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Whistleblowing in the Federal Realm

A look at *Fraser v*
Public Service Staff Relations Board

Public Servants Disclosure Protection Tribunal Canada

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Introduction

*Fraser v Public Service Staff Relations Board*¹ came before the Supreme Court in 1985 and remains the leading case on the proper balance between the right of an individual to speak freely on important public issues and the duty of an individual who is a federal public servant to be loyal to his or her employer.

At issue in this case was the right of a public servant to publicly criticize the federal government's policies concerning metrification. The facts of this case arose in 1982 before the *Charter of Rights and Freedoms* became a part of Canada's Constitution.

Fraser was an appeal to the Supreme Court of Canada from a Federal Court of Appeal decision in which the Court found that the dismissal of an employee for public criticism of the federal government was justified because the **duty of loyalty** to his employer was breached. Although the appeal was ultimately dismissed, the broader principles enunciated in this case continue to be very significant in Canadian case law, both in the courts as well as in tribunals.

Public servants must be loyal to their employer but they can, in certain circumstances, express publicly their opposition to the government's policies. The question that persists and which the Court attempted to answer in its judgement, regards the circumstances under which public servants can publicly criticize the government.

¹ [1985] 2 SCR 455 [*Fraser*] (available on the [Supreme Court of Canada's website](#)).

History

Prior to this case, this area of the law was relatively undeveloped. It is for this reason that the principles enunciated in *Fraser* are known to have set the foundation for whistleblowing in the realm of the federal public service.

The Tribunal's decision, *El-Helou v Courts Administration Service*² (2011-PT-01) gives a very comprehensive judicial and legislative history of this particular area of the law. The Tribunal begins this history with a quote from the 1981 arbitral decision *Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees Union*³ which reflects the state of the law prior to *Fraser*. In that case, the arbitrator sets out the following:

- 1) Government employees should be loyal to their employer and generally refrain from criticism.
- 2) However, there are situations in which it is neither in the best interest of the public nor the employer for the public servant to be intimidated to the point of not being able to speak up about a wrongdoing in the workplace.

As mentioned in the introduction, *Fraser* builds upon these comments by attempting to define when it is proper and encouraged for public servants to criticize the government.

Analysis

In discussing the balance between freedom of expression and the duty of loyalty, the Court takes into account several factors which are worthy of note.

² 2011-PT-01 [*El-Helou I*].

³ (1981), 3 LAC (3d) 140 at 162-163.

The Two Dimensions of Public Service

The Court highlights that employment in the public service has two dimensions: one relating to an employee's **tasks** and **how the employee performs them**, and the other relating to the **public's perception** of the job. This was particularly relevant to the facts in *Fraser* because, although the appellant's criticisms of the government policies were not directly related to his position at Revenue Canada, the nature of his comments were nonetheless considered to have an impact on the *perception* of his job performance and his ability to do his work in an objective and impartial manner. The importance of these characteristics in public servants is further discussed below. However, what remains important is not only the effects of one's public actions or comments relating to one's job, but also how public perception might be affected.

The Duty of Loyalty and Circumstances where Government Criticism is warranted

The Court states that public servants must possess three main characteristics in order to properly do their jobs. These characteristics are **knowledge**, **fairness**, and **integrity**. The Chief Justice states that a further characteristic of public servants is **loyalty**.⁴ The Court explains this characteristic as follows:

The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies.

The Court also notes that there are some exceptions to this general rule. According to the Court, it would be appropriate for a public servant to express criticism if for example:

⁴ Fraser, paragraphs 40-41.

- The government were engaged in illegal acts;
- If the government's policies jeopardized the life, health or safety of the public servants or others, or;
- If the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public's perception of that ability.⁵

The Court then goes on to explain why it is so important that public servants remain loyal to their employer. This has to do with the public interest in both the actual and apparent impartiality of the public service.⁶ This means that even if the public sector is actually impartial, but that if it is not *perceived* to be impartial, there is a problem. The public service must ensure that it is above reproach.

The Position and Visibility of the Public Servant

Finally, the Court notes that **the position and visibility of the public servant** are to be considered in weighing the duty of loyalty against freedom of speech in a particular context. These factors are important when determining if there was an impact on the public servant's ability to perform his or her job. The rationale behind this is that the consequences of public statements are likely to be different depending on the role of the public servant in the government. In this case, the appellant was in a position of leadership and the Court used this to determine that the duty of loyalty would be even more important than usual.

Evidence of Impairment to Perform Job

The Court also considered what type of evidence would be required to conclude that the public servant's ability to do his or her job was impaired.

⁵ Ibid.

⁶ Fraser, paragraph 42.

The general rule is that direct evidence of impairment is required.⁷ However, the Court noted that in this case, given that the appellant's occupation was both important and sensitive and also that the **substance, form and context**⁸ of the appellant's criticism was extreme, an inference of impairment could be drawn. As such, there can be exceptions to the general rule.

When speaking of impairment in the wider sense, the Court found that it is open to an adjudicator to infer impairment if there is evidence of a pattern of behaviour which an adjudicator could conclude would impair the usefulness of the public servant. In order to determine if such evidence is present, adjudicators are to look at the substance, form and context of the criticism in question.⁹ This means that a court or tribunal will need to take into account what was said or done by the public servant, how it was said or done, and in what context the public servant said or did certain things.

Impact of this Decision

The *Fraser* case remains the seminal case in the area of disclosure of wrongdoing, or whistleblowing. This case created a framework for analysing the conflicting values of **freedom of expression** and the **duty of loyalty** [[Hyperlink to the Basics of Whistleblowing and Reprisal](#)]. In fact, this case is quoted as having recognized the common law duty of loyalty (Note: A 'common law' rule is a judge made law as opposed to a law coming from a legislative provision).

Following *Fraser*, and with the adoption of the *Charter* in Canada, the Courts went on to recognize the common law duty of loyalty as "a limit prescribed by law" under the terms of

⁷ Fraser, paragraph 47.

⁸ Fraser, paragraph 48.

⁹ Fraser, paragraph 47.

Section 1 of the *Charter*. In *Haydon v Canada*,¹⁰ the Federal Court recognized that this duty is essential to promoting an effective public service and to the functioning of a democratic society.

The *Fraser* decision was also recently flagged in the Public Servants Disclosure Protection Tribunal's decision, *2011-PT-01*¹¹ because of its historical significance. The Tribunal noted that, "this decision incorporated the principles of *Fraser* within the scope of the *Charter* by associating the duty of loyalty of public servants with one of the reasonable limits provided for in section 1 of the *Charter*".

Parallel to the ongoing conversation in the Courts, the Canadian legislature has also implemented several initiatives in the area of values and ethics, one of these being the *Public Servants Disclosure Protection Act*.¹² This Act has further expanded upon the definition of 'wrongdoing' and created the Public Servants Disclosure Protection Tribunal for public servants who have disclosed wrongdoing and been the subject of subsequent **reprisal** as a result of this disclosure.

Conclusion

In conclusion, *Fraser* is the first in a series of cases dealing with the balancing of two competing values which are both very important to a well-functioning democracy: freedom of expression and the federal public servant's duty of loyalty to his or her employer. The test set out in *Fraser* continues to be applied and interpreted as various fact scenarios arise.

¹⁰ *Haydon v Canada*, [2001] 2 FC 82 (*Haydon I*) (available on the [Federal Court's website](#)).

¹¹ *Supra* note 2. (available on the [Public Servants Disclosure Protection Tribunal's website](#)).

¹² SC 2005, c 46 (PSDPA) (available on the [Department of Justice's website](#)).