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

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

BETWEEN

MARC-ANDRÉ ROUET

Grievor

and

DEPUTY HEAD
(Department of Justice)

Respondent

Indexed as
Rouet v. Deputy Head (Department of Justice)

In the matter of an individual grievance referred to adjudication

Before: Steven B. Katkin, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Jean-François Rousseau, counsel

For the Respondent: Marc Séguin, counsel

Heard at Montreal, Quebec,
December 13 to 16, 2016, and May 24 and 25, 2017.
(Written submissions filed July 4 and 28 and August 9, 2017.)
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievance referred to adjudication

[1] This decision deals with the issue of whether the decision of the deputy head of the Department of Justice ("the department") to terminate Marc-André Rouet ("the grievor") during his probation was based on a contrived reliance on the *Public Service Employment Act* (S.C. 2003, c. 22, s. 12, 13; *PSEA*), a sham, or a camouflage. In other words, is it established that the termination was not based on the department's good-faith dissatisfaction with the grievor's ability to perform his duties? If so, the Federal Public Sector Labour Relations and Employment Board does have jurisdiction to hear the grievance against his termination.

[2] On March 31, 2011, the department informed the grievor that it rejected him on probation. The rejection letter on probation ("the rejection letter") reads as follows:

> [Translation]
>
> …
>
> *This is a follow-up to the assessment of your work performance since joining the Department of Justice Canada. We have determined that you did not meet the expected level of performance for the position you hold in our organization.*
>
> *You were informed of the objectives of your position and of the expectations of you throughout the past few months in the Tax Litigation Directorate. Nathalie Lessard, your immediate supervisor, regularly provided you with feedback and indicated the improvements required in your work, including expectations about the drafting of your legal documents and written communications in general, expectations about your submissions to the court and expectations about interpersonal relationships. Despite the many meetings, the main ones being on July 16, 2010, and November 2, 2010, and the constant follow up that you received, there was not enough improvement at the level expected by management, and you did not achieve the anticipated level of independence for the position occupied.*
>
> *As indicated in your letter of offer dated March 30, 2010, you were advised that under section 62(1) of the* Public Service Employment Act *(*PSEA*), you would be subjected to a one-year probation from the date of your initial appointment; that is, as of April 12, 2010.*
>
> *In view of this, we decided to terminate your employment under section 62 of the* PSEA*, in accordance with the powers conferred on us under section 24 of that Act. Therefore, your employment as a lawyer at the LA-01 level at the* [Quebec Regional Office of the Department of Justice] *will end as of today, when the offices close*

> *at 5:00 p.m. You will be paid until April 30 in lieu of notice, in accordance with section 6 of the Schedule to the Regulations Establishing Periods of Probation and Periods of Notice of Termination of Employment During Probation.*
>
> …
>
> *Finally, pursuant to section 208 of the* Public Service Labour Relations Act *and the provisions of your collective agreement, you may file a grievance against this decision within 25 days of receiving it.*
>
> …

[3] On May 6, 2011, the grievor filed a grievance under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) against his termination. In it, he claimed that his termination did not comply with the *Guidelines for Rejection on Probation* adopted by the Treasury Board ("the *Guidelines*"), his employer. Specifically, he claimed that the rejection letter was too vague for him to know exactly why the department found that he had "… not achieved the anticipated level of independence for the position occupied." In his grievance, he asserted that had it not been for Nathalie Lessard's comments, who was his immediate supervisor in the Tax Litigation Directorate at the Quebec Regional Office of the Department of Justice, when she gave him the rejection letter on March 31, 2011, he would never have known that the submissions he made before the Tax Court of Canada on January 31, 2011, in truth led the department to decide to terminate him. In that respect, he claimed that an experienced colleague suggested the submissions in question to him, that they were well founded, and that they best protected the interests of the Canada Revenue Agency ("the Agency"), the party that he represented before the Tax Court of Canada. Therefore, he alleged that his termination was arbitrary and that it was done in bad faith. Finally, he claimed that the department did not inform him in advance of its expectations about the submissions in question, that those expectations went against his professional obligations under Quebec's *Code of ethics of advocates* (CQLR, c. B-1, r. 3), and that they unduly interfered with the lawyer-client relationship.

[4] The grievor referred his grievance to adjudication on September 30, 2011.

[5] On January 4, 2012, the department informed the Public Service Labour Relations Board that it intended to raise an objection to the jurisdiction to hear the grievance as part of a referral to adjudication.

[6] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the Public Service Labour Relations Board and the Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act*, as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[7] The hearing in this case took place over six days, between December 13, 2016, and May 25, 2017, inclusively. At the hearing, the department objected to my jurisdiction to decide the grievance. In any event, s. 211 of the *Public Service Labour Relations Act* provides the following about s. 209:

> ***211*** *Nothing in section 209 … is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to*
>
> > ***(a)*** *any termination of employment under the* Public Service Employment Act *….*
>
> …

[8] At the grievor's termination, and since then, s. 62 of the *PSEA* has always provided as follows:

> ***62 (1)*** *While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of*
>
> > ***(a)*** *the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act *…*
>
> …
>
> *and the employee ceases to be an employee at the end of that notice period.*
>
> **(2)** *Instead of notifying an employee under subsection (1), the deputy head may notify the employee that his or her employment will be terminated on the date specified by the deputy head and*

> *that they will be paid an amount equal to the salary they would have been paid during the notice period under that subsection.*

[9] The Department of Justice is a portion of the federal public administration named in Schedule I to the *Financial Administration Act* (R.S.C., 1985, c. F-11).

[10] I took the department's objection under reserve.

[11] At the close of the evidence, the parties agreed to submit their arguments in writing.

[12] If I find that the grievor's termination was not a rejection on probation under s. 62 of the *PSEA* and that I have jurisdiction to decide the grievance, the parties asked that I remain seized of the matter, to allow them to agree on corrective measures.

[13] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act*.

[14] The applicable legal analysis in this case was clarified at paragraph 111 of *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, which reads as follows:

> *[111] In my view, the change between the former* PSEA *and the new* PSEA*, when viewed in the context of the recent jurisprudence of the Supreme Court of Canada on the appropriate approach to public employment, does not significantly alter the substance of the approach that adjudicators should take to grievances involving the termination of a probationary employee. However, the omission of the words "for cause" in section 62 of the new* PSEA *does change the burden of proof requirements. The burden of proof on the deputy head has been reduced.* ***The deputy head's burden is now limited to establishing that the employee was on probation, that the probationary period was still in effect at the time of termination and that notice or pay in lieu has been provided.*** *The deputy head no longer has the burden of showing "cause" for the rejection on probation. In other words, the deputy*

> *head does not have the burden of establishing, on a balance of probabilities, a legitimate employment-related reason for the termination of employment. However, the Treasury Board* Guidelines for Rejection on Probation *require that the letter of termination of employment of a probationary employee set out the reason for the decision to terminate employment. The deputy head is still required to tender the letter of termination as an exhibit (normally through a witness) to establish that the statutory requirements of notice and probationary status have been met. That letter will usually state the reason for the decision to terminate the employment of the probationary employee. The burden then shifts to the grievor.* ***The grievor bears the burden of showing that the termination of employment was a contrived reliance on the new*** **PSEA*****, a sham or a camouflage. If the grievor establishes that there were no legitimate "employment-related reasons" for the termination (in other words, if the decision was not based on a bona fide dissatisfaction as to his suitability for employment:*** **Penner** ***at page 438) then the grievor will have met his burden.*** *Apart from this change to the burden of proof, the previous jurisprudence under the former* PSEA *is still relevant to a determination of jurisdiction over grievances against a termination of a probationary employee.*
>
> [Emphasis added]

[15] Since then, federal public sector adjudicators and the Board have consistently applied that analysis to decide grievances involving terminations of employment during probationary periods.

II. Summary of the evidence

[16] The parties agreed that the grievor would proceed first.

[17] The grievor testified and called Solange Marion, former Director of Human Resources Operations and Client Services at the Department of Justice, as a rebuttal witness.

[18] The department called as witnesses Ms. Lessard and Vlad Zolia, the grievor's mentor.

[19] The grievor held a lawyer position at the LA-01 group and level with the Department of Justice from April 12, 2010. He worked at its Quebec Regional Office, where he was on a team that Ms. Lessard led in the Tax Litigation Directorate. Essentially, his duties were to represent the Agency in litigations before the Tax Court

of Canada. He was subjected to a 12-month probationary period that was to end on April 11, 2011.

[20] The parties noted certain events that will be discussed in greater detail in this decision and that are summarized in the following paragraphs.

[21] On June 14, 2010, Ms. Lessard spoke with the grievor about his work objectives. The only personalized objectives were to gain knowledge of the Tax Court of Canada's rules of procedure and of the rules of evidence in civil law and to develop advocacy skills (evidence and arguments), to independently handle litigation cases of low or medium complexity.

[22] On June 28, 2010, Marie-Claude Landry, a colleague of the grievor, accompanied him to the Tax Court of Canada and reported his lack of preparation to Ms. Lessard.

[23] On July 16, 2010, an action plan was put in place until October 16, 2010. Mr. Zolia was the grievor's mentor. The plan was to help him develop his ability to account for the time he worked, to track deadlines, to respect contact persons and cooperate with them, to be adaptable, to respect advice on the rules of judicial decorum, and to communicate clearly and effectively.

[24] Mr. Zolia remained the grievor's mentor until early December 2010.

[25] At a meeting with the grievor on December 20, 2010, about the assessment of his first six months of work, Ms. Lessard acknowledged that he had developed his skills in all the areas in the action plan (accounting of time worked, tracking deadlines, respecting and cooperating with contacts, being adaptable, respecting advice on judicial decorum rules, and communicating clearly and effectively). However, she felt that he should continue to develop his advocacy skills. She identified deficiencies in three legal opinions and responses to appeal notices that he had prepared. She noted that he had to develop his skills in terms of written communications, advocacy techniques, assessing the facts of a case, and forming nuanced conclusions and that he had to continue to develop his communication clarity and effectiveness skills. She felt that his performance for April 1 to September 30, 2010, did not meet the requirements of his position.

[26] The grievor testified about his responses to three topics in the performance report in the part the employee was to complete by checking the "yes" or "no" boxes.

In his response, he indicated that the quality of his work was not regularly reviewed throughout the evaluation period, that Ms. Lessard did not assess him against the work objectives set in advance, and that she did not discuss an individual learning plan with him based on his needs and aspirations.

[27] In the part of the report for the supervisor to complete, Ms. Lessard checked "no" for some points. She indicated that she did not regularly inform the grievor of his performance during the period in question. However, she added a handwritten note that the grievor "[translation] also received feedback from the designated resource person". In the employer's records, she did not indicate the training agreed to for the grievor or the associated costs. However, she completed the "[translation] training and development" area of the report. She indicated that she had not assessed him against the set work objectives and that, as applicable, she did not consider comments from anyone who had received services from him. However, the evidence shows that she discussed objectives with him on June 14, 2010. As well, in the "[translation] other achievements" section of the performance report, she indicated that she had received three positive comments about him. She indicated that she did not attach a performance appraisal of him to the report, but the narrative is attached to the report. Finally, she indicated that she did not discuss the individual learning plan with him. However, the evidence shows that Ms. Lessard discussed the learning plan with the grievor in May 2010 and that the plan was approved on May 21, 2010.

[28] The parties provided no explanation for the obvious contradiction between the subjects that Ms. Lessard indicated that she did not discuss with the grievor, by checking "no" in the performance report, but that based on the evidence, she indeed discussed with him.

[29] On February 22, 2011, the grievor received training on drafting legal opinions.

[30] Between March 21 and 25, 2011, Valérie Tardif, Director of the Tax Litigation Directorate, and Ms. Lessard decided on a rejection on probation after they consulted other managers.

[31] On March 31, 2011, Ms. Tardif gave the rejection letter to the grievor, in Ms. Lessard's presence. Although Ms. Tardif mentioned in the letter the department's dissatisfaction with his skills drafting legal documents and with his communications, with respect to representing the Agency before the Tax Court of Canada and to

interpersonal relationships, Ms. Lessard told him that the submissions he made before that Court on January 31, 2011, were such that she could not allow him to represent the Agency before it.

A. For the grievor

[32] The grievor was interviewed in Ottawa in summer 2009. In about January or February, Ms. Lessard contacted him for an informal discussion. She told him that she wanted to fill a position for a junior lawyer to litigate before the Tax Court of Canada. He told her that he had just graduated and that he had no professional law experience. He has been trained in electrical engineering and had worked in that field for 10 years. He also has a master's degree in taxation.

[33] Ms. Lessard's team, including the grievor, was responsible for assessments, to defend the merits of the Agency's decisions before the Tax Court of Canada. Another team at the Tax Litigation Directorate was responsible for collecting debts that the Agency believed were at risk.

[34] The assessments team was divided into two groups, one led by Ms. Lessard, and one led by Johanne M. Boudreau, known as "Johanne Boudreau (tax)" and "Ms. Boudreau (tax)", to distinguish her from another Johanne Boudreau, known as "Johanne Boudreau (civil)" and "Ms. Boudreau (civil)". Ms. Boudreau (civil) was the assistant regional director for the Quebec Region and the supervisor of Ms. Lessard and Ms. Boudreau (tax). Ms. Boudreau (tax) signed the letter employing the grievor.

[35] As for the circumstances of his termination, on March 31, 2011, the grievor was called to a meeting with Ms. Tardif and Ms. Lessard. When Ms. Tardif gave him the rejection letter and told him that he was rejected because he was not a good fit, he was shocked. Ms. Lessard described the departure protocol to him the same day. He did not have the time to read the letter and continued to read it as he left the room. He saw no facts and asked to go back into the room. He told Ms. Tardif and Ms. Lessard that the letter contained no facts and asked them if they would communicate the facts to him or if there was only the letter's contents. Ms. Tardif replied that everything was in the letter. He then asked about the facts that had been considered, speaking directly to Ms. Lessard. She referred him to the letter, but he insisted on the facts. Ms. Lessard raised her voice, but he remained calm while asking his questions. Ms. Lessard then said that she felt that he was not a good fit because she had observed him at the Tax

Court of Canada on January 31, 2011, and he had not requested a "[translation] hearing on common evidence" for two files that were connected. She told him that he should have known because he had been on the team for a long time. According to him, it was the only fact behind his termination.

[36] The grievor explained that the hearing in question involved two connected files related to expenditures incurred by two taxpayers who co-owned a building. The taxpayers claimed that they were routine expenditures, while the Agency claimed that they were capital expenditures. The grievor said that they were the first related files that he argued. His experience with such files had been only at the preliminary-arguments stage. No one had informed him of common evidence, and it had not been included in any of his training.

[37] The grievor said that most of the training was through knowledge transfer between lawyers. Management expected junior lawyers to speak with experienced lawyers, who would share their knowledge and delegate certain tasks in a case. He was told as much when he began to attend regular team meetings. The weekly team meetings alternated between the teams of Ms. Lessard and Ms. Boudreau (tax). The next meeting was for both teams.

[38] The grievor said that he had seen the phrase "hearing on common evidence" when reading jurisprudence but that he did not know its meaning. In summer 2010, he was accompanied before the Tax Court of Canada by a lawyer who reminded him that a party to a proceeding is entitled to be in the courtroom throughout the hearing. He did not know if the two co-owners could remain in the room and hear each other testify, and he wanted to try to isolate them.

[39] The grievor consulted an experienced lawyer on his team (Sophie-Lynne Lefebvre), who suggested that he ask the Tax Court of Canada to have one case heard and, once it was decided, to have the evidence from the first case entered in the second. She explained to him that both taxpayers could not simultaneously claim party status to the proceeding. While the first case proceeded, the other taxpayer could remain outside.

[40] The grievor said that when he explained to the judge how he would exclude one of the taxpayers, i.e., to hear one file and enter the evidence in the other case, the judge said, "[translation] Yes, hearing on common evidence". The Tax Court of Canada

ordered the exclusion of witnesses, and one of the taxpayers left the room. The judgment indicates that the matter was heard on common evidence even though the grievor did not request it.

[41] With respect to Ms. Lessard's feedback, who attended the hearing, she called the grievor into her office on that day or the next. She began by telling him that the Agency's witness had testified well and that the facts had seemed fresh in his memory. When the grievor replied that he had met with the witness the day before (Sunday), Ms. Lessard was not pleased and told him that that was not done. The grievor explained that he had contacted the witness the week before and that he had suggested meeting with him on the Friday. The witness told him that the Agency's rules did not allow him to stay at the hotel all weekend. The witness told him that he was entitled to spend one night at the hotel and that he had to be available for the hearing on the Monday. The witness then suggested that they meet on the Sunday, which the grievor accepted. According to him, Ms. Lessard still seemed unhappy after he explained it.

[42] Ms. Lessard then commented to him about the order in which he had addressed certain matters, for which Ms. Lefebvre had advised him. He did not respond because, in his view, Ms. Lessard's physical reaction prevented him from doing so. She then accused him of not requesting a hearing on common evidence. He did not tell her about Ms. Lefebvre's advice because of her reaction to the witness preparation issue.

[43] According to the grievor, several times, Ms. Lessard had begun conversations by reproaching him, without asking any questions. After he responded, she became even angrier. He referred to one incident in particular, in related files about a fishing business.

[44] In those files, the Agency had accused the company of not reporting certain revenues, and it conducted the case on a net-worth basis. The grievor's role was to prepare a response to the appeal notice; i.e., to translate the auditor's work into a legal format. In one paragraph in the response, he had written the following: "[translation]… these surplus assets may be from the corporation's activities…". After the response was sent on November 29, 2010, Ms. Lessard reproached him for using the phrase "may be" and told him that it was feedback on his work.

[45] The grievor said that he prepared the response to the appeal notice under Mr. Zolia's direction. The grievor's earlier draft did not contain the phrase "may be"; thus, it was a firm position. Mr. Zolia first told him that he had the choice of keeping what he had written or adding the nuance, "may be". After reflecting on it, Mr. Zolia then told him that it would be better to add the nuance, "may be". He based it on his experience litigating related cases in which he adopted a firm position and lost before the Tax Court of Canada because the taxpayer had an explanation that the Agency did not have. Mr. Zolia told him that it is not necessary to adopt a firm position and that it could even be dangerous. The grievor was able to find the judgment to which Mr. Zolia referred.

[46] When Ms. Lessard looked at the pleadings, she told him that "may be" had no place in a response to an appeal notice and that a firm position must be adopted. The grievor gave her Mr. Zolia's explanation; she reacted very hostilely. She did not call Mr. Zolia, and the grievor did not ask her to call him. He heard nothing more about it.

[47] The grievor said that in late June 2010, Ms. Lessard accused him of shopping for opinions. It involved a case in which a taxpayer had applied to the Tax Court of Canada to be relieved of the failure to meet a deadline to challenge an assessment. The grievor had a document to produce. He identified a legal provision that in his view, allowed the document to be produced without a witness. Ms. Landry, a colleague, accompanied him to the Tax Court of Canada. As the judge had questions about the document that only one person from the Agency could answer, the hearing was suspended.

[48] Once back at the office, Ms. Landry told him to always produce documents with witnesses. The grievor explained to her how he had prepared based on the legislative provision in question and asked her for the purpose of that provision. She did not know, but he could not use it to produce documents in evidence himself. Ms. Lessard joined the discussion and told him that documents had to be produced with witnesses. She did not answer his question about the role of the legislative provision in question.

[49] After the hearing, he discussed an accounting matter with a colleague, Marielle Thériault, who was an accountant and a lawyer. He asked about the role of the legislative provision in question, and she told him that she did not know it. A short time later, the grievor encountered Ms. Lessard, who told him that he had been shopping for opinions by speaking with Ms. Thériault. She told him that it sowed

discord in the department and to not try to contradict one lawyer by asking another one. He said that he had simply tried to discover the purpose of the legislative provision. Ms. Lessard did not respond. He never received an explanation about the provision. He did not discuss it with Mr. Zolia so that he would not be reaccused of opinion shopping. Training he took after the hearing, which was on administration, procedure, and certain types of evidence under the *Income Tax Act* (R.S.C., 1985, c. 1 (5th supp.); *ITA*), did not address the legislative provision.

[50] The grievor said that toward the beginning of his probation in 2010, he was assigned to work on two general procedure cases with Mélanie Bélec, and that he had emailed her. Ms. Lessard told him that she had spoken with Ms. Bélec and that she felt that his email had offended her. Ms. Lessard counselled him to be careful with his email communications and suggested that he speak with Ms. Bélec about it.

[51] The grievor spoke with Ms. Bélec about the file. He asked her if his email had rushed her and, if so, what he could do to prevent it from happening again. She replied that she had not felt rushed and that she was surprised at the analytical effort he had made so early in the process, when it was not clear that the file would go to court. She told him that she made that kind of analysis much later. He did not talk to Ms. Lessard about it, but he found her behaviour strange. Mr. Zolia told him that there were two methods: making the analysis earlier and making it later. Each method had its drawbacks and benefits.

[52] The grievor then spoke about another incident with Ms. Lessard. In May or June 2010, the Tax Court of Canada issued a ruling against the Agency, which decided to appeal. Janie Payette, who was responsible for preparing the appeal brief with another lawyer, asked the grievor to research a very specific question. He found no results to answer it. He then suggested that she set aside the research that she had asked him to do and that he analyze the trial judgment, which she agreed to. After he gave her his analysis, she told him that he had found something that she had not thought of and that she would use it in her appeal brief. She said that she carried out the research that she had originally asked for and that she found nothing.

[53] A few weeks later, Ms. Lessard asked the grievor if it was true that in that case, he had given Ms. Payette something other than what she had asked him for. He replied that he had done so and said that he had given her an analysis instead of the research.

In a disapproving tone, Ms. Lessard told him that he should be content with doing what he was asked to do. He told her what had happened and stated that Ms. Payette had agreed that he make his analysis. Ms. Lessard then ended the discussion.

[54] In March 2011, Ms. Payette informed the grievor that the Agency had won an appeal. She told him that in its reasons, the Federal Court of Appeal had accepted the part of the argument that she had taken from his analysis. At the next meeting, on March 31, 2011, she shared it with everyone.

[55] With respect to his interactions with Ms. Lessard, the grievor said that when she gave him feedback, she started with a reproach. When he explained the circumstances, he noted that her mood would turn bad, so there was no point forcing a discussion. In 2010 (not specifying the date), he said that he went to her office and explained to her the dynamics of their discussions. She replied that when she gave him feedback, all she wanted to hear was that he would correct himself. She did not want to hear him explain why he thought he was right acting as he had. He said that he understood that she did not see the difference between explaining what happened and claiming to be right. According to him, when he provided an explanation, she would see it as insubordination, pretentiousness, or arrogance.

[56] The grievor referred to another case he had worked on. He prepared a draft response to an appeal notice, and on the day in question, Ms. Lessard was absent, and Mr. Zolia was not available. Ms. Lessard had asked that while she was absent, the grievor speak to Bruno Levasseur, who led the collections team. The grievor gave him the draft for verification and approval. Mr. Levasseur noticed the use of tables and said that he had never seen them used that way in a response to an appeal notice. The grievor replied that he had prepared responses to appeal notices under Mr. Zolia's direction, who had had him use tables.

[57] Mr. Zolia had explained to the grievor that when drafting that type of document, the objective was to be clear so that the judge could understand by looking at the pleading without looking at certain specific exhibits, known as "Option C". On October 28, 2010, the grievor received training on drafting pleadings, including Option C, after drafting the response to the appeal notice in question.

[58] The grievor explained to Mr. Levasseur that he wanted to simplify the contribution history using tables. Mr. Levasseur found it a very good idea.

[59] The grievor received feedback from Ms. Lessard after he responded to the appeal notice on January 26, 2011. She told him that tables should not be used. He explained to her that it had been done to facilitate the understanding of Option C, that Mr. Zolia had taught him that by using tables, less debate might occur at the Tax Court of Canada, and that if a debate did arise, it would be easier if tables were in place. Ms. Lessard told the grievor that he should not try to avoid debates and that if a debate arose on an Option C, he should have a witness explain it.

[60] The grievor then brought up another interaction with Ms. Lessard about a case that was discussed in his meeting with her on December 20, 2010, which dealt with the assessment of his first six months of work.

[61] Mr. Zolia explained that the Directorate and the judges were concerned that lawyers conduct themselves well, particularly with unrepresented taxpayers. When dealing with such a taxpayer, as a courtesy, the lawyer should encourage the taxpayer to consult a lawyer, remind the taxpayer that it is important to bring all documents to the Tax Court of Canada, and explain in plain language what the lawyer would do before that Court.

[62] The case in question involved an unpresented taxpayer who was a teacher. His employer had not given him job priority and had not given him an available position because he had completed the tax forms himself, which normally, the employer had to complete. As part of his preparation, the grievor had a copy of the arbitration tribunal's arbitral award allowing the taxpayer's grievances, the Superior Court of Quebec's judgment on judicial review overturning the arbitral award, and the Court of Appeal of Quebec's judgment granting leave to appeal.

[63] The grievor saw in the arbitral award that the arbitrator had concluded that the taxpayer had signed the forms in error and understood that before the Tax Court of Canada, he had to address the circumstances in which the taxpayer had signed the forms. The grievor thought that the taxpayer might end up before an arbitrator again and was concerned that later, the employer would use the discussions before the Tax Court of Canada about the signatures before the arbitrator. He questioned whether, as part of the courtesy measures, he should contact the taxpayer and counsel him to retain a lawyer or speak with his labour lawyer about his tax file. He asked Mr. Zolia

who, after a lengthy reflection, told him that he did not know the answer and to ask Pierre Cossette or Ms. Lessard.

[64] On October 4 or 5, 2010, as Mr. Cossette was away, the grievor asked Ms. Lessard. She told him not to call the taxpayer, that the facts were the facts, and that the judge would decide accordingly. So, he did not contact the taxpayer.

[65] That incident was discussed during the grievor's meeting with Ms. Lessard on December 20, 2010. She told him that he had demonstrated a lack of ethics and that taxpayers should not be given advice. He replied that he did not consider giving advice but having the taxpayer think about his situation. She told him that a Department of Justice lawyer's role is not to win at all costs and that he had to adopt that attitude.

[66] The grievor believed that perhaps the taxpayer would withdraw, but that was not the purpose of his request. He told Ms. Lessard that he had not called the taxpayer and that he had just asked wondered about it. She replied that the fact that he had wondered about it was already too much. He replied that the question was not too much and that Mr. Zolia had thought about it for a long time and had suggested that the grievor ask her. She replied that that was not true and that Mr. Zolia would never have done that. According to the grievor, she was very angry. He had taken mandatory online ethics training in early December 2010.

[67] The grievor wished to introduce his personal handwritten notes from two meetings of lawyers. The department objected on the grounds that they were not relevant to the issues in question. I allowed them under the reserve of the objection. He wanted to note that discussions took place on including non-disclosure clauses in out-of-court settlement agreements. Some Department of Justice lawyers were in favour and used it, while others did not. The grievor acknowledged an error in the date that he had put on the notes from the second meeting, and he could not say when it took place. His notes also referred to other topics discussed at the meetings. My opinion is that his personal notes are not relevant to the dispute before me. Therefore, I allow the department's objection and will not consider them for the purposes of this decision.

[68] The grievor then discussed the training he received during his employment. He received in-house training from lawyers at group meetings or by teleconference. Mr. Zolia started as his coach on an acting basis in mid-July 2010. In December 2010,

Mr. Zolia told him that due to a work overload, he could not coach him on a particular file and accompany him before the Tax Court of Canada. He told him to pose his questions to another lawyer of his choice.

[69] Mr. Zolia resumed coaching the grievor in February 2011. They interacted less because the grievor had no cases to prepare for the Tax Court of Canada. However, Mr. Zolia was available to him for consultation.

[70] The grievor acknowledged receiving a document from Ms. Lessard entitled, "[translation] General employee objectives" for the Quebec Regional Office.

[71] In about late November 2010, Ms. Lessard provided the grievor with an assessment document and told him that the it was for his first six months of work. The result was a failing mark. He had taken training on the "[translation] Employee Performance Review and Appraisal Policy" (Exhibit M-1, Tab 39; "the Performance Management Policy"), and he noticed that she had given him a short form, while the policy required a detailed form. He spoke to her about it.

[72] He referred to a section of the Performance Management Policy entitled, "[translation] Constructive feedback", which included the following:

> [Translation]
>
> …
>
> *Immediately describe the event and explain the impacts*
> *Ask what happened*
> *Help the employee identify shortcomings*
> *Develop a plan to address the issue(s)*
> *Show confidence in the employee's abilities*

[73] According to the grievor, Ms. Lessard rarely asked what had happened and when he answered, she became angry.

[74] The grievor referred to a section of the Performance Management Policy entitled, "[translation] The different stages of performance assessment", including Step 4, "[translation] Manager and employee meeting", which stated as follows:

> [Translation]
>
> …

> *The manager is responsible for scheduling an interview with the employee at a mutually convenient time. The purpose of the interview is to give both parties an opportunity to discuss the employee's performance during the year, plan corrective measures in the event of unsatisfactory performance, congratulate again an employee who has performed well, develop a performance plan for the coming year, and identify training and development needs.*

[75] The grievor said that he did not have a prior discussion with Ms. Lessard before she gave him the short form.

[76] Ms. Lessard returned to the grievor and gave him the same appraisal on the detailed form. She told him to take his time to look it over, sign it, and call a meeting so that she could give him her comments. He did not do it immediately, as he had significant concerns about the appraisal's content and about how it had been completed. He then asked to meet with her but without signing the form. He had seen that under Step 8 of the Performance Management Policy, signing meant confirming that he had had the opportunity to discuss the appraisal.

[77] The meeting with Ms. Lessard took place on December 20, 2010. The grievor listened to what she had to say and wanted to discuss his disagreement with how she had reported the unrepresented teacher incident. As he saw that the situation was worsening, he did not continue.

[78] Ms. Lessard told him that the appraisal covered his first six months of work, from April to September 2010. She said that she considered that he had failed for that period but that he was still there because she considered that he had resolved what she found problematic in the appraisal. He testified that she did not inform him of the problems. On reviewing the appraisal, he had no idea of the source of the failure.

[79] Ms. Lessard said that to determine whether she would recommend his permanency, she would reassess the grievor based on his response to a request for legal opinion on a file. She told him that the legal opinion was the central item and that it did not exempt him from maintaining the progress that she had noted.

[80] The grievor was mandated to draft the legal opinion in December 2010. He received training on drafting legal opinions on February 22, 2011.

[81] When asked if a deadline had been set for submitting the legal opinion, the grievor responded that in his opinion, he had to submit it before the first anniversary of his hiring, as Ms. Lessard wanted to decide on his permanency. He said that he completed the opinion on March 28 or 29, 2011, and that it was submitted to a review committee. He did not know if the opinion was assessed before he was terminated.

[82] The grievor said that about a week before he submitted the opinion, he explained to Ms. Lessard that he was about to finish it and that he would submit it to her very soon. She told him not to worry.

[83] The grievor then addressed other aspects of his appraisal that he felt did not respect the Performance Management Policy. He said that he did not have the type of discussion under the policy that provides that the employee must receive continuous feedback and that "[translation] … the immediate supervisor regularly inform the employee about his or her performance…". He also referred to one of the policy's guiding principles, which provides as follows: "[translation] The employee should have regular opportunities to engage in constructive dialogue with his or her superior to discuss the employee's work and performance." He believes that in general, his sense of initiative was not appreciated.

[84] The grievor said that Mr. Zolia had told him that while Mr. Zolia was away, he should pose his questions to a lawyer of his choice and that no coaching would take place during that time.

[85] Under Mr. Zolia's coaching, before appearing before the Tax Court of Canada, he had significant preparation about the representations. The grievor did not receive coaching from Ms. Lessard before the file about the hearing on common evidence. Mr. Zolia told the grievor that he thought that the grievor was ready to go to the Tax Court of Canada on his own and that he would so inform Ms. Lessard.

[86] The grievor said that between his December 20, 2010, appraisal and his termination, his only meetings with Ms. Lessard were "[translation] what she termed feedback" on the hearing-on-common-evidence file and the one in which he used tables in the response to the appeal notice.

[87] On the day of his termination, the grievor asked Ms. Lessard for a copy of his employee file; she told him to ask Human Resources. She accompanied him to the exit.

When they passed Mr. Zolia's office, the grievor told him that he had been rejected on probation. Mr. Zolia was very surprised, and when he asked why, the grievor told him to ask Ms. Lessard.

[88] When the grievor went to Human Resources, he was able to review the contents of two files, in the presence of an employee. He did not see anything in them related to the decision to terminate him. He requested copies of both files in sealed envelopes, as he wanted to be sure that he had a true copy of his file on a specific date.

[89] According to the grievor, the department's decisions at the grievance process levels did not explain his termination. In the discussion with Ms. Tardif and Ms. Lessard, he was told about a hearing on common evidence. He said that at the hearings at the different grievance process levels, the department offered no fact-based explanations.

[90] According to the grievor, his probationary period was spent in an environment in which appraisal expectations were unclear. He was exposed to conflicting influences between his supervisor, Ms. Lessard, and the lawyers who could coach him. He was controlled by a superior who did not like him, and the environment, as designed by management with respect to human resources management, was of no help. He was let go after working well and with great care for the interests that he had to represent. He said that his explanations were never welcome and that they were often met with hostility at important times.

[91] In cross-examination, the grievor said that he felt that Ms. Lessard had complimented him when she told him that the witness he had prepared on a Sunday seemed to have the facts fresh in mind when testifying. According to him, it showed that he had prepared the witness well.

[92] The grievor said that he went to Ms. Lessard's office on his own on a few times, including for the conversation about the dynamic of their feedback discussions. He noted that she did not seem to like giving him an explanation when she reproached him. He said that he was able to confront her and that he did it several times, to argue his point of view on the circumstances surrounding her reproaches even though, at times, he knew that she would become angry.

[93] The grievor was referred to a document that had been given to him and that was entitled, "[translation] Action plan for a third of the probationary period" (Exhibit E-1, Tab 18), which was for the period from July 16 to October 16, 2010. It designated Mr. Zolia as the coach. The grievor said that at the time, he understood the requirements in the action plan.

[94] With respect to the incident involving Ms. Bélec, the grievor reiterated that she had told him that his email had not rushed her and that she had been surprised by the scope of his work. When asked if she said that to avoid discussing the matter again, he replied that that seemed unlikely to him. She has a very strong personality, and anyone stepping on her toes would be put in their place. At the time, the grievor had had a few verbal interactions with her, and communication was easy.

[95] The grievor said that Mr. Zolia accompanied him to the Tax Court of Canada at least four times and that Mr. Zolia provided him feedback on his representations. Mr. Zolia took notes during his representations. On their return from the Tax Court of Canada, Mr. Zolia gave him feedback on the way. At the office, a short time later or the next day, Mr. Zolia would review his notes with the grievor in a meeting and provide feedback, which could take a large amount of time. Mr. Zolia would tell the grievor what he could have done differently and would assess his representations to the Tax Court of Canada.

[96] The grievor said that he submitted the legal opinion to Ms. Lessard in late March 2011. When asked why he did not submit it earlier, he replied, "[translation] I submitted it when I submitted it." He said that he thought that he had had to seek clarification or additional information from the Agency representative who had requested the opinion.

[97] In re-examination, when asked if he agreed with the entire content of the action plan, the grievor said that he was concerned about it. When she presented the plan to him, Ms. Lessard insisted that he had to properly apply the content. She referred to the incident involving the legislative provision, which he had wanted to know how to apply. He said that it caused tension in their relationship and that he had not dared discuss his points of disagreement.

[98] The grievor then commented on some of the points in the action plan, including the requirement to wear a jacket and tie to the Tax Court of Canada. He said that once

before that Court, he went to the office at lunch to prepare certain documents but forgot his jacket when he returned to the Court. He said that that was the only time he had not worn a jacket in court.

[99] With respect to the point that he had to rise when addressing the Tax Court of Canada, the grievor said that he might not have done so but that he had no recollection.

[100] With respect to the point that he had to transport files in locked briefcases and keep the files in good condition, the grievor said that when he arrived, he did not know that briefcases were available to him. At one point, he was told that they were available, and later on, he used them, after Ms. Lessard told him that she wanted him to.

[101] The grievor said that he was able to confront Ms. Lessard. He saw that she was unwilling to listen to his explanations due to her rigid nature.

B. For the department

1. Ms. Lessard

[102] Ms. Lessard was called to the Bar in 1993. Since 1992, she has worked at the Tax Litigation Directorate and has been the regional manager and the senior counsel/team leader since 2007. Her team-leader duties include taking part in the management committee and managing a team of 12 to 20 lawyers. She assigns work, assesses the lawyers, and handles developing new lawyers. All the positions are for litigators.

[103] The organization includes a senior regional director for the Quebec Region and an assistant regional director, Ms. Boudreau (civil), who was Ms. Lessard's supervisor. Her director was Ms. Tardif. Her team-leader colleagues were Ms. Boudreau (tax) and Mr. Levasseur.

[104] Ms. Lessard is experienced with coaching lawyers. Starting in 2000, she has been an articling principal with the Barreau du Québec for several lawyers, and she supervises several law students. As a team leader, she coached several lawyers after they were hired. She said that the document entitled, "General Objectives 2009-2010 [*sic*]", and dated June 14, 2010, which both she and the grievor signed (Exhibit E-1, Tab 11), includes the same objectives that everyone in the regional directorate receives.

[105] With respect to her email exchange with the grievor on April 16, 2010 (Exhibit E-1, Tab 2), about the review of a draft response to an appeal notice that he prepared, Ms. Lessard said that she revises all new lawyers' pleadings until she thinks it is no longer necessary. She spent a good hour with him and wrote her comments by hand on the draft.

[106] In an email to the grievor on April 21, 2010 (Exhibit E-1, Tab 4), about a case that he was to argue in June, Ms. Lessard informed him that a colleague had a case to argue on the same day and that she could coach him. She suggested that he review the litigation and attend his colleague's hearing. She said that new lawyers were assigned informal proceedings files.

[107] Ms. Lessard referred to an email exchange on April 28 and 29, 2010 (Exhibit E-1, Tabs 6 and 7), about the grievor's refusal to handle a file that Mr. Levasseur had given him on the grounds that he felt it required too long of a factual analysis and that he did not have time to handle it. She said that as a team leader, she assigns files with team-leader colleagues, Mr. Levasseur and Ms. Boudreau (tax). Ms. Lessard said that given the context, she knew that the grievor was overloaded.

[108] Ms. Lessard said that all new lawyers and probationary employees, including the grievor, receive a binder that includes drafting instructions. Referring to an email exchange with him on May 7, 2010 (Exhibit E-1, Tab 8), in which she said that he had come to her office to discuss his interpretation of the use of a certain provision in a case involving a statute-barred assessment, she told him that his interpretation might be possible but that their experts had used the one adopted in the office based on the model in the drafting guidelines and that he had to use it. He followed the instructions in the case in question, but when she reviewed other pleadings, Ms. Lessard observed that he had returned to the model that he had adopted in the statute-barred case.

[109] In an email exchange with the grievor on May 20, 2010 (Exhibit E-1, Tab 9), Ms. Lessard reminded him to record his time in the computer system. The orientation binder provided to new employees indicated how to record their time. He was late entering his time. Since she had met with him a few times, she knew that he was recording his time on paper instead of in the system.

[110] On June 4, 2010 (Exhibit E-1, Tab 10), by email, Ms. Lessard informed the grievor of the deadlines for submitting his written recommendation to the Agency after a

negative decision and told him where in the orientation binder to find the items to include. She did it because it was his first case before the Tax Court of Canada.

[111] When a negative decision against the Agency is received, the lawyers must prepare a recommendation to the Agency on whether to appeal, which must be reviewed by the team leader before it is sent to the Agency. The recommendation must be sent 10 days after the Tax Court of Canada's judgment date. In the case in question, the judgment was rendered on June 3, 2010, and was received at the office on June 4, 2010. The grievor sent his draft recommendation to Ms. Lessard on June 15, 2010 (Exhibit E-1, Tab 13).

[112] Ms. Lessard made changes to the recommendation as it was not satisfactory. It lacked clarity, and the style was cumbersome. For example, it had a 14-line paragraph, and it lacked logic.

[113] Ms. Lessard referred to an event related to a file assigned to the grievor involving a taxpayer's request to extend the deadlines for filing a notice of objection. Ms. Landry accompanied him to the Tax Court of Canada on June 28, 2010, and reported on it to Ms. Lessard the same day.

[114] One thing was that the grievor arrived at the Tax Court of Canada with a file that was rumpled because he had carried it in his backpack. Earlier, Ms. Lessard had advised him not to do that when he wanted to bring the file home to work on. He told her that he did not think it was the same rule when travelling to court by taxi. She explained to him that the same rule applied, that the taxpayer's information was vulnerable, and that if he became distracted, he could forget his backpack in the taxi.

[115] The most important factor is that the grievor did not bring an Agency witness to the Tax Court of Canada. The taxpayer's only argument was that he had not received the assessment notice from the Agency. The grievor should have brought evidence from the Agency that the assessment had been made and that the deadlines for filing a notice of objection had begun to apply. Ms. Landry requested an adjournment and told him that he needed an Agency witness. He believed that he did not need one, relying on a section of the *ITA*. After the adjournment, he tried to make the taxpayer accept the reconstituted assessment notice, but it was not the document that the taxpayer had received, and he did not recognize it.

[116] On returning to the office during the noon adjournment, the grievor intervened in Ms. Lessard's discussion with Ms. Landry and shared his theory on the section of the *ITA* that exempted him from calling a witness. Ms. Lessard confirmed that she shared Ms. Landry's interpretation that an Agency witness was needed, but not necessarily the person who had made the assessment. She could see that he did not agree; he abruptly left. During the lunch hour, he contacted a witness to present the document in evidence.

[117] The next day, the grievor returned to see Ms. Lessard. He had not liked Ms. Landry's feedback. According to Ms. Lessard, Ms. Landry's comments might have been a bit harsh, but the grievor had not sufficiently prepared his case and did not react well to their feedback. Ms. Lessard reiterated her interpretation that the documents had to be presented through a witness, and she told him that the other lawyers presented evidence through them. He replied that other lawyers thought like him and mentioned Ms. Thériault. Ms. Lessard told him that Ms. Thériault did not have as much experience at the Tax Court of Canada as did she and Ms. Landry. She told him that he had to follow the advice of those who accompanied him to court. The discussion then ended.

[118] With respect to the action plan for July 16 to October 16, 2010 (Exhibit E-1, Tab 18), Ms. Lessard said that Ms. Tardif had asked her to consult Human Resources, as a problem with the grievor had started. She was advised to prepare an action plan and to find one person, rather than several, to support the grievor. She believed that Mr. Zolia was the right person; he was thorough, he had litigated in the private sector before joining the Department of Justice, and she knew the quality of his work because she had supervised him as a team leader for a while.

[119] Ms. Lessard presented the action plan to the grievor on July 16, 2010. She referred to certain points in it. Workload management required that with his assistant, he develop tables of his cases and deadlines that had be regularly updated. After the meeting, he emailed Ms. Lessard an Outlook calendar that his assistant had made and that Ms. Lessard found appropriate, and he followed her comments.

[120] With respect to Ms. Payette's appeal case, Ms. Lessard assigned the research to the grievor. Ms. Payette's feedback was that he did not carry out the research because he preferred instead a point of law that had not been argued at trial. Ms. Lessard

discussed this with him and told him that the point could not be raised on appeal as it had not been raised at trial. However, Ms. Payette told Ms. Lessard that the grievor found something that the Federal Court of Appeal had retained, and she shared it at a group meeting.

[121] As for the request to remain flexible when applying the law to facts in a litigation case, Ms. Lessard said that it was related to her comments in the action plan, namely, "[translation] The facts are often nuanced and will evolve."

[122] As for wearing a jacket, it was easy to correct, but Ms. Lessard mentioned it so that it would not be forgotten.

[123] Ms. Lessard relied on Ms. Landry's comments to include the correction to arrive at the Tax Court of Canada early so that he could have his documents properly in order and then effectively manage the evidence and authorities.

[124] Ms. Lessard also referred to the correction that the grievor had to listen to all parties, express his opinions tactfully, and maintain good working relationships with everyone. When he arrived, he did not interact with people, such as in hallways. In the summer, he went to a party at a colleague's home, and Ms. Lessard observed that he was beginning to become involved.

[125] Ms. Lessard asked the grievor if he agreed with the choice of Mr. Zolia as coach. He said that he was and that Mr. Zolia seemed good. She submitted the action plan to Mr. Zolia, who told her that he did not want to be responsible for the decision in the grievor's case. She told him that he was not the grievor's supervisor and that she would make the decision. So, Mr. Zolia agreed to be the grievor's coach.

[126] Ms. Lessard was referred to the grievor's mid-year appraisal (Exhibit E-1, Tab 23). She appraised all the lawyers in her group. The grievor completed the last page, the "[translation] Individual Learning Plan", with four objectives. For objective 1, "[translation] essential training", and objective 3, "[translation] diversity awareness training initiative", Ms. Lessard said that he was aware of them since registration was automatic. The grievor made the comments on the other two objectives.

[127] Although the appraisal meeting took place on November 2, 2010, the form was signed on December 20, 2010. Ms. Lessard explained that she had already prepared the narrative attached to the form and that she had shared it with the grievor. However,

she had used the short appraisal form for all the lawyers. As the grievor had requested the detailed form he was entitled to under the policy, she had had to redo it.

[128] The observations noted in the narrative section about sessions at the Tax Court of Canada were based on Mr. Zolia's written comments to Ms. Lessard and the grievor, including the need for a logical plan and a structure for examination or cross-examination. As for the observation that the grievor had to note the reasons for judgment when they were delivered from the bench, he told Ms. Lessard that it was not necessary since the judgment was in the Agency's favour. She told him that it was important to have it on file and to notify the client.

[129] In the narrative section about three legal opinions that had been assigned to the grievor, Ms. Lessard relied on the comments from those who had reviewed the opinions. A review committee consisting of two lawyers reviewed each opinion, and the committee's composition differed for each opinion. The reviewers deemed the first two opinions inadequate. They found the writing style cumbersome. In the first opinion, the conclusion was incorrect, the order of presentation was inadequate, and many of the statements were irrelevant. One reviewer rewrote the opinion.

[130] In the second opinion, the sentences were still long and cumbersome. Among other things, the grievor assumed facts without proof, and in his analysis, he gave a legal statement rather than merely a reasoning supported by references. He addressed an issue that the Agency had not raised and concluded that it was not a problem. The reviewers rewrote the opinion. Ms. Lessard noted that it was true that the Agency had told the grievor that it did not want to pursue the audit in that case any further, but there was a way to go further or to indicate the limitations of the opinion rather than presuming unverified facts.

[131] With respect to the third legal opinion, Ms. Lessard noted that the grievor had clearly identified the legal issues in question. However, one legal point was addressed incorrectly; namely, the tax debtor's arbitrary assessment. The grievor treated it as if it were fatal to the Agency's position, even though the information on file was insufficient for that. It is a challenge to apply concepts of law to a fact situation that is sometimes incomplete. The order of presentation was similar to the first two opinions and was far too complex. The reviewers rewrote portions of the opinion to show how to achieve a more understandable order and a better conclusion.

[132] The narrative section on general-procedure cases indicated that the grievor was primarily required to prepare responses to appeal notices. Much of the first one had to be rewritten. Although the subsequent ones were better written, some things had to be improved, including writing assumed facts clearly, concisely, and in a logical order, and listing all applicable legislative provisions. It is noted that in one file, the grievor was late sending a response to the appeal notice with a draft letter to the Agency for review. He indicated that he was not aware that he had to send such a draft letter 10 days before the deadline for filing with the Tax Court of Canada. Ms. Lessard noted that he had had to prepare a similar letter for the Agency in his first cases under her supervision and that of Ms. Bélec.

[133] The narrative included an ethics-and-values section that referred to the grievor's question about whether he could recommend that an unrepresented appellant withdraw from the appeal by explaining that the Tax Court of Canada's judgment could prejudice the taxpayer in labour-law litigation. Ms. Lessard told him that advice cannot be given to unrepresented people or to someone he argues against. He then asked her if he could recommend that the taxpayer withdraw from the entire case. She explained that the Crown prosecutor's mandate is not to win but to ensure the proper application of the *ITA*.

[134] The narrative refers to other achievements by the grievor, including his active involvement in his professional development through several training courses. With respect to interpersonal relations, it is noted that he had had a lack of openness to legal advice from a more experienced colleague and from Ms. Lessard. It is also indicated that since then, he was more open to the legal advice he received. Ms. Lessard noted that she received three positive comments from the Agency about him.

[135] The conclusion of the narrative in the grievor's appraisal reads as follows:

> [Translation]
>
> …
>
> *Mr. Rouet still requires reviews of his work, given the points to improve noted earlier. Specifically, he must develop his written communication skills … in the area of advocacy techniques and must develop his assessment of the facts to properly apply the law, as this difficulty has emerged in several mandates. In particular, his conclusions should be more nuanced. With respect to*

> *interpersonal relations, Mr. Rouet must pay more attention to how he interacts with others (tone and explanations) due to the potential impact on others.*

[136] Ms. Lessard told the grievor that he was on probation and that his job was at stake. He had to show significant improvement to the expected level, and he had to become self-sufficient. She told him that they would look at it again in February 2011. She wanted to see a legal opinion, if she had the opportunity to assign him one, before reassessing him in February. After the meeting, she had the opportunity to assign him a new legal opinion in December 2010 or January 2011.

[137] In February 2011, Ms. Lessard met with Ms. Tardif about the grievor, as they both had serious concerns. Ms. Lessard wanted to see more legal writing from him before making a decision.

[138] Ms. Lessard had a discussion with the grievor in early March 2011. He asked her if a decision had been made about his permanency. She pointed out to him that she still had concerns, particularly about his session at the Tax Court of Canada on January 31, 2011, which she attended to assess the state of his development. She reminded him of the feedback she had given him and noted that had the case been more complex or the opponent more experienced, he would probably not have achieved the same result.

[139] Ms. Lessard also referred the grievor to his legal opinion on a consent to judgment in which he did not refer to *ITA* provisions but to lines in the income tax return, which have no legal meaning. She told him that at that stage of his development, the results caused her concern.

[140] As for the legal opinion that Ms. Lessard had assigned him, the grievor told her that he was not ready to submit it because he had requested more information from the Agency. They discussed the opinion. She did not agree with his approach; she reoriented him. He submitted the opinion to her on March 28, 2011. She was unable to provide him with feedback. She passed the opinion to an experienced lawyer and sought another lawyer to set up the review committee. Before she could, the lawyer told her to reassign the file because it required too many changes. She assigned it to another lawyer who was at the same level as the grievor.

[141] Ms. Lessard had other concerns about the grievor's interpersonal relations. In an incident involving his assistant, he had to accompany another lawyer for a case out of town. He did not have a credit card to book a hotel room. He apparently informed his assistant of it, who reportedly told him that she could still make the reservation. When she received the invoice, Ms. Lessard found that the room price was above the standard because the room reservation had not been guaranteed by a credit card. The grievor wrote on the invoice that it was his assistant's fault. Ms. Lessard learned from the team leader for assistants that it upset the assistant. Ms. Lessard said that when she met with the grievor, he was defensive and explained the context in an angry tone. She told him that the assistant was upset and that it was not good interpersonal relations. He told her that he would make a nice Christmas gift for the assistant; she replied that nevertheless, good interpersonal relationships were still required.

[142] Between November 2010 and March 2011, the grievor was involved in two other interpersonal issues with paralegals. The first incident involved a legal mortgage contract prepared by a paralegal based on a template and signed by the lawyer. A notary at the Quebec Regional Office had prepared the template. The grievor requested changes to it twice in March 2011, and the paralegal team leader, Steve Massenat, shared them with Ms. Lessard and asked her what to do. She met with the grievor for a discussion.

[143] With respect to the second incident, Mr. Zolia told Ms. Lessard that a paralegal had cried because the grievor had asked her for work that she thought was beyond her duties. He had wanted her to find documents to support net-worth amounts. He requested that she attend the meeting with the lawyer for the opposing party and support the net-worth amounts. Ms. Lessard discussed it with Stéphanie Côté, who was in charge of the students. Ms. Côté told Ms. Lessard that she had told the grievor that it was the Agency auditor's work and that she refused to assign it to her students.

[144] Ms. Lessard met with the grievor in mid-March 2011, told him how the paralegal felt, and stated that the paralegal would not attend the meeting. He or the auditor had to justify the amounts. She told him that she did not understand why he did not follow the advice of an experienced lawyer who had told him to give the work to the auditor. He provided her with several explanations for not following the advice.

[145] With respect to the grievor's rejection on probation, Ms. Tardif terminated his employment, but on the Management Committee's recommendation. Ms. Lessard's role at the meeting was as the grievor's supervisor, and she had to identify the shortcomings she had discussed with Ms. Tardif.

[146] Ms. Lessard said that Mr. Levasseur had called the meeting. The Management Committee had agreed on a recommendation. However, Ms. Lessard said that she believed that the situation could be corrected. The Management Committee recommended that Ms. Tardif terminate the grievor's employment. Ms. Tardif, Ms. Boudreau (tax), Mr. Levasseur, the team leaders, and Mr. Massenat attended. They all made the decision on consensus to terminate the grievor's employment during his probationary period.

[147] Ms. Lessard testified about certain things that were part of her considerations for rejecting the grievor on probation.

[148] She observed the grievor at the Tax Court of Canada on January 31, 2011, with respect to related files of partners who jointly owned a building. Ms. Lessard said that she commented both at the meeting and in writing after it. It was a matter related to building expenditures. The taxpayers' counsel said that according to the grievor, only one issue was at play, but the taxpayers challenged all expenditures related to the building.

[149] At the start of the January 31, 2011, hearing, the grievor asked the Tax Court of Canada to exclude the witnesses. Ms. Lessard felt that it was an awkward way of presenting common evidence. Her feedback was that he should have asked for common evidence. He had the first taxpayer's testimony entered on his partner's record, but due to how he made his request, it was not clear whether the auditor's testimony should also be entered into the partner's record. The first taxpayer's partner did not testify, and the partner's documents were not submitted as evidence. Ms. Lessard told the grievor that it was wise not to have the first taxpayer's partner testify but that there was a way to submit the essential documents as evidence, because were an appeal made, then a complete file would be required. She told him that he was lucky that the opposing parties did not present much evidence. Although the decision was in the Agency's favour, it could have been different, depending on the context.

[150] The grievor prepared well for his examination-in-chief of the auditor. However, his questions were too long, but because he had prepared her well, she was able to answer them. Although it was not his first case, he had problems filing documents, such as presenting a document to the witness before presenting it to the opposing counsel for that counsel's consideration. The arguments had no logical order, and he forgot to submit to the judge a Quebec Court of Appeal decision.

[151] Ms. Lessard also referred to issues that Mr. Zolia identified.

[152] When Ms. Lessard provided her feedback to the grievor with respect to the cases on common evidence, he simply listened and did not respond. After his rejection on probation, he emailed several people at the Department of Justice and the Agency, attacking Ms. Lessard's competency. Only after his termination did she learn that he had consulted with someone from the Department of Justice, who had provided him with other advice on the related files of January 31, 2011.

[153] Under cross-examination, Ms. Lessard said that she and Ms. Boudreau (tax) had met with the grievor in an informal interview for the purpose of making a first contact and of determining his interests before hiring him. He said that he had gained taxation experience with Judge Tardif of the Tax Court of Canada as part of his master's degree in taxation. According to Ms. Lessard, it is plausible that he told her that he had no litigation experience.

[154] Ms. Lessard was looking for two major facets in the candidates: taxation and litigation. She stated that since the grievor had taxation experience, she simply needed to train him in litigation. She expected him to be self-sufficient after one year of work.

[155] With respect to her mid-year appraisal of the grievor on November 2, 2010, Ms. Lessard said that her observations were made throughout the appraisal period, from April 1 to September 30, 2010. She received feedback from colleagues and prepared the narrative before November.

[156] As for the action plan from July 16 to October 16, 2010, the grievor had not met certain objectives, and major incidents had occurred. The purpose of the plan is that the person know the areas that management, Ms. Lessard, and the other team leaders find of concern and that the shortcomings be very clear.

[157] The grievor's objectives are found in the document entitled, "[translation] General Objectives 2009-2010 [*sic*]" that he and Ms. Lessard signed on June 14, 2010. In addition to the general objectives, the document contains these two personalized objectives that apply to all new lawyers:

> [Translation]
>
> *Have gained good knowledge of the rules of the Tax Court of Canada and the rules of civil evidence to handle low- or medium-complexity litigation cases independently.*
>
> *Have developed advocacy skills (evidence and arguments) to be able to lead low- or medium-complexity litigation cases independently.*

[158] Ms. Lessard said that it was very likely that she did not show the objectives to the grievor before June 14, 2010. They talked about his individual learning plan in May 2010 and might have discussed his performance against the objectives in that plan. I note that the plan indicates that it was approved on May 21, 2010.

[159] The part of objective 2 (rules of procedure) about the learning objective referred to the personalized objectives in the document entitled, "General Objectives 2009-2010 [*sic*]". With respect to the peer learning item in objective 4 (achieving independence), Ms. Lessard said that it could vary; it could be done through coaching or by consulting team leaders or colleagues. In May 2010, when the grievor entered his objectives in the system, she identified four or five different lawyers as resources for him. Beginning in mid-July 2010, most of his peer learning was done through Mr. Zolia and Ms. Lessard and through regular discussions with him. Mr. Zolia had concerns about the performance appraisal. She told him that he did not have to carry one out.

[160] Mr. Zolia did not take part in the grievor's mid-year appraisal. Ms. Lessard prepared it and never showed it to Mr. Zolia. He did not take part in the meeting with the grievor on November 2, 2010, and Ms. Lessard does not believe that he was present on December 20, 2010. Ms. Lessard had only his feedback from what he had observed. She had observed other things.

[161] Ms. Lessard was referred to Mr. Zolia's notes (Exhibit E-1, Tab 20) and said that it was the type of document he gave to her. Among other things, she relied on this type of document for the grievor's appraisal. She did not discuss the appraisal with Mr. Zolia after presenting it to the grievor. When the grievor began in his position, she

told him that he could observe hearings. The one-week course on advocacy skills that he attended was considered the most comprehensive training in Quebec. When he returned, she asked him for his comments. He replied that it is good to be reminded of principles that one knows. The other lawyers who had attended the course did not provide that answer. Ms. Lessard did not ask Mr. Zolia for an opinion on the grievor's independence at the Tax Court of Canada because she wanted to form her own opinion. Mr. Zolia's role was to let her know about shortcomings that he had observed.

[162] At one point, Mr. Zolia told Ms. Lessard that he had assigned the grievor a search and that he had suggested that the grievor's work be limited to carrying out research for other lawyers. She told him that there was no research position. She had told the grievor that he understood taxation, which was one of his strengths. She also observed that he was comfortable with computers. However, she found that one of his shortcomings was applying his knowledge to the facts. He presented the facts in a questionable light to support his argument. Going to court to win at any cost is not the goal of Department of Justice lawyers.

[163] The grievor had difficulty accepting feedback, such as from the legal-opinion reviewers. His weakness drafting legal opinions was one of the reasons for his rejection on probation. He was unable to apply his knowledge to the facts. When asked if it had been possible to not assign legal opinions to the grievor, Ms. Lessard replied that all lawyers must do them.

[164] When asked where legal opinions are mentioned in the general objectives document, Ms. Lessard indicated the "[translation] communication" and "[translation] quality service delivery competency" objectives and said that the objectives apply to all lawyers. She said that the grievor should have read his position's job description (Exhibit E-1, Tab 1) or consulted her to discuss the expectations for drafting legal opinions. She said that the action plan did not mention drafting legal opinions, probably because she had not yet received one from him.

[165] The grievor took a course on drafting legal opinions about a month before his rejection on probation. However, Ms. Lessard relied on examples in which he could not apply the law to the facts. Although the individual learning plan did not mention drafting legal opinions, she said that it is part of clear communications and that it was included in the appraisal narrative.

[166] At the November 2, 2010, meeting, Ms. Lessard told the grievor that his job was at stake. When asked where that was mentioned in the appraisal, she replied that it was not included in the form, which was why she informed him of it verbally.

[167] Ms. Lessard said that after the grievor's rejection on termination, she prepared another narrative. It was suggested to her that each employee should have two appraisals per year and that discussions should take place on performance feedback between them. He received continuous feedback, which she understood was enough.

[168] As for the case involving the unrepresented teacher mentioned in the narrative section on ethics and values, Ms. Lessard said that when the grievor wanted to advise the taxpayer to abandon the penalty issue, she told him not to. He then asked her if he could recommend that the taxpayer abandon the whole case. When asked whether, apart from that incident, the grievor was concerned about complying with the code of conduct, Ms. Lessard said that she assumed so.

[169] In the case of the legal mortgage contract, Ms. Lessard said that the grievor took care not to sign a document about which he was uncertain.

[170] Ms. Lessard was referred to the judgment partially in the Agency's favour, for which the grievor was to prepare a recommendation. In that case, he did not follow an experienced lawyer's advice, who had suggested that he settle the matter. Ms. Lessard assumed that the lawyer's advice had been well founded.

[171] Ms. Lessard was referred to the incident of the case in which the grievor wanted to use a legislative provision to file a document at the hearing as evidence, without a witness. She said that it was a significant event for her because two lawyers had told him that the document had to be filed with a witness, and he had not followed their advice. He did not like Ms. Landry's feedback during the lunch break and left abruptly. The discussion was intense, and Ms. Landry told him that he needed a witness. He did not say that he had a call to make. The day after the discussion, he told Ms. Lessard that he had not appreciated Ms. Landry's feedback.

[172] When asked whether, based on the peer learning method, she assumed that all instructions from mentor lawyers were correct, Ms. Lessard replied in the affirmative, if they had the right information. When asked why she intervened in the grievor's work for Ms. Payette in the appeal case, Ms. Lessard replied that Ms. Payette had told her

that the research assigned to the grievor had not begun because he insisted on a point of law that had not been raised at trial. He did not deny that he had emphasized that argument with Ms. Payette.

[173] When it was suggested that the grievor had proposed another point because his research had not yielded any results, Ms. Lessard replied that Ms. Payette did not tell her that. He told her that although there was no evidence at trial, the argument could be made on appeal. He was not open to feedback. That was one time when Ms. Lessard felt that her comments were not getting through. If he could not convince her of his point, he had to accept her feedback.

[174] When asked if the tone was raised sometimes, Ms. Lessard replied that the grievor spoke in a calm tone but that it was possible.

[175] The decision to reject the grievor on probation was made before March 31, 2011. He submitted the legal opinion on March 28, 2011, but the decision had been made.

[176] When asked about the facts that supported the rejection on probation, Ms. Lessard said that she reviewed the legal opinions, the consent to judgment, the incidents with the paralegal and the grievor's assistant, his sessions at the Tax Court of Canada with her and Mr. Zolia, and her comments in testimony-in-chief. When asked why that had not been mentioned in the termination letter, Ms. Lessard said that Human Resources had advised her on preparing it.

[177] Ms. Lessard read the grievor's grievance because, after his rejection on probation, his email to several people had included part of the grievance.

[178] With respect to the hearing on common evidence, the grievor did not explain to Ms. Lessard that a lawyer from the office had advised him to file the evidence from one case in the other, to exclude one of the witnesses. Had he informed her, she would have told him that the lawyer for the other party could have objected to the exclusion request. It was also not clear that the auditor's testimony had been entered in the second case. When asked if the decision to terminate the grievor during probation would have been different had he told her that he had acted on the advice of a lawyer from the office, Ms. Lessard replied that it would have been the same. She was present at the hearing, and other shortcomings arose.

[179] The hotel-reservation incident with the grievor's assistant took place between November 2010 and his rejection on probation, thus after the appraisal for the period of April 1 to September 30, 2010. It was included in the verbal feedback for all the lawyers.

[180] Under re-examination, Ms. Lessard said that the narrative attached to the grievor's mid-year performance appraisal detailed his shortcomings.

2. Mr. Zolia

[181] Mr. Zolia was called the Bar in 1998. Since 2000, he has worked at the Tax Litigation Directorate. He completed a master's degree over two years. His work consists of 95% litigation before the Tax Court of Canada and the Federal Court of Appeal. With respect to his coaching experience, he said that at the time relevant to the facts, experienced lawyers were paired with junior lawyers, with which he took part often. He also coached CEGEP students in oral debates.

[182] Mr. Zolia made two warnings. First, when he was called to testify, he remembered very little. He had not kept any documents, so he could refer only to the documents filed in evidence. Second, he was in a sensitive position because he had gotten along well with the grievor.

[183] In 2010, Ms. Lessard, his team leader, approached him to coach the grievor for upcoming hearings and for the pleadings that he was to prepare, such as responses to appeal notices. Mr. Zolia said that his coaching began in July 2010, and he believed but was not certain that it lasted three months. No formal meetings were held with the grievor and Ms. Lessard. It was like the other coaching he had done, with a little more detail from her.

[184] Mr. Zolia explained the appeal process as follows. The Agency makes a reassessment that corrects an initial assessment and that is not always in the taxpayer's favour. The taxpayer may file an administrative appeal within the Agency and, if not satisfied, may file an appeal notice with the Tax Court of Canada. The Agency then transfers the file to the Department of Justice. The deadline for responding to an appeal notice is 60 days and may be extended.

[185] Mr. Zolia's role was to answer the grievor's questions, review the texts for the Tax Court of Canada, and ensure that deadlines were met. Ms. Lessard said that the

grievor had difficulty meeting the Agency's deadlines and standards. The draft response to an appeal notice must be sent to the Agency's Litigation Office 10 business days before the date for filing with the Registry of the Tax Court of Canada.

[186] Mr. Zolia was informed that the grievor had encountered some procedural difficulties during a hearing. Ms. Lessard asked Mr. Zolia to attend the hearings, take notes, and provide feedback to the grievor.

[187] Mr. Zolia believes that he was chosen because he gets along well with everyone at the office and with the younger staff. As well, his office was close to the grievor's office, which facilitated interaction.

[188] Mr. Zolia attended two of the grievor's hearings. His six pages of handwritten notes from September 22, 2010 (Exhibit E-1, Tab 20), were related to the first hearing. The case involved the insurability of an employee under the *Employment Insurance Act* (S.C. 1996, c. 23), which is within the jurisdiction of the Tax Court of Canada. The judgment was rendered from the bench.

[189] In his notes, Mr. Zolia included the facts of the evidence to allow himself to advise the grievor during a break in the hearing. The first three pages of the notes are criticisms of the grievor's work. This was part of the coaching to correct the grievor's problems during the hearing. To offset the negative effect of the criticisms, Mr. Zolia had noted, "[translation] presented well at the beginning". He said that one of the grievor's strengths was his good pace in his arguments. He gave a copy of his notes to the grievor after discussing them and gave Ms. Lessard a copy.

[190] One thing that most struck and surprised Mr. Zolia was that the grievor had given the Agency's witness a binder that included the exhibits and authorities. They did not speak about it before the hearing because Mr. Zolia did not foresee such a problem. The rules of procedure at the Tax Court of Canada state that exhibits must be filed individually and separately from the jurisprudence. Mr. Zolia said that he was coaching a professional, who was a lawyer and an engineer, and that he did not believe that his role went as far as checking knowledge of the rules of evidence. He discussed it at length with the grievor, and it did not happen again.

[191] According to Mr. Zolia, based on the two hearings he attended, it is fair to say that in the terms of presentation to the Tax Court of Canada, the grievor had many

shortcomings. Mr. Zolia discussed them all with him. He noted that the questions that the grievor asked were unusually long — almost a minute. As well, when questioning a witness, he used words that the witness had never said. Mr. Zolia said that each thing that he felt was very serious, such as adducing exhibits into evidence, had basic rules that every lawyer is supposed to know. However, Mr. Zolia tried to strike a balance in his feedback by also highlighting the good in the grievor's delivery.

[192] At the Tax Court of Canada, when addressing the judge, one must stand. The grievor did not do it, which Mr. Zolia attributed to his nervousness. However, he again forgot to stand during the second hearing that Mr. Zolia attended.

[193] Among his notes worthy of mention, Mr. Zolia said that the grievor had difficulty with oral arguments. According to Mr. Zolia, oral arguments, or at least the theory of the case, must be prepared in writing before the hearing. He noted that the application of the law to the facts was deficient; the grievor had difficulty linking the law and the facts. The law was not the problem, in terms of the litigation. When discussing with the grievor the application of the law to the facts in his role as coach, Mr. Zolia mentioned the good points. He said that the law was one of the grievor's strengths but that he had to better prepare and interpret the facts. Once, Mr. Zolia spoke with Ms. Lessard about the possibility that the grievor, who has a master's degree in taxation, could work more in law related to technical issues and less in litigation.

[194] The second hearing that Mr. Zolia attended was in late October 2010. It involved unreported income that included one of two possibilities: either the income was not reported, or the expenditures were too numerous. It was an informal proceeding case. Mr. Zolia's handwritten notes (Exhibit E-1, Tab 22) indicate that the preparation was rough, which had already been discussed. Before the hearing, Mr. Zolia asked the grievor questions, including about the theory of the case, and the grievor did not do well.

[195] The grievor requested that the hearing be postponed due to the absence of a witness, the taxpayer's former friend. Mr. Zolia said that before requesting a postponement, he should consider the issues, including the witnesses who were called and the cost of preparing the case. It seemed to him that the absent witness was quite detached from the situation. The notes indicate that the burden of proof must be

taken into account when considering a postponement. Mr. Zolia explained that when the Agency reviews an assessment and a tax return within three years and reassesses the taxpayer, all the facts on which the Agency relies are taken for granted for subsequent appeals.

[196] When considering a postponement, one question is whether the appellant can overturn the Agency's presumptions of fact without the presence of a witness. The witness's absence was discussed at the Tax Court of Canada, but not clearly. The appellant arrived at the hearing with letters from the absent witness, which were entered into evidence without objection that they were hearsay.

[197] Mr. Zolia also noted that the grievor had objected, without stating reasons. In addition, the exhibits for the evidence and the oral arguments had a lack of clarity between them. The grievor filed exhibits that he had prepared, but his Agency witness should have prepared them.

[198] Mr. Zolia believes that for that hearing, he strongly suggested to the grievor that his questions be written down.

[199] Mr. Zolia noted that in his arguments, the grievor was confused about the treatment of the amounts involved. Also, he used expressions that suggested that the appellant lied on his income tax return. Mr. Zolia said that that should not be done after hearing an appellant's congenial testimony. The grievor had to exercise judgment and not attack an appellant who gave credible testimony. Other techniques had to be used, such as the burden of proof, which is basic, as the facts are taken for granted. The grievor did not remind the appellant of the appellant's burden of proof. In his arguments, he also did not mention the law.

[200] Mr. Zolia testified that the grievor's delivery had disappointed him because a month had passed since the first hearing he attended, and he had discussed it in depth with the grievor. After the second hearing, Mr. Zolia reviewed his notes with the grievor. He was in a constructive role and did not know if he had made his disappointment clear.

[201] Their relationship remained cordial after the coaching.

[202] Mr. Zolia said that after the grievor's rejection on probation on March 31, 2011, which surprised him, the grievor called him and wanted to meet with him, which

Mr. Zolia accepted. They met at a café. The grievor was disappointed with the decision. Mr. Zolia tried to be positive and told him that he had technical strengths.

[203] Later, Mr. Zolia was bothered that the grievor had emailed the director and assistant director of the Agency's Litigation Office, criticizing the Department of Justice. The grievor was very nice about Mr. Zolia but harsher about other colleagues, including Ms. Lessard. Mr. Zolia said that again, he noted what the grievor had done at the Tax Court of Canada, namely, put words in Mr. Zolia's mouth, particularly that he had been shocked by the grievor's departure. Mr. Zolia said that if by the word "[translation] shocked", the grievor meant "[translation] surprised", it was right. But if he meant that Mr. Zolia had been angry, he had not been.

[204] The other thing that bothered Mr. Zolia was that the grievor used positive comments that Mr. Zolia had made during their discussions. The grievor had good sides, but he was unfair to other lawyers at the office who were very strong technically. Mr. Zolia had to justify himself, and he forwarded the email to Ms. Lessard. It left him with a bitter taste. Were it not for that, he would have been interested in news about the grievor's career and maybe in seeing him again.

[205] Under cross-examination, Mr. Zolia said that he had not been involved in preparing the grievor's action plan. When asked if his coaching was only with those who had problems, Mr. Zolia said "[translation] No," and stated that he coaches beginning lawyers according to a method similar to the one he used with the grievor. His coaching style is based on observation, his 12 years of experience as a litigation lawyer, and his experience in speaking competitions.

[206] Before the coaching, the relationship between Mr. Zolia and the grievor was always very good. The only thing that cooled it was the grievor's email after his rejection on probation.

[207] Mr. Zolia did not recall if he met with the grievor and Ms. Lessard about applying the action plan or after it was signed. However, as part of the plan, he met with the grievor on Monday, July 19, 2010, to prepare the response to an appeal notice and to talk. The draft response was to be submitted to the Agency 10 business days before the filing with the Tax Court of Canada. That deadline was not met, but the response was not filed late with the Court.

[208] Mr. Zolia's role as coach was to help the grievor improve, try to share his experience with him, and correct problems. He did not take part in the grievor's performance appraisals and did not know if his notes were used for that purpose.

[209] When it was suggested that he took a large amount of notes while observing the grievor's hearings, Mr. Zolia replied that he observed as someone experienced. He identified problems and the good things and reviewed them with the grievor. Some things were discussed during the hearing, and others were discussed after the hearing or at the office. Mr. Zolia raised the very important issues, such as the fact that asking a question that lasts a minute is a bad practice. Mr. Zolia did not remember if the grievor made any comments when he raised a point.

[210] When asked why, in light of his observations, he was surprised that the grievor was not retained at the end of his probation, Mr. Zolia replied that it was because no one had talked to him about it. According to him, it was the first time someone had been rejected on probation at the Tax Litigation Directorate.

[211] When it was suggested that he had seen improvement in the grievor, Mr. Zolia replied, "[translation] Yes and no." During the second hearing that Mr. Zolia attended, the grievor did not mix the exhibits with the jurisprudence, but Mr. Zolia was disappointed that he had to repeat several things that he had discussed with the grievor after the first hearing. One important thing was that to him, the grievor's preparation seemed rough.

[212] When asked whether, without his notes, he would have remembered the grievor's rough preparation, Mr. Zolia replied that in general, he could have answered that the grievor needed significant improvement.

[213] When asked whether, given the improvements, he believed that the grievor had become self-sufficient, Mr. Zolia said that he did not think that the grievor had become fully self-sufficient for litigation. Had he had his own firm, he would not have let the grievor plead for a client. Mr. Zolia acknowledged that his opinion was from October 2010, when he completed his coaching role. He also admitted that he did not share that opinion with the grievor.

[214] With respect to the postponement request, the difficulties caused by the absence of the witness had to be explained to the judge, since it could have been

inferred that an essential item would be missing related to the burden of proof on appeal. The grievor might have requested the postponement because Mr. Zolia had noted that the arguments were not made clearly, suggesting that the request might have been made, but not clearly.

[215] Mr. Zolia was referred to his testimony that he had strongly recommended that the grievor prepare written questions and that he met with him before the second hearing that Mr. Zolia attended, to see if he was prepared. He responded that it was more of a discussion than a verification, for example, of the issues and witnesses. After the first hearing, Mr. Zolia told the grievor to come to his office with any questions. At the end of the preparatory meeting for the second hearing, he found that the preparation was rough. He believed that written questions had been prepared. According to Mr. Zolia, they had a discussion, and much had to be reviewed. He did not remember if he met with the grievor on the Friday before the Monday hearing, but everything was raised before the hearing.

[216] When asked if his impression that the grievor's preparation was rough was because the preparation was done in French, while the hearing was conducted in English, Mr. Zolia replied that he did not know in what language the grievor prepared his files. Mr. Zolia did not take part in the preparation, as two lawyers are not assigned to one case. It was not his mandate to prepare the case for the grievor from start to finish.

[217] Mr. Zolia was referred to his notes from the second hearing he attended about Option C and was asked why he had indicated "[translation] a bit arrogant". He explained that in the most common tax cases, the taxpayer's tax return is filed as evidence. The Agency might not have the original return, or the taxpayer might have filed the return electronically. The amounts on the tax return are available on a form entitled, "Option C", which is a summary of the tax return.

[218] During the second hearing that Mr. Zolia attended, the grievor filed in evidence the Option C of the appellant or the appellant's spouse and used the word, "[translation] mysterious". According to Mr. Zolia, it seemed arrogant to him. Mr. Zolia said that the grievor's comment was inappropriate because that document is filed in all tax-assessment disputes, and the Tax Court of Canada is familiar with it, but perhaps not the appellant. When it was suggested that that was his interpretation, Mr. Zolia

replied that it was; it was what he had seen and maybe what he had also seen on the judge's face.

C. Rebuttal

1. Ms. Marion

[219] At the time, Ms. Marion was the director of human resources operations and client services at the Department of Justice. The grievor called her to appear at the hearing before me, to produce documents related to Ms. Tardif, including Ms. Tardif's letter of appointment to the position she held from December 1, 2010, to May 30, 2011, and its classification; the record of her training and the documents showing the essential training needed before authorities could be delegated to her; and the delegation of authority.

[220] The grievor did not challenge the authorities delegated to Ms. Tardif, which she was entitled to exercise under the *PSEA*. Therefore, I do not consider it necessary to summarize Ms. Marion's testimony for the purposes of this decision.

2. The grievor

[221] The grievor never saw the job description for his position (Exhibit E-1, Tab 1) during his employment. He obtained it through an access-to-information request after his termination.

[222] With respect to his email exchange with Ms. Lessard on May 7, 2010 (Exhibit E-1, Tab 8), about the instructions for drafting a response to an appeal notice, the grievor said that he thought that the case was Ms. Bélec's and that he signed the response to the notice for her. According to him, the response was in accordance with the instructions, except that Ms. Bélec had combined into one paragraph what were normally two.

[223] With respect to his work with Ms. Payette, the grievor was in his office when Ms. Lessard walked by in the hallway and asked him what he was working on. She stood in the office door during the discussion. He told her that he was working on an appeal and that it seemed to him that there was a question of interest that had not been raised at trial but that he thought should be used in the appeal. When she told him that it could not be done, he replied that according to his research, it was possible,

if the necessary evidence was already in the trial record. She left, and he heard no more about it.

[224] The grievor raised the judgment that had been partially unfavourable to the Agency, for which he was to prepare a recommendation. In the case in question, he did not follow an experienced lawyer's advice, who went with him to the hearing and advised him to settle the case. The grievor said that he tried to settle but that the taxpayer did not want to, whom he contacted by letter on May 3, 2010, two days before the hearing on May 5, 2010. The letter asked the taxpayer for supporting documents showing that the amount borrowed had been used for an investment. According to the grievor, had the taxpayer shown him that the claim was justified, he was prepared to settle on the amount in question. He said that the judge told the taxpayer that the letter's contents were reasonable. The hearing was suspended while the taxpayer looked for the supporting documents.

[225] With respect to the file for which Ms. Landry had gone with him to the Tax Court of Canada on June 28, 2010, and the fact that he tried to file a document without a witness, the grievor said that Ms. Landry intervened at the hearing, to bail him out, and that she requested that the hearing be suspended. When they left, she told him to call the Litigation Office immediately, to reserve the presence of the required witness. When he asked to borrow her work phone, she became angry and told him that it had been irresponsible to be at the hearing without one. He replied that the office did not provide new lawyers with telephones. She gave him hers, and he called to ensure the witness's presence.

[226] Back at the office, he had a discussion with Ms. Lessard and Ms. Landry. He explained that he had had to make a call to ensure that the witness's presence and that he could not be away from his phone for too long. They understood, and he left the meeting. Apparently, he did not leave abruptly. The first time he heard Ms. Lessard complain about it was in her testimony.

[227] When he returned from the one-week advocacy-skills course, the grievor addressed his comment to Ms. Lessard that it is good to be reminded of the principles that one knows. He said that when he returned, she asked him how the course had gone; the meeting lasted about 20 minutes. He told her of an anecdote about the training that was from a welcome speech from a judge who said that the exercise was

based on simple concepts that all lawyers know but that are poorly applied, even by the experienced ones. He told Ms. Lessard that he found that the exercise was very good and that indeed, it is good to be reminded of the concepts that everyone knows. In her testimony, she referred to an excerpt out of context; it involved remarks that he had reported from an anecdote.

[228] The grievor mentioned the unrepresented teacher's file, for which Ms. Lessard had complained that he had raised the issue of whether he could recommend that the teacher withdraw the appeal. He testified that she told him that he would have to respond to the teacher's postponement request but that as he remembered, she did not refer to the file by the teacher's name. He said that at the time, she did not accuse him of what she accused him of in her testimony. However, I note that with respect to her testimony about the unrepresented teacher, she referred not to a postponement request from the teacher but only to the issue that the grievor raised; namely, recommending that the taxpayer withdraw the appeal.

[229] Ms. Lessard accused the grievor of upsetting his assistant by blaming her for the cost of the hotel room, which was more than expected. He said that the itinerary for the trip in question (Exhibit M-1, Tab 53) did not indicate, and his assistant did not tell him about, having to arrive at the hotel before 5:00 p.m., as he did not have a credit card to secure the reservation. Since he arrived after 5:00 p.m. and the room had been offered to someone else, he had to pay for a more expensive room.

[230] When he returned from the trip, the grievor contacted the Finance Branch to find out how to complete a reimbursement request and was told to attach a justification for the higher rate. He prepared the justification and indicated in it, "[translation] Reservation made without credit card …", followed by his handwritten and initialled note, and he added, "[translation] by my assistant". His reimbursement claim for the amount in excess of the allowed room price was denied. He met with Ms. Lessard in her office with the door closed and explained the context to her, which allowed reimbursing the excess amount.

[231] As for the Christmas gift for his assistant, the grievor said that Ms. Lessard told him that his assistant felt self-conscious around him and that she did not know how to approach him and break the ice. His office was far from hers, and he had little contact

with her. Ms. Lessard's information seemed plausible. He told her that people were making Christmas gifts and that would give his assistant a nice one, to break the ice.

[232] With respect to the hearing of the cases on common evidence on January 31, 2011, the grievor said that in her testimony, Ms. Lessard said that the testimonies in the first case had not been advanced in the second case. He referred to the hearing minutes (Exhibit M-1, Tab 54) and noted that they were the same for both cases. He pointed out that the minutes indicated that "[translation] … counsel for the appellants … requests that the evidence in [case 1] be entered into [case 2]". He said that he spoke to counsel for the appellants before the hearing and that they agreed to that approach. This is reflected in the partial transcript of the hearing (Exhibit M-7). Therefore, there was only one evidence for both cases without a joinder of causes.

[233] The grievor referred to Ms. Lessard's testimony on a consent to judgment in which he referred not to *ITA* provisions but only to lines in the income tax return, which means nothing in legal terms. He said that she did not name the case and that he had not handled many consent-to-judgment files. He found a consent-to-judgement file on which he had worked that included the *ITA* provisions (Exhibit M-1, Tab 55). He said that at the time, she did not mention her disappointment with his approach.

[234] With respect to the legal mortgage contract file, according to the grievor, Ms. Lessard said that all lawyers are called on to work on such files. He said that it was the collection group's work on Mr. Levasseur's team and that he was called on to work on it because they were overloaded.

[235] The grievor said that he had to certify the contents of the document for which the author was an Agency representative and to countersign it as a lawyer. He was uncomfortable because he was working on assessments and had not had any training in that type of work. It was a file that would have had enormous consequences for the Agency had he erred. He said that Ms. Lessard had said that he had not accepted the position of Mr. Massenat, the paralegals team leader. The grievor said that that was not accurate, as Mr. Massenat apparently spoke with the notary, who reportedly approved the contract, as indicated in an email from Mr. Massenat.

[236] The grievor then addressed the event in which Ms. Lessard told him that a paralegal had cried because he had asked her to carry out work that she felt was beyond her duties. In the case in question, involving a fishing company, he had

received a box of supporting documents from the Agency's auditor that had to be put in order. He thought that a student could do the work, and he spoke to Ms. Côté, who coordinated the students' work. She told him that his proposed work had no legal content and that it could not be given to the students.

[237] The grievor met with Mr. Massenat to explain the task and to determine whether it was suitable for a paralegal. Mr. Massenat designated a paralegal, and the grievor explained the task, which consisted of aligning the items with the expenditure years so that they could be found quickly. He told her that he might meet with the opposing party's lawyer and that if so, he wanted her to be there to find the documents. Since he did not know in advance the document he might request, they had to be filed well. The paralegal started the work and carried it out for a few days.

[238] The grievor learned about the problem when Ms. Lessard entered his office and accused him of abandoning his professional responsibilities by telling the paralegal that she would have to be present during a meeting with the opposing party's lawyer and that she would respond to the lawyer. He explained the circumstances to Ms. Lessard and what he had explained to the paralegal, which was that she would attend only to find the documents and not to answer legal questions from the opposing party. According to the grievor, Ms. Lessard did not respond.

[239] Ms. Lessard then reproached the grievor because the work was much too complicated for a paralegal with so little experience. The paralegal was on probation and was afraid to fail and not become permanent. He replied that Mr. Massenat had designated the paralegal, after which Ms. Lessard left his office.

[240] The grievor commented on Mr. Zolia's coaching. He said that he was disappointed to hear Mr. Zolia say that at the time, he did not believe that the grievor could go to the Tax Court of Canada on his own and that if Mr. Zolia had told him such a thing, it was for the purpose of coaching, to improve him. According to the grievor, in about December 2010, Mr. Zolia told the grievor that he had things to learn, that he was ready to litigate, and that Mr. Zolia had no concerns. He was also disappointed with Mr. Zolia's description of their meeting after his termination.

[241] As for how Mr. Zolia provided feedback, he told the grievor that he noted many things, to not go on at length about each item, and that he wanted to observe the direction of the grievor's progress and not have to repeat the same things to the

grievor. When Mr. Zolia told the grievor that he was ready to go to the Tax Court of Canada on his own, in a general sense, Mr. Zolia felt that the grievor was progressing to his satisfaction.

[242] The grievor then made more specific comments about the coaching. He referred to Mr. Zolia's notes made at the second hearing he attended in late October 2010 (Exhibit E-1, Tab 22) about the grievor's rough preparation. The grievor said that it was one of the first times he had argued with a large number of invoices. He said that he prepared the case the same way as another lawyer had, for whom he had worked in the past, who did not check all the exhibits, as Mr. Zolia did. The grievor said that he did not speak after that with Ms. Lessard about the same points as Mr. Zolia, since Mr. Zolia handled the work at the Tax Court of Canada. According to the grievor, Ms. Lessard told him that if Mr. Zolia was happy, then she was happy.

[243] The grievor commented on the content of the narrative attached to his mid-year performance appraisal for April 1 to September 30, 2010. One of the legal opinions referred to was related to a $150 million transaction for a high-profile person, and Yanick Houle assigned the case to him. The grievor asked him if he wanted to give the case to someone like him, who had just started. Mr. Houle replied that the legal principles are the same whether the case involves $100 000 or $100 million and that it was not unusual for a new lawyer to be asked for a legal opinion in such a case.

[244] According to the grievor, after he submitted the opinion, Ms. Lessard told him that a mistake had been made and that the case should not have been assigned to him. She thought he had been asked only to carry out research for the case. She suggested that he read the opinion of an experienced lawyer who had been assigned the work. He did not understand why it was part of the appraisal, in what he described as the "[translation] dependent elements". According to him, Ms. Lessard spoke about it in her testimony to fuel her criticism against him. He began speaking with her about another file, the file of the unrepresented teacher, but seeing that the situation was deteriorating, he signed the appraisal and left.

[245] That discussion took place in December 2010, and Ms. Lessard told him that he was still there because she felt that he had corrected what she had found problematic. She encouraged him to continue his progress. Allegedly, she told him that her recommendation would depend on his next legal opinion. If he did not maintain his

progress, she could consider more factors to make a favourable or unfavourable decision in his next performance appraisal. He said that no further appraisals were done or meetings held and that he was never treated according to the appraisal rules.

[246] In cross-examination on his email exchange with Ms. Lessard on May 7, 2010 (Exhibit E-1, tab 8), about the instructions for drafting the response to an appeal notice, the grievor was asked to explain the gap in time between that email and the date on which the response was signed, on June 16, 2010. He replied that as he remembered, the time was extended in the case.

[247] With respect to the appeal file on which he worked with Ms. Payette, the grievor was referred to a Federal Court of Appeal judgment (Exhibit M-1, Tab 49), which considered an argument that had not been raised at trial. The Court stated that the argument could be considered if all relevant evidence was on the record and the opposing party suffered no harm. He said that he had used that judgment as a principle, but he did not recall if he mentioned it in particular. When asked if he mentioned to Ms. Lessard the principle that the opposing party must not suffer harm, he replied that he did not. She told him that if the argument was not raised at trial, it could not be raised on appeal.

[248] With respect to the file that he was advised to settle, the grievor was referred to his letter to the taxpayer of May 3, 2010, and was asked why it did not contain an offer to settle. He replied that he had probably asked the taxpayer to produce the primary documents during a telephone conversation the day before the hearing of May 5, 2010. His efforts to resolve the matter consisted of the telephone call to request documents.

[249] With respect to the telephone incident with Ms. Landry, when asked whether he had thought of borrowing one before going to the Tax Court of Canada, the grievor replied that he was not aware at the time that telephones were available to the lawyers.

[250] As for the hotel-room incident, the grievor said that he arrived at his destination late in the afternoon and took a taxi and that he arrived at the hotel after 5:00 p.m. He had told his assistant that since he did not have a credit card to book the hotel room, she had to speak with the person who booked the plane ticket to see if the same procedure could apply for booking the hotel. She later told him that it had been resolved.

[251] As for the incident with the paralegal, the grievor asked her to attend the meeting with the opposing party's lawyer because he believed that it would be more effective. When asked if he had seen the paralegal's filing of the documents, he said that he had gone to her office and had told her to see him if she had questions.

III. Summary of the arguments

[252] At the close of the evidence, the parties agreed to present their arguments in writing.

A. For the grievor

[253] The grievor presented 102 pages of written arguments. I do not intend to report all his representations, only those that are most relevant to the issues that I must decide.

[254] At paragraphs 10 and 11 of his written arguments, the grievor submitted the following:

> [Translation]
>
> ***10.*** *The success or failure of the implementation of the authority under section 62(1) of the PSEA rests on whether bad faith, in the broad sense, was present, or not, in the use that management claims it made of this provision, which it cited to terminate the grievor's employment. We use the term bad faith, in the "broad" sense, to refer to all expressions used to conclude that a termination decision did not arise from the use of section 62(1) of the PSEA. It refers to a decision to reject on probation that denotes the existence of a sham or camouflage, citing a contrived reliance, which would be tainted by arbitrary or irrational behaviour that is other than what it claims to be, etc. Regardless of the expression used, all such decisions are equally flawed, preventing section 211(a) of the PSEA from blocking arbitral jurisdiction.*
>
> ***11.*** *If there was bad faith, in the broad sense, the use of 62(1) of the PSEA was invalid, and thus of no legal effect; therefore, the grievor's employment has not ended.*

[255] The grievor contended that the Board does not have jurisdiction to determine whether his termination was truly a rejection on probation under s. 62 of the *PSEA*. However, the Board has jurisdiction if his termination was invalid; i.e., if instead the department based itself on a contrived reliance on s. 62 of the *PSEA*, a sham, or a camouflage or if its decision was arbitrary.

[256] The grievor also claimed that the department did not respect several of the rules set out in the *Guidelines*, which guarantee procedural fairness when appraising employees on probation, as well as those set out in other employer performance-appraisal policies, guides, rules, and documents. He alleged that the omissions were so serious that they could have prevented him from effectively challenging his termination.

[257] The grievor pointed out that in her testimony on the reasons that led the department to decide to terminate, Ms. Lessard referred to several incidents unrelated to the dissatisfaction that the department referred to in the rejection letter.

[258] The grievor also noted that three months before his termination, Ms. Lessard told him that she considered that he had corrected the problems she had identified in his mid-year performance appraisal, that she would appraise his performance at year-end to assess his probation based solely on the legal opinion that he was to prepare, and that the objectives that she had set for him on developing his advocacy skills had been postponed.

[259] The grievor asserted that the department lacked transparency in its management of his termination, allowing him to believe that it would assess his probationary period based only on the legal opinion that he was to prepare.

[260] He argued that the department did not meet its burden. He claimed that it had to establish the true reason for his termination; namely, its dissatisfaction with his representations before the Tax Court of Canada on January 31, 2011.

[261] The grievor questioned the credibility of Ms. Lessard's testimony, presented by the department. He also asked that the Board conclude against the department because it did not produce the written explanation of its dissatisfaction with his skills, even though Ms. Lessard specifically referred to it in her testimony.

[262] The grievor argued that his termination was based on a contrived reliance on s. 62 of the *PSEA*, a sham, a camouflage, or an arbitrary assessment of his skills. He also claimed that the department's failure to comply with several of the rules set out in the employer's *Guidelines* and other performance appraisal policies, guides, rules, and documents resulted in it appraising his skills without ensuring that all relevant facts were considered.

[263] The grievor pointed out that the department did not instruct or train him with respect to his representations before the Tax Court of Canada on January 31, 2011, and that those representations were consistent with the advice he received from one of his experienced colleagues. He claimed that the expectations under which the department assessed his representations were not clearly communicated to him in advance. Therefore, he was unable to meet them. He alleged that the expectations under which it assessed his representations infringed the professional obligations that Quebec's *Code of ethics of advocates* imposed on him.

[264] At paragraph 231(b) of his written arguments, the grievor wrote that in situations of a difference of opinion between Ms. Lessard and the other lawyers, such a "[translation] … type of situation placed [him] at odds with his ethical obligations …". He expanded his argument on Quebec's *Code of Ethics of advocates* at paragraph 313(a) as follows:

> [Translation]
>
> ***313a)*** *The concern to avoid unnecessary legal risks to defend as best as possible the interests of the Revenue Agency, considering the available legal data, clearly motivated Mr. Zolia when he so instructed the Grievor. It clearly motivated Ms. Lefebvre when she advised the Grievor in the F&M cases. Clearly, Ms. Lessard lacks that concern, which is also an ethical duty for a lawyer, because even after the Grievor's explanations, her direction to him was to take a firm position on the origin of the unreported income when drafting the responses to the appeal notice and not to take the time to check the legal principle that he told her he had learned from Mr. Zolia. Thus, Ms. Lessard asked the Grievor to subordinate his professional judgment to hers and to engage in conduct incompatible with his professional obligations.*

[265] The grievor reviewed the evidence to suggest the weight that the Board should give it and the conclusions to draw from it. Several times, he noted that Ms. Lessard, the department's main witness, did not mention or did not know all the facts of the events on which she testified.

B. For the department

[266] The department presented a nine-page written response.

[267] The department reiterated that it dismissed the grievor because it was dissatisfied with his ability to draft documents, his representation of the Agency

before the Tax Court of Canada, and his interpersonal relations and that the Board has jurisdiction to hear the grievance only if it finds that the rejection on probation was based on a sham, a camouflage, or bad faith.

[268] The department alleged that it met its burden of proof to establish a legitimate reason for its dissatisfaction with the grievor's skills.

[269] The department claimed that it had no obligation to advise the grievor of the expectations related to his work or its dissatisfaction with his skills, as the mere fact of being on probation is enough warning that performance concerns could result in rejection on probation.

[270] The department claimed that Ms. Lessard's testimony was credible and that Mr. Zolia's confirmed it.

[271] The department asserted that it established its dissatisfaction with the grievor's skills and that he was responsible for establishing its bad faith. However, it submitted that its failure to comply with several of the rules set out in the *Guidelines* as well as its other performance-appraisal policies, guides, rules, and documents cannot create a presumption of bad faith.

[272] The department claimed that it "[translation] … can make mistakes in its interpretation of facts, as long as the facts are in reality related to employment …". However, it did not explain what it meant by the expression "facts … related to employment".

C. The grievor's rebuttal

[273] On August 9, 2017, the grievor presented a 21-page written rebuttal. I do not intend to report all his representations, only the new arguments that he presented to refute those that the department made in its written response.

[274] The grievor reminded the Board that the department's dissatisfaction with his ability to carry out the duties of his position had to be in good faith.

[275] He accused the department of not indicating in the rejection letter the name of the person who appraised his performance or the date on which that appraisal took place.

[276] He noted that the department did not submit any evidence of the appraisal criteria supporting the alleged dissatisfaction with his skills. He argued that the Board's role is not to assess his skills.

[277] The grievor claimed that the department's alleged dissatisfaction with his writing skills did not relate to documents for which he was responsible. He also claimed that the evidence does not support the department's alleged dissatisfaction with his interpersonal relations.

[278] He reiterated that the only objectives that the department gave him in support of the appraisal of his probation was the preparation of the legal opinion and to continue the progress he had made.

[279] He emphasized that the action plan that the department subjected him to ended on October 16, 2010, and that it was not renewed.

[280] He alleged that Ms. Lessard was biased against him and that she allowed her emotions to dictate her appraisal of his skills.

[281] The grievor claimed that the department engaged in deceitful conduct with respect to his termination.

IV. Reasons

[282] The fact that the parties agreed that the grievor should proceed first did not change the burden of persuasion that rested on each of them.

[283] The Board does not have jurisdiction to hear a termination that was a rejection on probation under the *PSEA*. However, the jurisprudence has long recognized that the Board has jurisdiction over a termination that was based on a contrived reliance on the *PSEA*, a sham, or a camouflage. The legislative and jurisprudential framework applicable to a termination during a probationary period requires that the department show that in reality, the termination took place during the probationary period, after which the grievor must prove that it was not based on the department's dissatisfaction in good faith with the grievor's ability to carry out the duties of his or her position. The Board confirmed that approach in *Tello*, as I indicated earlier in this decision.

[284] The department clearly established that the grievor was subjected to a 12-month probationary period from when he was hired on April 12, 2010, that he was still

on probation on March 31, 2011, when it informed him that it was terminating his employment, and that it compensated him in lieu of notice, in accordance with s. 62(2) of the *PSEA*. He did not dispute those facts.

[285] Therefore, I find that the department met its burden of proof. I also note that the rejection letter referred to its dissatisfaction with the grievor's ability to carry out the duties of his position.

[286] Since the department met its burden, it was up to the grievor to establish that the termination was based instead on a contrived reliance on the *PSEA*, a sham, or a camouflage. As I noted in the first paragraph of this decision, therefore, he had to establish that the termination was not based on the department's good-faith dissatisfaction with his ability to carry out the duties of his position.

[287] Therefore, I will examine the allegations set out in the grievance, which read as follows:

- The rejection letter is vague and does not state the reasons for the termination.
- The real reason for the termination was the appearance before the Tax Court of Canada on January 31, 2011.
- A colleague proposed the approach adopted at the hearing on January 31, 2011, making the termination arbitrary and in bad faith.
- The grievor was not informed in advance of the expectations for his appearance at the Tax Court of Canada on January 31, 2011.
- The department violated Quebec's *Code of ethics of advocates*.
- The department unduly interfered in the solicitor-client relationship.

[288] The first allegation relates to the rejection letter, while the next three relate to the grievor's appearance before the Tax Court of Canada on January 31, 2011. All but the last two relate to his skills and the department's appraisal of them. He argued that its appraisal of his appearance at the Tax Court of Canada on January 31, 2011, was arbitrary and that the Board has jurisdiction to rule on arbitrary decisions about a termination during a probationary period. I will address this issue later in this decision.

[289] Both the grievor and the department provided their views on a range of issues undeniably related to his abilities, but no evidence was presented to prove that the termination was in fact based on a contrived reliance on the *PSEA*, a sham, or a camouflage. The only arguments he made that dealt with the issue of a contrived

reliance on the *PSEA*, a sham, or a camouflage were that the January 31, 2011, incident was the "[translation] true" reason for his termination and that therefore, the department acted in bad faith, which made the rejection on probation a camouflage. He made the first of those two arguments from the start, as it is the second allegation in the grievance. In his written arguments, he asserted that the bad faith was a sham or camouflage. However, I note that in *Canada v. Rinaldi*, Federal Court file T-761-96 (19970225), at footnote 15, the Federal Court taught that simply bad faith by the department is not enough to invalidate a termination under the *PSEA* and that instead, the grievor must prove that "… the conditions required to apply it [i.e., in this case, the use of rejection on probation] were in fact not present at the relevant time …".

[290] I find unfounded the grievor's argument on the "true" reason for his termination. First, from a factual standpoint, the evidence reveals that the department had serious and legitimate concerns about his skills on a range of questions that were clearly explained to him either as events unfolded or as part of the more structured framework of the mid-year performance appraisal. I find that he did not establish that the conditions required to reject him on probation did not exist at the time. The evidence does not confirm the allegation that his appearance before the Tax Court of Canada on January 31, 2011, was the "true" reason for his dismissal; instead, the evidence establishes that several reasons were in play. At the end of her testimony, Ms. Lessard explained the reasons for the grievor's termination; there were many, and they did not focus on the January 31, 2011, incident but were much broader in scope. She expressed concerns about files that required more work, a cumbersome and inadequate writing style, his reluctance to accept and follow advice, logical analytic skills, values and ethics, and interpersonal skills, among other issues. Not only Ms. Lessard but also Mr. Zolia and some of the grievor's colleagues expressed those concerns. The issue of his appearance before the Tax Court of Canada on January 31, 2011, was just one of the reasons that the department cited. I find that he did not establish that Ms. Lessard or Mr. Zolia showed bias, exaggeration, or camouflage on these issues. He failed to establish, on a balance of probabilities, a contrived reliance on the *PSEA*, a sham, or a camouflage.

[291] In his testimony, the grievor referred to a comment Ms. Lessard made at the March 31, 2011, meeting, at which he was informed of his rejection on probation. He alleged that in response to his specific questions on the reasons for the decision to terminate him, she stated that his appearance before the Tax Court of Canada on

January 31, 2011, was such that she could not let him represent the Agency. I do not consider that to prove in any way that her comment meant that his appearance on that day was the only reason for his termination during probation, and her testimony on her myriad concerns supports my conclusion.

[292] Throughout his employment, the grievor was informed that he had to improve his skills in several areas and that the appearances before the Tax Court of Canada were a specific area in which he needed to improve. I find that the appearance on January 31, 2011, was not in fact the sole reason for the department's decision to terminate him during probation.

[293] The grievor also attempted to question the department's consideration of the appearance before the Tax Court of Canada on January 31, 2011, in its decision to terminate him during probation, but Ms. Lessard admitted that her main concern about that day was based on a lack of information on her part. However, she also stated that even had she been aware of all the facts of that day, her overall conclusion about the grievor's skills would have remained the same and in favour of a rejection on probation. I have no reason to doubt the good faith of her convictions on this matter.

[294] I find that the grievor failed to prove that on a balance of probabilities, the department's decision to reject him on probation was in fact based solely on the January 31, 2011, incident, and that therefore, it constituted a sham or camouflage, given the reasons set out in the rejection letter.

[295] Much of the grievor's evidence was devoted to refuting the department's dissatisfaction with his skills, to explaining his alleged inability to defend himself before his supervisor, and to minimizing or explaining his advocacy choices, among other things. In other words, much of his evidence was designed to establish that the department had no reason to be dissatisfied with its skills. As it argued, making certain factual errors in its assessment of the facts was not fatal to it, as long as the facts related to the grievor's ability to perform the duties of his position, which is so in this case. I agree with that assertion, in principle. That the department's dissatisfaction might, in part, have resulted from incorrect conclusions does not **necessarily** establish that that dissatisfaction was not **in good faith.** Since, as noted earlier, the grievor acknowledged that the Board's role is not to assess his ability to perform the duties of his position, he had the onus, as indicated in *Tello*, of establishing that the termination

during probation was not based on the department's **good-faith** dissatisfaction with his skills.

[296] The grievor's evidence was generally presented to question the department's assessment of his skills and to justify his positions or actions.

[297] Returning to the grievance itself, the grievor's first allegation in it indicates that the rejection letter is vague and does not indicate the reasons for his termination. In fact, this statement is incorrect. The letter indicates that he had shortcomings related to writing, court appearances, and interpersonal issues. He did not provide me with any reason to require more from such a letter. Although it outlines his shortcomings in general, it is not necessary to send a rejection letter that describes each shortcoming in minute detail. In addition, the department had no obligation to prove that the reasons it listed for rejecting him on probation were well founded. It had only to prove that he had been subjected to a probationary period, that he was still on probation when it informed him of his termination, and that it gave him the required notice or compensation in lieu of it. I see no sham or camouflage in how the rejection letter was written.

[298] I note that in his testimony, the grievor also appeared to argue that the department's decisions on his grievance were unclear in that they did not disclose the reason for his termination during probation. I find this argument, which was made after the grievance and was unsupported by references to jurisprudence, irrelevant to the issue before me; namely, whether his termination during probation was based on a contrived reliance on the *PSEA*, a sham, or a camouflage.

[299] I pause to note that the grievor's other written arguments, about the lack of clarity with the department's dissatisfaction and that he did not know why he failed his mid-year performance appraisal or why he was terminated during probation, were not based on an accurate representation of the facts. He was subjected to an action plan until October 2010, with Mr. Zolia as his coach, and the grievor stated that the goal was to help him improve on recording his time, meeting deadlines, respecting and working with contacts, clarifying communications, being flexible, and following advice. He stated that he understood the plan. The evidence also reveals that Mr. Zolia accompanied him twice before the Tax Court of Canada, that Mr. Zolia took careful notes, and that he shared his positive and negative observations with the grievor both

after the hearing and on the next day. In December 2010, his supervisor assessed his performance and acknowledged that he had met the objectives set out in the plan but stated that he had to continue to develop his litigation skills and cited three legal opinions that had not been up to par. In his testimony, he acknowledged that Ms. Lessard expressly stated that he had to improve written communication and advocacy techniques, the assessment of facts, and the formulation of nuanced conclusions. Although the mid-year performance appraisal contains positive comments, I find that it was disingenuous for the grievor to allege that he did not know why he failed his mid-year appraisal and why he was terminated during probation. Instead, the evidence shows that he was made aware of his shortcomings and that he knew that he had to address them.

[300] Returning to the grievance, as I mentioned, the grievor's second, third, and fourth allegations in it relate to his appearance before the Tax Court of Canada on January 31, 2011. For the reasons explained earlier, I reject his claim that it was the sole reason for his termination.

[301] In the third allegation in his grievance, the grievor also claimed that since he consulted a colleague on his approach before the Tax Court of Canada on January 31, 2011, the termination was arbitrary and in bad faith. Again, the facts do not support him. This allegation is based on the earlier allegation that that appearance before the Court was the sole reason for his termination during probation, which I found was not the case. In addition, Ms. Lessard's uncontradicted testimony indicated that even had she known that the grievor's approach had been suggested by a colleague, her decision to reject him on probation would have been the same. Regardless, he did not establish that his rejection on probation was arbitrary or in bad faith. Instead, the evidence revealed that the department made a serious and considered decision and that its two witnesses testified in such a way that their credibility and good faith were not undermined. Ms. Lessard was clear, and her was testimony direct. She acknowledged her mistake in one case and acknowledged the merit due the grievor. The fact that the department might have made certain factual errors in its assessment of the facts with respect to his skills does not necessarily that mean there was no proof of a dissatisfaction in good faith with his ability to perform the duties of his position.

[302] The grievor's last allegation about the appearance before the Tax Court of Canada on January 31, 2011, was that he was not informed in advance of the expectations with respect to that appearance. Again, this allegation seems based on his first allegation that that hearing was the sole reason for his termination, which I found was not the case. Although the department was not required to inform him of its specific expectations for each task assigned to him, nevertheless, it advised him of its general expectations for improving his skills. According to his testimony, he was given objectives with respect to judicial proceedings, evidence, and developing his litigation skills, and he admitted that he had been given a document entitled, "General employee objectives" for all employees in the Quebec Region. He was hired as a tax lawyer; as such, it was expected that he could demonstrate skills at a certain level without it being specified each time he had an appearance before the Tax Court of Canada.

[303] The last two allegations in the grievance allege that the department contravened Quebec's *Code of ethics of advocates* and that it inappropriately interfered in the solicitor-client relationship. If I understood well his argument on this point, the grievor claimed that in his disagreements with his supervisor, the order to respect her preferences resulted in him violating his professional obligations. I agree that the professional independence of a salaried lawyer subject to a management structure can be problematic. However, he did not provide me with any jurisprudence to support his claim. In addition, I do not think that it is appropriate for me to comment on the interpretation and scope of ethical standards adopted by a professional corporation under provincial jurisdiction. In any event, this issue is not determinative in the case before me.

[304] I turn now to the grievor's written arguments. Although they were broader than the issues raised in his grievance, most of his observations were related to performance and appraisal issues.

[305] At the start of his written arguments, he set out the burden of proof that he had to meet and acknowledged that he had to prove that his termination was a contrived reliance on the *PSEA*, a sham, or a camouflage, but, as I mentioned, he then inserted the word, "[translation] arbitrary", alleging that a termination is not appropriate if it is arbitrary. As I concluded, and setting aside the issue of whether the grievor's termination was indeed a rejection on probation under the *PSEA*, this termination was not arbitrary, from a factual standpoint. I found that the department acted seriously

with respect to its purpose and that it examined the problems it faced. I found nothing arbitrary in the overall assessment of his skills or in the department's adopted approach. Even though Ms. Lessard was mistaken about his approach before the Tax Court of Canada on January 31, 2011, as she did not know that a colleague had suggested it, this fact, even combined with what he termed the department's failures to follow its performance appraisal policies to the letter, does not mean that it had an arbitrary attitude.

[306] At paragraph 54 of his written arguments, the grievor contradicted his initial acknowledgement of the burden of proof and incorrectly alleged that "[translation] [m]anagement had to prove the reason for the termination decision …". As stated at the start of this decision, since *Tello*, it has been well established that the grievor had the onus of proving that his termination during probation was based on a contrived reliance on the *PSEA*, a sham, or a camouflage. In other words, he had to establish that the termination was not based on the department's proven, good-faith dissatisfaction with his ability to carry out the duties of his position. That is also why he testified first.

[307] As I just mentioned, the grievor also argued that the department contravened several procedural-fairness provisions in the *Guidelines* and other policies and guides, etc. He argued that those violations were so serious that they could have prevented him from effectively challenging his termination.

[308] In his testimony, the grievor alleged that the department violated the Performance Management Policy in two ways. First, Ms. Lessard did not follow the instructions to provide constructive and ongoing advice, as she rarely asked for his point of view and became angry when he shared it. Second, he said that the procedure required meeting with Ms. Lessard in advance, before she handed him his performance appraisal.

[309] With respect to the first issue, on constructive and ongoing feedback and advice, the grievor was correct in that personally, Ms. Lessard did not provide him with ongoing advice. However, the evidence did not reveal that she did not provide him with any advice. In addition, she appointed Mr. Zolia as his coach, and he received constructive criticism and advice from Mr. Zolia and from other experienced lawyers he consulted during his probationary period. In fact, the grievor did not dispute the

support that he received from Mr. Zolia and other colleagues. He did not appear to seriously dispute the fact that together, the team led by Ms. Lessard provided him with regular feedback at her request. Instead, most of his testimony aimed to challenge the quality of the feedback he received from Ms. Lessard personally, in an attempt to prove that he was right.

[310] With respect to the second part, the requirement to meet before his mid-year performance appraisal, the grievor cited a passage from a policy that he felt confirmed his argument. But I am not persuaded by that argument, and I do not interpret the passage the same way he did.

[311] The mere fact that the department did not follow its policies and procedures did not automatically transform the grievor's termination during probation into a sham or camouflage. However, it does not mean that I suggest that the department should be able to completely dismiss them and treat employees cavalierly.

[312] The grievor then claimed that Ms. Lessard testified about several issues that were not part of the reasons cited in his rejection letter. Once again, the facts do not support his allegation. She testified that he did not follow instructions; that he resisted criticism; that he had problems accounting for his time worked; that he had shortcomings in written communications, flexibility, and interpersonal relations; and that he tried to file documents in evidence without a witness. I agree that part of his testimony referred to incidents not specifically detailed in the rejection letter, but they were still examples of her dissatisfaction with his skills, and as I said earlier, the rejection letter can highlight shortcomings in general and need not be a list that minutely describes each of his shortcomings.

[313] Regardless, the items of dissatisfaction of which Ms. Lessard testified that were not included in the rejection letter according to the grievor were nonetheless dissatisfactions related to his skills. Her entire testimony was about the dissatisfaction with his inability to perform the duties of his position. The rejection letter refers to issues such as writing, appearances before the Tax Court of Canada, and interpersonal skills, and her testimony addressed them, to further illustrate the issues raised in the letter.

[314] The grievor's written arguments then raised his December 2010 appraisal and his allegation that Ms. Lessard told him that he had corrected all his shortcomings and

that she would assess him in the future based on the legal opinion assigned to him. First, I must say that this argument incorrectly reports the evidence. Her testimony, set out earlier in this decision, was clear on this issue. She stated that she had informed him that although he had corrected the shortcomings described in his plan, he still had to work on his litigation skills, both orally and in writing; that he had to become self-sufficient; and that his job was at stake. This was clearly indicated to him at the meeting. Although she stated that she wanted to reassess him once he submitted the legal opinion assigned to him, she did not say that the legal opinion was the sole basis on which she would assess him.

[315] I also note that the grievor submitted that legal opinion on March 28, 2011, which was only a few days before the end of his probationary period, and that the evidence revealed that it also contained problems and that his colleagues had to review it extensively, despite the fact that he had taken training on drafting legal opinions in February 2011. His allegation also contradicted his testimony, in which he admitted that Ms. Lessard had informed him that he had to improve more in several areas and that the areas she indicated to him were advocacy, legal advice, assessing facts, and legal conclusions. Once again, the facts do not support the grievor's position, and in addition, he did not establish that on a balance of probabilities, those factors make his termination a contrived reliance on the *PSEA*, a sham, or a camouflage.

[316] I also note that the evidence on the assessment of his legal-opinion writing skills was not based solely on Ms. Lessard's judgment. In her testimony, she explained that review committees had gone over the three legal opinions assessed in his mid-year appraisal and that each committee had been composed differently, eliminating any question of bias. In one case, a reviewer rewrote the opinion, while in the second, the committee rewrote parts of the opinion to provide a better structure and conclusion. In the third, the opinion contained an erroneous conclusion, which supported the department's assertion that he had difficulty applying the law to the facts. I find that the department's evidence on its dissatisfaction with the grievor's writing skills contradicted his allegation that his termination resulted from a contrived reliance on the *PSEA*, a sham, or a camouflage.

[317] In his written arguments, the grievor alleged that the department lacked transparency when it said that he would be assessed on a specific basis and then

assessed him on another. As I concluded, this allegation is not supported by the preponderance of the evidence.

[318] The grievor then incorrectly argued that the department did not meet its burden of proving the true reason for his termination; namely, his performance on January 31, 2011. The *PSEA* does not impose an obligation on the department to justify a rejection on probation. Instead, as indicated in *Tello*, the burden of proof was the grievor's, and he had to prove that his termination was a contrived reliance on the *PSEA*, a sham, or a camouflage, which he failed to do.

[319] The grievor then asserted that his supervisor had credibility issues, and in his arguments, he stated that it was partly because her testimony was not confirmed by written documents. I conclude that Ms. Lessard testified openly and frankly and that I found no bias or artifice in her testimony. Her testimony was coherent and credible, and she did not hesitate to acknowledge things in the grievor's favour when justified. In addition, the department, as for any party appearing before the Board, had no obligation to submit documentary evidence to establish the credibility of one of its witnesses, and the alleged "[translation] omission" of such documentation cannot automatically undermine a witness's credibility. Had the grievor wished to challenge her testimony using documentary evidence, it was up to him to request the disclosure of the documents he considered necessary.

[320] Ms. Lessard's credibility with respect to the grievor's abilities was supported by that of Mr. Zolia, who in my view was a neutral and somewhat reluctant witness. He confirmed that the grievor had "[translation] serious" problems, that he had difficulty applying the law to the facts, and that he had difficulty preparing for his appearances before the Tax Court of Canada.

[321] Finally, I will examine the grievor's written rebuttal. He had a dim view of the fact that the rejection letter did not contain the name of the person who had assessed him or the assessment date. The evidence before me does not establish such a requirement for a rejection letter on probation, and I find that the fact that it does not contain such information does not necessarily transform the termination during probation into a contrived reliance on the *PSEA*, a sham, or a camouflage.

[322] In his written rebuttal, the grievor also criticized the department for not providing evidence of the assessment criteria that supported his termination. Once

again, the *PSEA* does not impose any obligation on the department to justify a rejection on probation. Instead, the grievor had the onus of establishing that his termination was a contrived reliance on the *PSEA*, a sham, or a camouflage. In other words, he had to prove that the termination was not based on a good-faith dissatisfaction with his ability to carry out the duties of his position.

[323] Finally, he again alleged that the only objectives he had to meet to successfully complete his probation were the legal opinion and continuing the progress achieved. As I said, even if that is true, the evidence revealed that he had shortcomings.

[324] The grievor referred to *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109, and *Dyson v. Deputy Head (Department of Fisheries and Oceans)*, 2015 PSLREB 58, but I conclude that they are clearly distinguished from this case. In them, the adjudicators found that the terminations during probation were shams or camouflages in that the true reason behind the terminations was the legitimate use of sick-leave credits. In this case, the factual context is quite different and does not involve the use of leave credits. I find that the grievor in this case, contrary to Mr. Dhaliwal and Mr. Dyson, did not prove the factual allegations on which he based his theory of the case.

[325] I find that the evidence that the grievor presented did not establish that on a balance of probabilities, his termination during probation was based on anything other than the department's good-faith dissatisfaction with his ability to perform the duties of his position. In other words, he did not meet his burden of proving that his termination was a contrived reliance on the *PSEA*, a sham, or a camouflage. Therefore, I must accept the department's objection that the Board does not have jurisdiction to hear a termination under the *PSEA*.

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

(The Order appears on the next page)

V. Order

[327] I allow the deputy head's objection to the admission into evidence of the grievor's handwritten notes with respect to two meetings of lawyers.

[328] I allow the deputy head's objection that the Board does not have jurisdiction to hear a termination under the regime of the *PSEA*.

[329] The grievance is dismissed.

June 1, 2021.

FPSLREB Translation

Steven B. Katkin,
a panel of the Federal Public Sector
Labour Relations and Employment Board