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Whistleblowing in the Federal Realm

A look at Haydon I

Public Servants Disclosure Protection Tribunal Canada

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Introduction

In *Haydon v Canada*,¹ the Federal Court was asked to judicially review a decision to reprimand the applicants for having disclosed wrongdoing. The Court allowed the application. Although the principle of the duty of loyalty was confirmed, the Court found that it did not apply in this case.

The applicants were drug evaluators for Health Canada and were responsible for conducting objective, scientific evaluations of drug submissions to ensure that new drugs comply with regulations. While exercising these duties, they became seriously concerned with the drug approval process generally and, in particular, with that related to growth hormones and antibiotics.

The applicants made a number of attempts to address their concerns internally. These attempts included requesting an external investigation, raising their concerns with the Prime Minister and the Health Minister, initiating several formal grievances within the Department, and initiating proceedings under the *Public Service Staff Relations Act* before the Public Service Staff Relations Board.

Not being satisfied with how their concerns were being addressed, they raised the issues publicly during an appearance on a national television program. The applicants pointed to the fact that scientists within the department were asked to approve some drugs despite a

¹ *Haydon v Canada* [2001] 2 FC 82 [*Haydon I*] (available on the [Federal Court's website](#)).

recommendation not to approve them. The applicants were reprimanded and accused of having breached the duty of loyalty owed to their employer.

They grieved the disciplinary measure imposed and their grievances were denied both at the preliminary and the final level. At both the initial and Associate Deputy Minister (ADM) level it was found that the applicants' statements breached the [duty of loyalty](#) owed to their employer and that the letter of reprimand was warranted. It is this final level decision on the grievance, made by the ADM which was the subject of the application for judicial review.

These were the issues to be determined by the Federal Court:

- (1) Is the duty of loyalty a reasonable and justifiable limit on an employee's freedom of expression within the meaning of section 1 of the *Canadian Charter of Rights and Freedoms (the Charter)* ²?
- (2) If so, did the ADM err in law by holding that the applicants' freedom of expression was reasonably restricted by the imposition of the reprimand/instruction, thus denying their grievance?

The application for judicial review was allowed and the decision was sent back for re-determination. The principles and reasoning in this case have had a large impact in the area of public sector whistleblowing and shall be discussed below.

History

At the time that *Haydon I* was before the Federal Court, the leading case on the duty of loyalty was [Fraser v Public Service Staff Relations Board](#)³. (The Public Servants Disclosure

² Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 [Charter].

Protection Tribunal's summary of that case can be found [here](#)). The issue in *Fraser* was to determine: "the proper legal balance between (i) the right of an individual, as a member of the Canadian democracy, to speak freely and without inhibition on important public issues and (ii) the duty of an individual, *qua* federal public servant, to fulfill properly his or her functions as an employee of the Government of Canada".⁴

In *Fraser*, the Court stated that in some circumstances a public servant may actively and publicly express criticism of government policies. The Court identified three situations where such criticism would be appropriate:⁵

- If 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.

These exceptions continue to be applied in court and tribunal decisions in Canada.

Analysis

Issue # 1: Is the duty of loyalty a reasonable and justifiable limit on an employee's freedom of expression within the meaning of section 1 of the *Canadian Charter of Rights and Freedoms*?

As a general rule, rights guaranteed under the *Charter* can only very rarely be infringed. Section 1 of the *Charter* describes the test that the courts must consider in determining whether a *Charter* right should be infringed. That provision states that:

³ [1985] 2 SCR 455 [*Fraser*] (available on the [Supreme Court's website](#)).

⁴ *Fraser*, *supra* note 2, paragraph 1.

⁵ *Fraser* *supra* note 2 paragraph 41.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it **subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. [emphasis added]**

Therefore, any limitation on a *Charter* right must fall within the boundaries of the above section.

Accordingly, the Court analyzed the duty of loyalty within the parameters set out in section 1 of the *Charter* and found that the common law duty of loyalty as articulated in *Fraser* sufficiently accommodates the freedom of expression as guaranteed by the *Charter*. Therefore, the Court found that the duty of loyalty constitutes a reasonable limit within the meaning of section 1 of the *Charter*.

Issue #2: If so, did the ADM err in law by holding that the applicants' freedom of expression was reasonably restricted by the imposition of the reprimand/instruction, thus denying their grievance?

The Court found that the ADM disregarded the context that led to the comments in question. The Court also found that the ADM failed to proceed with a fair and complete assessment of the competing interests, namely, the government's interest in maintaining an impartial and effective public service and that of an employee to inform the public of any wrongdoing as well as the public's right to have any wrongdoing exposed (in other words, the duty of loyalty and the right to freedom of expression). Accordingly, it was determined that the ADM committed an error in the application of the *Fraser* test.

The Court also found that the applicants' criticisms would fall within the first qualification of the *Fraser* test, namely, disclosure of policies that jeopardize life, health or

safety of the public. The Court also found that the statements made by the applicants disclosed a legitimate public concern with respect to the efficacy of the drug approval process.

The Court also considered whether or not the statements made by the employees in question had a negative impact on their ability to perform their duties as drug evaluators. It found that there was no evidence to demonstrate that there was a negative impact in this case. The Court also stated that in making public criticism of the drug approval process, the applicants had no personal interest at stake. It concluded that as a general rule, public criticism will be justified where reasonable attempts to resolve the matter internally are unsuccessful.

Impact of this Decision

Haydon I has been cited by many courts and tribunals as authority for the principle that the duty of loyalty constitutes a reasonable limit on the right to freedom of expression.⁶ This decision is also cited as the authority for the “up the ladder approach” which states that, “as a general rule, public criticism will be justified where reasonable attempts to resolve the matter internally are unsuccessful”.⁷ This rule was affirmed in *Merk v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers*.⁸

Parallel to the ongoing conversation in the courts, the Canadian legislature has also implemented several initiatives⁹ in the area of values and ethics, one of these being the *Public Servants Disclosure Protection Act*.¹⁰ This Act has further expanded upon the definition of

⁶ For example, see: *Chopra v Canada (Treasury Board)*, 2003 PSSRB 115, *Read v Canada (AG)*, 2005 FC 798, *Gendron v Canada (Department of Canadian Heritage)*, 2006 PSLRB 27.

⁷ For example see: *Haydon v Canada (Department of Health)*, 2002 PSSRB 10.

⁸ 2005 SCC 70, [2005] 3 SCR 425, paragraph 24.

⁹ For a comprehensive summary of these initiatives, please see *El Helou*, beginning at paragraph 14.

¹⁰ SC 2005, c 46 [PSDPA]. (available on the [Department of Justice's website](#))

‘wrongdoing’ and created the Public Servants Disclosure Tribunal for public servants who have disclosed wrongdoing and been the subject of subsequent [reprisal](#) as a result of this disclosure.

The *Haydon I* decision was referred to by the Tribunal in *El-Helou v Courts Administration Service*.¹¹ In that case, the Tribunal referenced the recognition in *Haydon I* of the reasonable limit on the right to freedom of expression. The Tribunal states at paragraph 39 that:

The common law duty of loyalty is also recognized under the *Charter*, as a limit “prescribed by law” under section 1. That duty is considered essential to promoting an effective public service and to the functioning of a democratic society. This was highlighted by the Federal Court in *Haydon v Canada*, [2001] 2 FC 82 (*Haydon No. 1*). 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*. Tremblay-Lamer, J stated:

In conclusion, I am of the view that the common law duty of loyalty as articulated in *Fraser* sufficiently accommodates the freedom of expression as guaranteed by the *Charter*, and therefore constitutes a reasonable limit within the meaning of section 1 of the *Charter*. (paragraph 89)

The Tribunal also noted that *Haydon I* specified that the “whistleblowing defence” applies to issues of public interest.

Conclusion

In conclusion, *Haydon I* builds on the principles established in *Fraser* and further expands upon the law relating to the balancing of the duty of loyalty and the right to freedom

¹¹ 2011 PT 01 [*El-Helou I*] (available on the [Public Servants Disclosure Protection Tribunal’s website](#)).

of expression. The principles set out in *Haydon I* continue to guide decision makers in both the administrative and judicial realms.