security responsibilities. It is published on the CRA's intranet. It is given to new hires to read and sign, and is to be read and affirmed by all employees yearly. The Code sets out a high standard for employees, who are to ensure that their conduct, both on-and off-duty, is beyond reproach. It says this about off-duty conduct:

Off-duty conduct

Taking on the role of a public servant comes with opportunities as well as responsibilities and constraints. One such constraint is consideration for the public's perception of both our on and off-duty actions. An employee's off-duty activities could reflect negatively on the Agency and the Government of Canada, and can affect public confidence and respect...

*If you are charged, arrested, or detained under any laws, regulations, federal statutes, or Criminal Code, you must inform your manager without delay. Off-duty conduct is usually a private matter, but it **can become work related** if it:*

- *is harmful to the CRA's reputation (such as personal violations of the laws that the CRA administers);*
- *renders you unable to perform your duties in a satisfactory manner;*
- *leads to refusal, reluctance, or inability of other employees to work with you;*
- *is a violation of the **Criminal Code**; or*
- *makes it difficult for the Agency to effectively manage its operations and its workforce.*

You cannot use your job title or any official identification to influence or obtain any privilege or favour for yourself or others, or to do anything that is illegal, improper or against the best interests of the CRA.

[Emphasis in the original]

[12] The framework for the review-for-cause process is laid out in the procedural document entitled, "Review for Cause of a Reliability Status/Reliability Status + Procedures". At page seven, it sets out the matters to be considered and the questions to be answered when carrying out such a review:

...

General Considerations

*In checking reliability, the question to be answered is whether the individual can be relied upon not to abuse the trust that might be accorded. An assessment must be made to determine whether they can be trusted to carry out the duties of their position to the level of trust required. Questions to be considered include: Is there **reasonable cause to believe** that the individual may:*

- *pose a threat to the safety of clients (taxpayers) or CRA employees;*
- *fail to safeguard CRA information or assets entrusted to him/her;*
- *exploit CRA assets and information for personal gain or for the gain of others;*
- *exhibit behavior [sic] that would reflect negatively on their reliability;*
- *exhibit behavior [sic] that would reflect negatively on the integrity of the CRA;*
- *steal CRA valuables.*

If the answer to any of the above questions is yes, the revocation of the Reliability Status/Reliability Status + becomes a possibility, a review for cause must be initiated and a decision taken based on an overall assessment of all known information.

...

[Emphasis in the original]

III. The grievor's position and access to sensitive information

[13] As of April 4, 2016, the grievor was Acting Chief, Personnel Screening, Personnel Security Unit, Security and Internal Affairs Directorate. He headed up a team responsible for conducting the required verifications and processing requests for all levels of security clearances. He had the authority to sign off on reliability status requests, if no adverse information had been received with respect to them.

[14] In his position, the grievor had access to a vast amount of personal information — all personnel screening records, including information provided by applicants, such as biographical and family information, addresses, dates of birth, social insurance numbers, medical information, travel information, and employment history. He had access to the entire financial picture of applicants, including banking information with

account balances, full credit reports, some taxpayer information if a tax compliance verification had been conducted, any tax debt, and records of every time an applicant had sought funds. The grievor also had access to fingerprint checks, criminal record checks, Law Enforcement Records Checks (LERCs), Canadian Security Intelligence Service classified responses for secret and top secret clearances, and witness protection information.

[15] The grievor had both digital and paper access to employee and applicant information. The CRA has about 40 000 employees and, at the time, had about 100 000 security screening files, mostly housed in paper files on rolling shelves. There were two layers of security. An employee had to pass a perimeter door and then sign-in to the authorized area. The rolling files were locked at night; however, once in that area during the day, there were no impediments to an employee reading or taking a file. The grievor had full access.

[16] The grievor's substantive position in the Public Affairs Branch also gave him access to sensitive information. There, he prepared media notes and the like and required a secret clearance due to his access to classified material. He had access to information on high-profile matters before they were announced publicly; such as criminal issues, the tax situations of citizens going to tax court, and early drafts of legislation or budgets.

IV. The Law Enforcement Records Check (LERC)

[17] The LERC is a tool used by CRA security for all security clearance requests for reliability-plus and higher levels. LERCs are not routinely requested for reliability status checks but are typically used whenever a question is raised about an employee's reliability. Like a criminal record check, a LERC report lists criminal charges and convictions, but it goes beyond that and also contains information on all interactions with law enforcement. The RCMP works with local police and taps into 16 different databases to obtain the information.

[18] Dana-Lynne Hills, Director General, Security and Internal Affairs Directorate, and Agency Security Officer, explained that the CRA looks at all the information, not just criminal charges, because if there is any criminal association, employees carrying out sensitive audits, for example, could be intimidated by criminals. A lengthy LERC report can also bring to light issues with reliability, judgment, and character. The

absence of a criminal conviction does not mean that the information cannot help to assess character and honesty. Even when criminal records exist, they show only the convictions, while a LERC can provide more information about the incident that resulted in the conviction. This helps the Agency better assess whether an employee is a risk to its assets, information, or other employees. At times, a LERC can help mitigate concerns, such as when a report shows that an incident resulting in a criminal charge was the only time a person interacted with police - an isolated incident. Because of the comprehensive information it provides, it is now one of the standard tools used in the screening process to determine if there is any adverse information about which the Agency should be aware.

[19] The grievor's counsel pointed out the one-sided nature of a LERC report, in that, unlike a criminal record, it is based solely on police notations and is, therefore, susceptible to errors and mischaracterizations. I agree that entries in a LERC report cannot be accepted as factual simply because they appear there. However, CRA procedure requires that a LERC report be given to the employee being assessed, along with an opportunity to make corrections, refute facts, or object to any characterizations in it. The grievor did all of that. He had been given the report prior to his resolution-of-doubt interview and he came prepared to address any entries in it with which he disagreed. He gave explanations for some of the entries and brought several documents to back up his explanations or to provide more information.

[20] The grievor refuted the accuracy of only one entry, which named him as the driver of a vehicle stopped by police when, in fact, he was the owner of the vehicle but had not been present at the relevant time. When this inaccuracy was raised, it was corrected, and the RCMP issued a revised LERC report. No other inaccuracies were raised. Both at the resolution-of-doubt interview and at the hearing, the grievor attempted to explain or justify some of the incidents listed in the LERC report but did not refute, and largely confirmed, the factual accuracy of them, as described. Accordingly, I find that, in this case, the information contained in the LERC report was reliable and factual.

[21] The grievor's LERC covered the 10-year period between 2005 and 2015. It lists seven criminal charges arising out of three incidents, 19 negative interactions with police, and 48 provincial offence notifications. Some of the 19 interactions are the same incidents that led to the criminal charges or the provincial offence notifications.

Others are just interactions with police that did not lead to either a criminal charge or a provincial offence notification.

A. Criminal charges

[22] All the criminal charges occurred while the grievor was a CRA employee. They relate to the following three incidents:

[23] On August 8, 2010, the grievor drove while impaired on the way to pick up his brother at a police detachment. He was involved in a road-rage incident and failed to remain at the scene. He was charged with impaired driving and driving with a blood alcohol concentration of over .08 milligrams. On May 14, 2012, he was convicted of driving 'over 80', received a \$1000 fine, and was prohibited from driving for 1 year.

[24] On July 28, 2014, the grievor drove while his licence was suspended, falsely told police that he had forgotten his wallet at home, and identified himself as his identical twin brother, who had a valid licence. On June 26, 2015, he was convicted of the wilful obstruction of a peace officer, for which he received a fine and an absolute discharge. Proceedings with respect to a fraudulent impersonation charge were stayed.

[25] On March 3, 2016, the grievor was charged with impaired driving, driving with a blood alcohol concentration of over .08 milligrams and prohibited driving. These charges arose out of the incident he disclosed, which resulted in the employer requesting the LERC. The charges had not yet gone to court at the time of the review for cause, however the grievor was convicted on February 24, 2017, received a \$1300 fine and was prohibited from driving for 2 years.

B. Interactions with law enforcement

[26] Apart from the criminal charges and convictions, the LERC brought to light a number of issues about the grievor's off-duty conduct and judgment. They are grouped in the following paragraphs into rough categories. Of course, the categories overlap considerably.

1. Using false identification to mislead police

[27] A crucial category of problematic behaviour for the employer was that of providing false identity information to law enforcement officers. From a taxation perspective, identity is very important as false identities are used to evade taxes. From

a security perspective, Mr. Lafleur testified, “If we’re not sure that the person we are screening is the right one, the whole thing falls.” Learning that the grievor seemed to somewhat habitually present himself as someone else, was seen as a serious reliability concern. The following three incidents of the grievor providing a false identity were alleged.

[28] On August 8, 2010, the grievor was involved in an accident that resulted in the first impaired driving conviction. He and his brother had been at a family gathering and he had been drinking throughout the day. His brother left and was arrested. The grievor, with two passengers, drove to pick up his brother at an Ontario Provincial Police (OPP) detachment. On his way there, he engaged in a road rage altercation and the other driver called police to report him for dangerous driving and failing to remain at the scene of an accident. An officer walked out to meet him as he drove into the detachment parking lot and requested identification.

[29] According to the officer’s testimony as recorded in the court decision, the grievor produced his valid driver’s licence, but when the officer repeated his request for identification a few minutes later, he produced his brother’s expired licence. The officer, aware that the grievor’s brother was in custody, concluded that the grievor was identifying himself fraudulently. However, when the officer asked again about the identification, the grievor realized that he had handed the officer the wrong licence and attempted to take it back. The officer did not return it.

[30] This scenario is a little confusing, to say the least. It is unclear why the officer asked for identification a second time, when he had already been provided with a valid licence. The grievor was intoxicated, does not recall the interaction and says that he does not know why he would have offered his brother’s identification when he knew that his brother was in custody, as he was there to pick him up. On the other hand, he also testified that he and his brother habitually left their licences lying around in cars for each other, and apparently, he did have his brother’s expired licence in his possession at the time. None of that suggests good judgment. However, in my view, there are too many unanswered questions to conclude that this was a deliberate and fraudulent impersonation attempt.

[31] On March 9, 2012, a complainant called the Ottawa Police Service (OPS) to report damage to her parked car. A witness had left a note providing the licence plate number

of the vehicle that had caused the damage, which later was determined to belong to the grievor. The police called him. According to the LERC report, he falsely identified himself on the phone as his twin brother and gave the police false contact information (providing his brother's contact information instead of his own). When the police called the number they had been given, the grievor's brother answered and stated that the grievor was falsely using his name.

[32] Two days later, the grievor called police and admitted that he had been driving the car but denied damaging the complainant's car or giving the police false identity and contact information. He told the police that he had been at a party with 80 people, and that he did not know who might have had his phone. At the resolution-of-doubt interview, he said that he had been at a family gathering and that anyone could have picked up his phone. At the hearing, he said that he had been with a few friends and speculated that maybe someone picked up his phone and gave the wrong contact information (his brother's) to the police.

[33] The grievor denies that it was him on the phone, and there is no direct proof that it was him. However, the alternative scenario is entirely fanciful; that an unknown person at a big party, a family gathering, or while the grievor was with a few friends, picked up his phone and misled the police. I find that it is more likely than not that the grievor misled the police on that occasion by impersonating his brother.

[34] On July 28, 2014, the grievor was pulled over and was asked for identification after failing to stop and to use his indicator. He told the police that he had forgotten his wallet at home and identified himself as his twin brother. Upon checking, the police determined that his twin had a valid driver's licence, but that the grievor's licence had been suspended. He continued to insist that he was his twin brother until the police found his wallet in the car with his suspended driver's licence. He then admitted his real identity. This is the incident that resulted in the impersonation and wilful obstruction charges mentioned earlier.

[35] In summary, I find that there were two instances of giving false identity information to police, not three as alleged.

[36] I also note that when commenting on the LERC item that wrongly placed him as the driver of his vehicle when he was not present, the grievor speculated at the resolution-of-doubt interview that perhaps his brother had been driving. He based this

speculation on an incident in 2006 when his brother had used his identification. I also note that the grievor testified that he and his brother habitually left their licences lying around in cars. He said this at the resolution of doubt interview and again at the hearing. According to the grievor they did not impersonate each other frequently, however, it was clear that they habitually gave each other access to their respective drivers' licenses in order to facilitate this practice whenever it might be deemed advantageous.

2. Intimidation

[37] Another category of concern raised by the LERC was the grievor's apparent propensity to engage in intimidation and threats. The report listed several attempts to intimidate other drivers and police officers and the grievor himself provided documents that illustrated attempted intimidation using his CRA credentials.

[38] On August 15, 2007, a complainant called the OPS to report that a very aggressive driver was following him. The complainant stated that the driver (later identified as the grievor) was driving erratically, tailgating, cutting the complainant off, and that the driver had almost hit his vehicle. The complainant said that the grievor had rolled down his window and yelled, in French, "You better be careful; you don't know who I am." The grievor also took several pictures of the complainant. This occurred a year and a half prior to the grievor's employment with the CRA.

[39] The grievor provided two different explanations as to what he had meant when he shouted this at the other driver. At the resolution-of-doubt interview, he said that since two members of his girlfriend's family were connected with the Ottawa police, he felt invincible. At the hearing, he denied attempting to invoke what he perceived as his police connections on this occasion, although he admitted doing so at other times. He said that on this occasion he was just trying to intimidate the other driver by telling him that he could not report the grievor, as he did not know who he was or where he lived. If the former explanation is the truth, then it was an attempt to abuse a perceived connection to power or authority. If the latter is true, then it was an implied threat of violence, based on his identity being unknown to the intended victim.

[40] The August 8, 2010, interaction in the OPP parking lot discussed earlier also included an attempt to intimidate. This was the incident in which the grievor went to pick up his brother and was arrested upon arrival at the detachment after he was

reported for dangerous driving and failing to remain at an accident scene. His comments to the police officers were along the lines of, “Oh, you will see, my whole family is police. You’ll regret this. You’ll see.” The police officer described to the court the grievor’s attitude, as follows: “He was trying to perform the tough-guy role, saying some rude things in regards to the fact that he was related to members of the Ottawa Police Service.” The decision further notes that the officer understood that this was drunken bravado.

[41] Drunken bravado or not, the comments caused the employer concern as they were reminiscent of the previous incident when he had threatened another driver with the words: “... be careful; you don’t know who I am.” Unlike that incident, this one occurred when the grievor was a CRA employee. The grievor did not specifically recall saying this on this occasion but testified that it sounded like something he would say. He explained that because of his girlfriend’s family members he felt invincible and felt that he had connections with the police. He now understands that that was not the case.

[42] The grievor brought documentation to the resolution-of-doubt interview about a complaint he had made to the Office of the Independent Police Review Director (OIPRD) about another of the incidents in the LERC report. On May 23, 2012, the grievor was intoxicated and was seen stumbling off a curb and onto the road. OPS officers signalled to him with a horn and siren combination, to which he responded with an aggressive expletive and a vulgar gesture. He was extremely confrontational, grabbing an officer’s uniform shirt to turn him around so that he could take his picture. The grievor ultimately complained that excessive force was used to restrain him, requested cancellation of his two tickets (for public intoxication and not using a crosswalk), and requested a written apology from the officer. He ended his complaint by stating that he was willing to bring the matter to the media and the courts.

[43] On June 12, 2012, the OIPRD advised the grievor that it was looking into his complaint of excessive force but that the tickets would be better dealt with under another Act. It warned him that the legislation that applied to the tickets had strict timelines, which the OIPRD could not change. Subsequently, the OPS made an offer to settle the complaint, but the grievor objected that the offer applied only to the officer’s demeanour towards him, and did not address the tickets. He reiterated that he was

willing to bring the matter to the media and the courts, and that he might add a request for compensation, as well, if his tickets were not cancelled.

[44] The grievor's original complaint contained only his name, address, and personal Yahoo! email address. However, his follow-up letter, which refused the offer to resolve the matter and threatened to escalate the dispute and add a claim for compensation if his tickets were not cancelled, was sent from his CRA email account at 3:57 p.m. with a cc to his Yahoo! account. This suggests to me that using his work email was deliberate, and there was no evidence to the contrary. Not only did he use his CRA email account, but also included his full CRA signature line, which displayed his title as Divisional Co-ordinator, Canada Revenue Agency, Government of Canada, and his CRA email address, street address, and phone and fax numbers. In the absence of evidence to the contrary, I find that this was an attempt to intimidate and to use his CRA credentials for personal advantage.

[45] The matter was later settled. The officer verbally apologized; the grievor verbally apologized for being belligerent and withdrew his request that his tickets be cancelled.

3. Belligerence with law enforcement

[46] The LERC report showed a clear pattern of the grievor failing to cooperate and acting aggressively with law enforcement. He often (apparently without reason based on the facts, which he did not contest) demanded officers' badge numbers or took their photos, thus implying and often stating that a complaint would be filed against them. Although the police likely did not take these threats seriously, I view this behaviour as illustrating the grievor's propensity to attempt to intimidate in order to benefit himself; i.e., to avoid being ticketed or charged with an offence. I also note that this behaviour, while often appearing in the context of drunken bravado as one police officer characterized it, was also resorted to at times when no intoxication was noted. The following paragraphs contain only a few examples.

[47] On March 7, 2007, the police stopped the grievor because he had a noisy muffler and broken headlight. He asked for the officer's badge number and advised him that he would file a complaint against him.

[48] On April 29, 2007, the grievor engaged in a verbal debate with a police officer at a traffic light when the officer spoke to him about his brakes and about following the police vehicle too closely. He stated that he wanted the officer's badge number and name. The officer advised the grievor that he would pull him over and provide this information. When he did so, the grievor could not produce vehicle registration documents and was issued a ticket. The grievor then demanded the name of the officer's supervisor and said that he would file a complaint.

[49] On May 14, 2008, the grievor was pulled over for driving while his licence was suspended. He immediately became confrontational, went to the police car, demanded the officers' names and badge numbers, and took pictures of them and of the police car. The very next day, May 15, 2008, and again on May 29, 2008, the grievor was pulled over for driving with a suspended licence. However, he did not demand a badge number on either of those occasions.

[50] The grievor also had interactions with police that did not involve threatening to file complaints, but simply showed extremely poor judgment, for example, speeding and tailgating RCMP officers when he had the wrong plates on his car and no insurance.

[51] This aggressiveness with police indicated to the Agency an alarming lack of respect for the law and for law enforcement. It was also considered a reputational concern because the Agency regularly interacts with law enforcement, and at least in his acting position, the grievor interacted directly with the RCMP as a service provider. When the grievor was asked in his resolution-of-doubt interview why he was so belligerent towards police, his response, once again, was that because of his girlfriend's family members he felt like he had a connection with the police and was, therefore, invincible.

4. Alleged criminal associations

[52] The LERC report also provided information that suggested possible criminal associations. Mr. Lafleur addressed the one LERC entry that the grievor had said was inaccurate; he had been wrongly identified as the driver of a car stopped by police. The grievor speculated that his brother might have been driving but then remembered and advised that he owned the car but had rented it to a friend and had not been present at the time. Although the grievor had not been present in the car, the incident concerned

the employer because the RCMP had provided information of serious criminality about one of the individuals in the car. It was not clear whether this person was the friend to whom the grievor had rented his car or a passenger, but either way, it was of concern due to the serious nature of the criminality raised.

[53] This is a very weak link to anything resembling “criminal associations”. There may be more to the story; however, Mr. Lafleur could not reveal any further information, and the LERC report was redacted due to third-party information that could not be disclosed. Accordingly, on the sparse facts before me, I find no merit to any suggestion that the grievor might have criminal associations beyond those he disclosed when asked — that two members of his family had DUI (driving while under the influence) convictions and one had a very old assault conviction. His friend (not the friend to whom he rented his car) had also been convicted of stunt driving.

V. The resolution-of-doubt interview

[54] Amy Bal, Security Analyst, assessed the adverse information in the LERC and prepared the preliminary risk assessment. Mr. St. Pierre testified that a review for cause is essentially a process of weighing the information obtained against the Code by looking at honesty, integrity, and risk factors. He said that personnel security assessment is not black-and-white, like physical security. It involves looking at behaviour patterns and assessing future risk. If the adverse information received reveals concerning behaviour or apparent untrustworthiness, a resolution-of-doubt interview is warranted.

[55] Accordingly, once the preliminary risk assessment was completed, the Agency arranged for a resolution-of-doubt interview with the grievor. It was his opportunity to answer any questions or provide any explanations or mitigating considerations with respect to the issues raised in the preliminary risk assessment.

[56] Mr. Lafleur testified that in a resolution-of-doubt interview, the employer seeks to assess an employee’s honesty, trustworthiness, and character. It is not a fact-finding; that is the LERC’s function. The employer looks for the employee to talk openly and honestly and to help it assess the risk of any ongoing security issue. It is a forward-looking determination of whether the person can be trusted to carry out his or her duties to the level of trust required.

[57] Barbara Radmore, Assistant Director of Security for the National Capital Region, conducted the interview, along with Mr. Lafleur and Ms. Bal. The grievor was invited to bring a third party as an observer but confirmed that he intended to proceed alone. He understood the purpose of the interview and addressed the contents of the LERC report. He was prepared and had brought documents to support some of his explanations. Unfortunately, no doubt was resolved in the interview.

[58] Mr. Lafleur, Ms. Radmore, and Ms. Bal all testified that they felt that the grievor failed to take ownership of his conduct and that he minimized the seriousness of his actions, blamed others, or was less than truthful. Ms. Bal and Mr. Lafleur testified that at times, they thought that the grievor did not tell the truth.

[59] Ms. Radmore noted that while the grievor did not deny the LERC report's contents, neither did he take much responsibility for the concerns it raised. With respect to his belligerence with police officers, he just referred to having made, in his words, "dumb mistakes" in his youth. He brushed over the events of using his brother's identity and did not deny or acknowledge them. Instead, he used general statements such as that he "did not recall" or "was not sure".

[60] Mr. Lafleur felt that the grievor's inability to truly take ownership raised the question of whether he could correct the behaviour and change his track going forward. He found the grievor untrustworthy and thought that he could not be trusted to safeguard client information and to carry out his duties with the level of trust required.

VI. The recommendation to revoke the grievor's reliability status

[61] The grievor had access to a great deal of sensitive information about security-clearance applicants and employees. The employer's witnesses acknowledged that his acting position was an aggravating factor, as he conducted and supervised security screenings. However, they also considered whether he could be trusted in his substantive position, in which he would also be privy to sensitive information, albeit of a different kind. It was felt that his concerning conduct also impacted the level of trust required for his substantive position. In fact, Mr. St. Pierre testified that because of the CRA's mandate, he feels strongly that every CRA position requires trust. He would have concerns with the grievor even if he were to work in the mailroom or the call centre. His view was that, in any position, the grievor was a risk to the CRA.

[62] There was a serious reputational concern vis à vis the Agency's law enforcement partners, aggravated by the fact that the grievor was in a security position. However, there was also a reputational concern with respect to the public that would apply to any position. If these matters became known, people would have questions about whom the CRA hires. The grievor's Twitter account is "@taxman". He testified that his friends know where he works. They must also know about his behaviour. This could lead to questions and mistrust from the public.

[63] The grievor's willingness to impersonate his brother was especially of concern. Proper identification is very important to the CRA, with respect to taxpayers and to employees' security clearances. Apparently, the grievor had a propensity to misuse legal documents and to misrepresent his identity.

[64] He was considered to have serious judgment issues, an inability to follow rules, and disrespect for the law and law enforcement. This suggested a risk in relation to the ability to safeguard the Agency's information. He had the potential to be exploited. He might be approached to have taxes lowered or for access to information such as names, addresses, etc. It was not far-fetched to assume that at some point, he might take action that would benefit himself and not the Agency. Mr. St. Pierre noted that CRA employees use judgment daily and that they are always subconsciously making decisions. The grievor's behaviour pattern had repeated for over 10 years and seemed to be instilled in him. He made poor decisions repeatedly and did not learn from them.

[65] The CRA witnesses testified that they considered any information the grievor gave them that could potentially excuse his conduct or mitigate it going forward. They looked for some comfort that it would not be repeated, such as any formally diagnosed medical conditions, his intentions going forward, and whether it was reasonable to attribute the conduct to the impact of his mother's death, as he had suggested. They found nothing in his responses to mitigate the concern going forward.

[66] The CRA can try to reduce risk in a number of ways. In the grievor's case, very significantly limiting his access to information was considered. However, given what the LERC revealed with respect to judgment, and given his unsatisfactory responses at the resolution-of-doubt interview, management felt strongly that nothing could be done to sufficiently mitigate the risk they felt he would pose anywhere in the organization.

VII. The decision to revoke the grievor's reliability status

[67] Ms. Hills is responsible for overseeing the CRA's security program. She sees 25 to 30 status reviews a year, which typically lead to 10 to 12 revocations. She is the final decision maker. She explained that this function is centralized in the agency security officer position so that it is at arm's length from investigatory proceedings. She does not participate in resolution-of-doubt interviews or in any other part of the process; she only reviews the complete file. This ensures that the information she has before her is the same information that anyone else making the decision would have. She typically does not know the individual whose status is being reviewed, and she did not know the grievor.

[68] Many doubts remained after the resolution-of-doubt interview about the grievor's honesty, reliability, and ability to follow rules. Ms. Hills felt that there had been no indication that he had accepted responsibility and that, therefore, it was highly unlikely that he could change his behaviour.

[69] Ms. Hills testified that she was concerned about the long duration of the grievor's conduct. The impersonation and use of inaccurate legal documents for fraudulent purposes was of significant concern, as was his apparent propensity to get out of difficult situations by being untruthful. His seeming willingness to blame others, the belligerence with law enforcement, and poor judgment were all concerns. She noted his apparent inability to learn from the past and to correct his behaviour, as when he was pulled over for driving while suspended two days in a row. She found the judgment issues striking and noted, for example, that he had inexplicably initiated and escalated an argument with a police officer while knowing that he did not have registration documents for his car.

[70] Ms. Hills also referred to the 2012 impaired-driving conviction, noting that the grievor had allowed two friends to lie under oath and testify that he had not been the driver. This conduct was naturally viewed as very serious. Both witnesses were less than convincing, and the judge made it clear in his decision that he did not believe their testimony. (At the Board hearing, the grievor admitted that he had been the driver. He said that his lawyer had arranged for the false testimony to be offered to the court on his behalf, that he knew before the trial that at least one friend was going to lie, and that he went along with the plan).

[71] Ms. Hills addressed the question of how these concerns related to the grievor's work at the CRA. She referred to the Treasury Board's *Standard on Security Screening* and said that the decision involves reviewing the information gathered and how it relates to what the Agency is trying to assess. It must consider honesty, reliability, and integrity. It must analyze whether, based on the information received, the employee will protect the CRA's assets, information, and reputation. The Agency must assess whether, when push comes to shove, the employee will act in their own interests and not in the Agency's interests. It had before it 10 years of evidence of the grievor's conduct and nothing to suggest that it would not continue in the future and spill over into his work.

[72] Ms. Hills noted that the reputation with law enforcement was a factor but not an overwhelming one, as this could have been mitigated by placing the grievor in a different role. More important were the instances of intimidation; for example, trying to intimidate other drivers and police officers, as well as using his CRA email to make threats about going to the media and the courts with his OIPRD complaint. The reputational risk from that kind of conduct was considered to be very important.

[73] Ms. Hills testified that she considered the mitigating information raised by the grievor, such as his young age at the time of some of the incidents and his medical issues, but was of the view that these factors did not mitigate the future security risk. With respect to his overconsumption of alcohol following his mother's death, she noted that while she empathized with his loss and its significant impact on him, it was not a unique circumstance. It was also clear that the behaviour had begun long before and continued long after his mother's death. The medical issues were not documented and, in any event, did not appear to provide any explanation for his behaviour.

[74] Ms. Hills based her decision on the information in the preliminary risk assessment, the LERC report, the grievor's input at the resolution-of-doubt interview, and the final risk assessment. This compilation of information included documents that the grievor himself provided which show him misusing his CRA credentials. Providing these documents served only to illustrate the same impulse to intimidate. They were meant to alleviate the Agency's concerns, but did the opposite. All of the compiled information led her to conclude that he posed an unacceptable risk to the Agency. Ms. Hills sees many cases, and in her view, this one went to the fundamental

heart of why the Agency carries out security screenings and why it carries out checks that are not directly related to workplace conduct.

VIII. The grievor's submissions

[75] The grievor's counsel argued that the employer did not have legitimate grounds for revoking his security clearance, essentially for four reasons. I will address each one in turn.

A. No link to the job

[76] Firstly, it was argued that the employer had failed to establish a link between the incidents noted in the LERC and any significant risk to the CRA. The grievor's off-duty conduct was unrelated to his work and raised no risk that he would engage in any problematic behaviour at work.

[77] Off-duty conduct is often separate and unrelated to an employer's interests, but that is not so in this case. Some of the entries in the LERC would have had little connection to the grievor's work had they been isolated events. However, they were not. They were part and parcel of a clear and lengthy pattern of poor judgment, lack of respect for the law and legal documents, dishonesty and a propensity to falsely identify himself, and to intimidate and abuse perceived power. It is not possible to conclude that there was no risk of the grievor's off-duty conduct spilling over into problematic behaviour at work.

[78] In my view, it was more than a risk – it had already happened. The grievor had attempted to use his CRA status to get the OPS to cancel two tickets. He began his excessive force complaint by using his personal email and not mentioning where he worked. However, he quickly escalated matters and displayed his association with the CRA when it appeared that his tickets would not be cancelled.

[79] In my view, it is more likely than not, that this type of conduct would again spill over into his work.

B. Mitigating factors were not considered

[80] Secondly, the grievor's counsel argued that the employer's analysis did not consider the full context; for example, the mitigating factors. His counsel noted that the majority of the incidents listed occurred before the grievor was a CRA employee,

when he was 18 or 19 years old. He had been a troubled teen who had been raised in difficult circumstances, and he had difficulty coming to terms with the death of his mother. And, it was alleged, the grievor did take responsibility for his conduct.

[81] It is clear that the employer did consider the mitigating factors raised by the grievor. Each of its witnesses stated that they did so, but that the factors raised did not serve to mitigate the conduct. I have to agree. Undoubtedly, the grievor was profoundly affected by his mother's death in 2010 and consumed too much alcohol at that time, as he testified. However, twelve of the grievor's interactions with police took place between 2006 and 2008; six of them took place between 2012 and 2016. Only one incident (although it was a serious one) occurred between 2009 and 2011, the period before and after his mother's death.

[82] And while many of the incidents did take place when the grievor was in his late teen years and prior to his CRA employment, this is not a mitigating factor in this case. The first 12 incidents occurred when he was 18-20 years old, just prior to his CRA employment which began in 2009 when he was 21 years old. Granted, he was young, but these were not adolescent misdeeds from a distant past bearing no relation to his current adult self. They were not only recent events, but the pattern of conduct stayed the same to a remarkable degree; it just became more serious and involved more alcohol abuse as the grievor moved into adulthood.

[83] As for the grievor taking responsibility for his actions, four employer witnesses did not think he had done so. After reading his responses at the resolution-of-doubt interview and hearing his testimony, I also do not think so. Except for saying those words, nothing he did or said suggested that he was taking responsibility for his actions or even that he understood what that might entail. In my view, taking ownership would, first and foremost, involve accepting the need for and getting serious treatment for alcohol abuse and anger management. The grievor did not indicate any intention to take any concrete steps to ensure that the behaviour would not continue in the future.

C. The Agency relied on misrepresented and unproven facts

[84] Thirdly, it was argued that the CRA's risk analysis was based on misrepresented and unproven facts in the LERC report, which the grievor denied. In fact, the grievor denied very little. He indicated that one entry in the LERC was wrong, which was

acknowledged and corrected. He also took issue with the entry in the LERC that described him answering his phone and impersonating his brother. He had denied it to the police at the time, and his denial was accurately recorded in the LERC report. The grievor continued to deny it in his testimony, however, I did not find his denial credible. He did not say that anything else described in the LERC was inaccurate; in fact, he confirmed virtually all the facts that were alleged about his conduct.

D. The grievor retained his Agency access during the review for cause

[85] Lastly, it was argued that the employer's actions were inconsistent with the belief that the grievor posed a risk. He not only stayed on the job after disclosing the impaired driving charge, but also took up his acting manager position supervising security screening. He was not suspended, nor did the employer remove his decisional authority pending an investigation. Instead, he was left with full access to the premises and to sensitive material, until his employment was terminated.

[86] I cannot fault the employer for allowing the grievor to take up his acting manager position once he disclosed his impaired driving charge. It was clear from the evidence that, in and of itself, such a charge would not likely have threatened his security clearance. It was also clear that the contents of the LERC report came as a complete surprise to the Agency.

[87] As for the decision to not suspend him, both Ms. Hills and Mr. St. Pierre testified that removing an employee, thus stopping his or her income immediately, is a harsh step to take before obtaining all the information. They said that it is important to be fair, that there are always two sides, and that they need to hear the employee's side and any mitigating information before acting. Ms. Hills also noted that given the LERC's contents, it was anticipated that the time span to revoking the grievor's reliability status would be brief, if the resolution-of-doubt interview did not resolve any doubt. That turned out to be so. Ten weeks passed between the receipt of the LERC report on May 13 and the revocation of his reliability status on July 21. The review-for-cause process took place with reasonable dispatch, and it was to the grievor's benefit that he continued to receive his salary during this relatively brief period.

[88] The evidence with respect to the failure to remove the grievor's decisional authority, as recommended by the Security Directorate, was less clear. The grievor

testified that he retained his decisional authority and had full access throughout the review-for-cause period. None of the employer witnesses could say otherwise; they had assumed that the recommendation would have been implemented and had no information to the contrary. Based on the grievor's evidence, I find that the recommendation was not implemented and that he retained his decision-making authority throughout.

[89] However, given the fairly short period of time during which the review-for-cause took place, I am not prepared to find that the Agency's security concerns were not credible because it did not immediately suspend the grievor or because it failed to implement the security team's recommendation to remove his decisional authority.

IX. Conclusion

[90] The adverse information about the grievor provided by the LERC revealed misconduct which included aggressive and dangerous driving, road racing, road rage, impaired driving, failing to remain at an accident scene, serious alcohol abuse, repeatedly failing to have proper licensing or vehicle documentation, neglecting to pay numerous provincial offence tickets, repeatedly driving with a suspended licence, failing to properly identify himself to police by impersonating his twin brother, threatening and intimidating other drivers, and repeatedly engaging in aggressive and belligerent interactions with police officers. The information revealed a long-standing pattern of anger, belligerence, and threatening behaviour, often, but not always, fueled by alcohol. Displaying a notable lack of self-awareness, both at the resolution-of-doubt interview and at the hearing, the grievor described himself as a "happy drinker."

[91] The grievor's conduct reveals a significant deficit of good judgment and an apparent inability to learn from past mistakes. Time and again, he acted against his own self-interest by conducting himself in ways that would inevitably bring him to the attention of law enforcement, and then escalated the situation by being unnecessarily combative with police officers. He did so because he felt he had family connections with the police and was, therefore, invincible. In other words, simply because he thought he could do so with impunity.

[92] Lengthy as it was, however, the LERC report uncovered no incident that directly involved the CRA. However, the grievor brought documents to the resolution-of-doubt interview that provided the employer with evidence of him misusing his CRA

association for personal advantage — to try and get the police to cancel two tickets. That he produced this evidence himself indicates that he did not realize there was anything wrong with that attempted misuse of power. In an effort to somehow mitigate his not very serious behaviour on that occasion (the tickets were for public intoxication and jaywalking), the grievor revealed much more serious misconduct that related directly to the employer's security concerns. More than poor judgment, this suggests a fundamental lack of understanding of what the CRA, and federal government policy in general, requires of public employees.

[93] That lack of understanding, when viewed along with the grievor's apparent propensity to intimidate with threats, often implying connections with power and authority that could be brought to bear against the individual being threatened, creates a picture of serious risk for the Agency's interests, assets and integrity. The misuse of his Agency credentials has occurred at least once. His pattern of quickly turning to various forms of intimidation when feeling aggrieved, whether by other drivers or police officers, is longstanding and well documented. In my view, the evidence supports the CRA's legitimate concerns that there is a risk of the grievor further misusing his Agency credentials for his own benefit or on behalf of others who might approach him to do so.

[94] The evidence also supports the Agency's concerns about the grievor's lack of respect for the law and for accurate legal documents. This was shown by his providing false identity information to law enforcement officers and impersonating his brother. The grievor did not seem to think there was anything wrong with him and his brother using their drivers' licences interchangeably depending on which one wasn't suspended at the time. It is clear that this practice is a longstanding one and I heard nothing persuasive from the grievor that would lead me to conclude that he now understands that this is problematic conduct or that it is unlikely to happen again.

[95] Even more serious, the grievor's lack of respect for both the law and the truth was illustrated when two of his friends gave perjured testimony to a court on his behalf. The testimony was that he was not the impaired driver of a vehicle when, in fact, as he acknowledged in the hearing, he was the driver. The grievor admitted that he had agreed to the plan of providing perjured evidence to the court.

[96] With respect to mitigating factors, the grievor addressed his alcohol abuse by saying that he had consumed too much after his mother's death in 2010. The grievor's first impaired driving conviction was for an incident that occurred in 2010 and the grievor testified that he had since reduced consumption. However, the evidence showed that in 2012, two years after his mother's death, the grievor received a provincial offence ticket for being intoxicated in a public place. In 2014, four years after his mother's death, he was described in the LERC report as being "highly intoxicated" when he initiated an altercation with a man who was sitting in his truck. The grievor smashed the truck mirror with his fist, received 17 stitches to his hand and agreed to pay to replace the mirror. In 2016, six years after his mother's death, the grievor was charged with impaired driving and driving with a blood alcohol concentration of over .08 milligrams.

[97] The grievor said that at times in the past, he would accompany a family member to Alcoholics Anonymous (AA) meetings to provide support. He found the meetings interesting. However, now that his family member had stopped attending meetings, he no longer goes. He did not attend them for himself, but only as a support person.

[98] The grievor has not sought out, or indicated an intention to seek out, any kind of assistance or treatment that might help him manage his alcohol abuse or the other destructive behaviours documented in this case. Accordingly, there is nothing upon which I can find that these issues might be ameliorated in future.

[99] The Agency has shown that the grievor poses an unacceptable security risk and that it had proper and legitimate grounds to revoke his reliability status.

X. Anonymization and the open court principle

[100] At the close of the hearing, the grievor requested that his name be anonymized in this decision. The respondent did not object. The Board requested submissions on the issue. Subsequently, the grievor's representative wrote to the Board withdrawing the request on the understanding that the Board would endeavour to keep sensitive information out of the decision, as discussed at the close of hearing. Still later, the Board found that the decision could not be written without disclosing sensitive information and requested submissions on anonymization. The grievor revised his request for anonymization and filed a submission. The respondent reiterated that it took no position.

[101] The Board operates under the open court principle, a vital component of our legal system. It is a fundamentally important principle from which courts and tribunals should only depart in exceptional circumstances.

[102] The principle is applied via the *Dagenais/Mentuck* test, as further refined by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.). It holds that a confidentiality order can be justified only when it is necessary to prevent a serious risk to an important interest because reasonably alternative measures will not prevent the risk; and when the salutary effects of such an order outweigh its deleterious effects, including the effects on the right to free expression. The right to free expression, in this context includes the important public interest in open and accessible tribunal proceedings. (See *Canada (Attorney General) v. Philips*, 2019 FCA 240, *Basic v Canadian Association of Professional Employees*, 2012 PSLRB 120 and *AB v Canada Revenue Agency*, 2019 FPSLRB 53).

[103] The Board's "Policy on Openness and Privacy" affirms the importance of this principle and discusses the exceptional circumstances that justify departure from it:

The open court principle is significant in our legal system. In accordance with this constitutionally protected principle, the Board conducts its hearings in public, save for exceptional circumstances. Because of its mandate and the nature of its proceedings, the Board maintains an open justice policy to foster transparency in its processes, accountability and fairness in its proceedings.

The Board's website, notices, information bulletins and other publications advise parties and the community that its hearings are open to the public. Parties that engage the Board's services should be aware that they are embarking on a process that presumes a public airing of the dispute between them, including the public availability of decisions. Parties and their witnesses are subject to public scrutiny when giving evidence before the Board, and they are more likely to be truthful if their identities are known. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute.

At the same time, the Board acknowledges that in some instances mentioning an individual's personal information during a hearing or in a written decision may affect that person's life. Privacy concerns arise most frequently when some identifying aspects of a person's life become public. ...

With advances in technology and the possibility of posting material electronically — including Board decisions — the Board recognizes that in some instances it may be appropriate to limit the concept of

openness as it relates to the circumstances of individuals who are parties or witnesses in proceedings before it.

In exceptional circumstances, the Board departs from its open justice principles, and in doing so, the Board may grant requests to maintain the confidentiality of specific evidence and tailor its decisions to accommodate the protection of an individual's privacy (including holding a hearing in private, sealing exhibits containing sensitive medical or personal information or protecting the identities of witnesses or third parties). The Board may grant such requests when they accord with applicable recognized legal principles.

[104] The Canadian Judicial Council has also produced guidelines entitled "Use of Personal Information in Judgments and Recommended Protocol" which address the use of personal information in court decisions. It states that although publication of decisions on the Internet has increased access to justice, at the same time it has raised new privacy concerns. The purpose of the protocol is to assist judges to strike a balance between the right to privacy and the open court principle.

[105] The protocol identifies different levels of protection, depending on the type of personal information. At the high protection end is personal information with a high privacy value such as birth dates, social insurance numbers and financial account information. This kind of information should never appear in a decision unless absolutely necessary. The second level includes less direct personal identifiers such as names of family members, coworkers, community and recreational groups, addresses and geographical locations. The protocol indicates that this kind of information should not be published unless it is "material to a reasoned award".

[106] In the course of the hearing, in an attempt to provide context to some of the behaviours that the grievor exhibited in his youth and young adulthood, including when employed for the CRA, he testified about highly sensitive aspects of his personal history and about various members of his family, living and deceased. The grievor's request to anonymize is based on his privacy interest in not having this history publicly disclosed.

[107] It is not difficult to see a connection between the grievor's challenging personal history and the conduct that was of concern to CRA security. However, the grievor did not allege a disability or proffer any medical evidence in that regard. Therefore, the

evidence provided with respect to this history was largely unnecessary to the decision and is not recounted therein.

[108] However, there are other issues in this matter that must be considered in respect of a request for anonymization. The allegations of impersonation and providing false identification necessitated mentioning the grievor's identical twin brother several times in this decision. His brother was implicated in several of the incidents recorded in the grievor's Law Enforcement Records Check and although not named, he would be easily identifiable should the decision be issued bearing the grievor's name.

[109] So too, although to a lesser extent, would another member of the grievor's family be identifiable. Evidence about the grievor's alcohol abuse necessarily appears in the decision, as it was a frequent aspect of his recorded interactions with police. To determine the just and appropriate outcome of the grievance it was important to consider whether the grievor had taken steps or indicated an intention to take steps to deal with his alcohol abuse. The only evidence provided on that issue centred on another family member and his history with Alcoholics Anonymous; the grievor's only connection to AA was as a support person to this family member.

[110] In my view, this kind of information is analogous to what is described in the CJC protocol as 'second level' information. Personal information about the grievor's family members is material to the decision and, therefore, is included. However, such information, along with the grievor's name, would render them almost as readily identifiable as they would be if their names were included. This is especially so for the grievor's twin brother.

[111] I believe that in these exceptional circumstances, anonymizing the grievor's name is necessary to prevent a serious risk to an important interest, namely the privacy interest of third parties who are not involved in this matter. I further believe that the salutary effects of anonymizing the grievor's name so as to protect the privacy of his family members outweighs the harm to the public interest in open and accessible legal proceedings.

[112] The grievor participated in a public hearing and the decision otherwise captures all relevant evidence, as well as my reasoning and the outcome. In my view, that is sufficient, in this particular case. There is no need for the public to know the identity

of the grievor, given that his name would expose sensitive personal information of his two family members.

[113] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

XI. Order

[114] The grievances are dismissed.

[115] The grievor will be identified as Grievor X in this decision and all exhibits containing his name, the names of his family members, and any other identifying information relating to any of them, will be sealed.

July 8, 2020.

**Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board**