THE *BENNETT* DECISION EXPLAINED: THE SKY IS NOT FALLING!

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The decision in *Bennett v President, Human Rights and Equal Opportunity Commission and Another*[1] sent shockwaves around the Commonwealth public service. To hear some people talk, the sky, metaphorically, was falling.

Why there should be such anxiety is a little difficult to understand. The trial judge, Finn J, did not kick the stars from their orbit, nor cause the sky to fall. While invalidating a particular regulation, he recognised the existing common law duty of fidelity and loyalty owed by public servants.

That duty has not been debated very extensively in this country, but it has been in Canada. The Canadian experience shows that the common law duty has coherent and sensible principles that neatly cover the difficult questions raised by public servants disclosing government information. Furthermore, the common law duty is sufficiently flexible and adaptable to be proportionate, and hence it will have no difficulty being consistent with both the implied constitutional guarantee of freedom of political communication and the International Covenant on Civil and Political Rights (ICCPR).

Disclosure and Comment

I will not summarise what happened in *Bennett* in any detail: we can all read it for ourselves. But to understand the significance of the case, it is necessary to look a bit more closely at the concept of disclosure.

Mr Bennett was charged with disciplinary breaches of a regulation which protected the disclosure of everything from Australia's most sensitive military secrets to the number of writing pads ordered by the regional office of a government department in the most remote part of the country.

His sin was not something out of a cold war Hollywood epic, with a shadowy character in a trench coat sidling up to a Russian spy in a darkened alleyway and handing over a buff envelope containing plans of a secret missile system. Nor was he a Deep Throat whistle blower revealing corruption in government at the highest level.

Instead, his offence was to make public comments in his capacity as the President of a small registered trade union, the Customs Officers Association. The comments were about proposed cuts to the number of customs officers on the barrier at our ports and airports. In the course of his comments he happened to note that at that time we actually inspected only a small number of the containers that cross the waterfront.

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At no time during the interview was he ever identified as a customs officer. Even more remarkably, most of the information he had 'disclosed' was already on the public record.

The interview came at the end of a long period of vigorous correspondence and disagreement between Mr Bennett and the CEO of the Australian Customs Service (ACS) about his right to make public comments on behalf of his union. One could be forgiven for thinking that the interview was probably the last straw in the eyes of an exasperated ACS.

The disciplinary offence was 'disclosure'. But a fair reading of the transcript of the interview shows that what Mr Bennett said was largely 'comment'. Along the way he made disclosures, but the average listener would probably have thought his remarks were comments on government policy, not disclosures of government information.

This is an important point, because it highlights one of the difficulties with limiting the right of public servants to make disclosures. There is a close connection in many cases between comment and disclosure. Finn J accepted this proposition.[2]

We can highlight the problem by taking a few hypothetical situations based on Mr Bennett's own comments in his interview. Let me hasten to say that every one of these examples is imaginary, including the so-called facts and disclosures set out in them.

1 Mr Bennett could have said: 'I believe that the proposed staff cuts are a bad thing'.

That would be pure comment, one would think. But what weight do I, as an interested member of the public, put on those comments? I have to give them some weight because of his experience and position as the head of a union of customs officers. But how do I weigh them against other comments that the proposed staff cuts will make the ACS more efficient?

2 Mr Bennett could have said: 'I believe that the proposed staff cuts are a bad thing because they will compromise our ability to patrol this country's borders'.

That goes a little further, because there is an opinion of future compromise of border protection. But it is still Delphic (to use one of Finn J's favourite expressions). What weight do I, the interested member of the public, give to his opinion? What is it based on?

3 Mr Bennett could have said: 'I believe that the proposed staff cuts are a bad thing because we currently inspect only a tiny handful of containers coming into this country, and fewer staff means even fewer inspections, which will compromise our ability to patrol this country's borders'.

Only now am I starting to get enough information in this 'comment' to let me weigh the significance of Mr Bennett's comments and opinions. The disclosure, one would think, is pretty trivial. But it gives substance to his comments, and lets me compare them with other comments from other people that support the proposed policy.

4 Mr Bennett could have said: 'I believe that the proposed staff cuts are a bad thing because we currently inspect only a tiny handful of containers coming into this country, as the CEO of the Customs Service admitted to a Senate Committee last week, and fewer staff means even fewer inspections, which will compromise our ability to patrol this country's borders'.

The difference on this occasion is that the 'disclosure' is of information already on the public record. Most people would think this was hardly a disclosure at all if it was already public.

5 Mr Bennett could have said: 'I believe that the proposed staff cuts are a bad thing because we currently inspect only a tiny handful of containers coming into this country, as the CEO of the Customs Service admitted to a Senate Committee last week (and in fact the figure is a pathetic 1.5% of all containers), and fewer staff means even fewer inspections, which will compromise our ability to patrol this country's borders'.

The only difference between this hypothetical comment and its predecessor is the addition of a statistic. Let us assume that the statistic (which, I repeat, is entirely hypothetical) was not disclosed in the Senate Committee. It certainly confirms the CEO's admission of only a 'tiny handful' of containers being inspected. Is this a disclosure of any significance?

But let me return to the point here. Disclosure is often necessary in order to make sense of a comment, and to give it some weight. It is unrealistic to maintain a rigid distinction between them: comment good, disclosure bad. Comment does not *have* to involve disclosure, but it often will. Without some disclosure, Finn J remarked that comment would be a 'dialogue of the deaf' between those who know and those who do not.

In his reasons, Finn J traced the history of statutory prohibitions on comment and disclosure by public servants. It is worth noting that until 1974 Commonwealth public servants were prohibited not only from disclosing any information, but from making any comments whatsoever on government activity[3].

The ban on comment was probably dropped because by 1974 Canberra was electing two members to the House of Representatives and two Senators. Inevitably this resulted in the ACT having very active political parties whose membership was drawn to a significant extent from public servants. Can you imagine trying to be a member of a political party (especially the opposition party) while facing an absolute prohibition on making 'public comment on the administration of any Department of the Commonwealth'[4]?

But while the ban on comment was dropped in 1974, the ban on disclosure remained.

Then came the *Freedom of Information Act 1982* (Cth) (FOI Act). This important legislation created a right in every Australian citizen to access to government information, subject only to the exceptions contained in Part IV of the Act.

It is true, as John Basten QC[5] pointed out in submissions before Finn J, that there is an important distinction between disclosure under FOI and disclosure by any public servant. Under the FOI Act there is a regulated system of disclosure, in which specifically authorised public servants make decisions on specific requests for disclosure. This does provide a reasonable degree of uniformity of approach and careful consideration of issues for every application for disclosure.

By contrast, a system of unregulated disclosure by any public servant who felt like it would produce capricious and inconsistent results, with widely differing consideration of significant issues such as national security and privacy.

But the point remains that the FOI Act is an important recognition that even in the area of disclosure, the balance should be tipped in favour of disclosure except in certain specified situations. It is surely anomalous that the public has a right to disclosure of a document

under the FOI Act, but a public servant disclosing the very same document outside that Act would be subject to a disciplinary and possibly a criminal charge.

In a very real sense, then, the question is no longer the substance of disclosure, but the process by which it happens. For the vast majority of government documents, the public has a right to see them. The issue is who makes the decision to release them, not whether they are released at all.

By the time the story reaches the 21st century, two more considerations had impacted on this discussion. First, Australia acceded to the ICCPR. While the Covenant does not act entirely as a bill of rights, it does have substantial legal effect. The Human Rights and Equal Opportunity Commission (HREOC) has considerable powers of investigation and enforcement as well as the power of making recommendations to government about inconsistencies between the Covenant and statute law.

Second, in the 1990s the High Court controversially recognised an implied constitutional guarantee of freedom of political communication. The text of this guarantee, as enunciated by a unanimous court of 7 judges in *Lange v ABC*[6], involves strikingly similar concepts to Art 19 of the ICCPR. As with the Covenant, the guarantee does not operate as a bill of rights. But all Commonwealth legislation (as well as the common law) must now be measured against the guarantee. Any law which fails to measure up is invalid.

The effect of these last two developments made the decision in *Bennett* probably inevitable. It was a question of when, not whether, the archaic ban on disclosure would be invalidated. A blanket ban of the kind previously in force in the public service could never stand against guarantees of free speech that demanded that any restrictions on free speech be directed at a legitimate end and be reasonably proportionate and adapted to that end.

The Current Situation

Alarmist reports of the decision in *Bennett* focussed entirely on the invalidity of the regulation prohibiting disclosure by public servants. Few seemed to understand the significance of Finn J's very careful comments in the second part of his judgment, in which he recognised the possibility that a direction not to disclose information could be supported by a public servant's common law duty of fidelity and loyalty to the employer.

While it was clear that HREOC really had not considered the duty of fidelity and loyalty in any serious way, there was next to no Australian jurisprudence on this topic. His Honour was circumspect about the scope of the duty, preferring to remit the case to HREOC to be considered there.

And that, for the moment, is where the case rests. Submissions have been made to HREOC about the scope of the duty and whether it could support the directions made by the ACS to Mr Bennett to make no comments or disclosure. As far as I am aware the ACS has not yet made submissions in reply. After that, HREOC will have to make its decision.

In the meantime, however, the government reacted with what looks like panic in slow motion. A new regulation was drafted, although it took about 12 months to be promulgated.

I say 'panic' because there appears to have been little consideration of whether a regulation was actually necessary at all. I am happy to be corrected on this, but my reading of the situation is that no serious attention was paid to how the common law duty of fidelity and loyalty might fill the gap left by the regulation. In particular, there seems to have been no consideration of the Canadian jurisprudence to which Finn J was taken in some detail during the submissions in *Bennett*, and to which His Honour referred approvingly in several places.

The scope of the duty of fidelity and loyalty in the context of comment and disclosure by public servants has been considered on several occasions by the Supreme Court of Canada, on several more occasions by the Federal Court of Canada, and on far more occasions by diverse Canadian provincial courts and tribunals. Almost all of this caselaw is less than 20 years old. There is every reason to think that the Canadian jurisprudence is germane to Australian legal and political conditions, and that the principles and criteria worked out in Canada would be applicable here.

Canada: The *Fraser* Decision

The starting point for the Canadian jurisprudence is the decision of the Supreme Court of Canada in *Fraser v PSSRB*[7].

Mr Fraser was the Group Head of the Business Audit Division of Revenue Canada, Taxation, in the regional office in Kingston, Ontario. One might expect him to be the stereotype of a quiet unassuming public official, diligently but self effacingly working away to audit business taxpayers and thus protect the revenue of the government of Canada. But Mr Fraser was a man of firm views and fiery temper.

He was strongly opposed to metric conversion. He wrote a letter to the local paper on the topic. He also attended a public meeting at which his hostility to metric conversion was robustly expressed and equally well publicised in the paper next day. At this point he was suspended for a few days for exceeding the bounds of reasonable comment by public servants.

This, however, only encouraged him. He turned his attention to the impending introduction of the Canadian Charter of Rights and Freedoms (the Charter). He attended a public meeting about the Charter, and made more comments critical of the government.

Next he appeared on a radio talkback show. He refused to talk about anything to do with Revenue Canada, but he made strong comments about the Charter. For good measure (why be restrained after all this vigorous public comment?) he also compared Prime Minister Trudeau's method of governing with the communist dictatorship in Poland.

Enough was enough as far the long suffering officials at Revenue Canada were concerned. After an inquiry, he was sacked. He appealed to a public service arbitrator, who confirmed the dismissal. He appealed to the Federal Court of Appeal, which also upheld the dismissal. Finally the case reached the Supreme Court in Ottawa.

It is important to know that this case did not involve any consideration of the Canadian Charter. That document postdates the actions in dispute. Rather, the Court was considering the general common law duty of employees of the Crown. That is, the Court was determining the scope of the duty of fidelity and loyalty, paying careful attention to the right of public servants to take part in a democratic society. In addition, there was no relevant public service statute which covered the right of public servants to comment or make disclosures. The governing law was the common law.

The reasoning is, therefore, directly applicable to the question remitted by Finn J to HREOC: what is the scope of the common law duty of a public servant in the context of public comment and disclosure?

The Supreme Court decision is, to Australian eyes, relatively concise and very much to the point. It pays close reading for the careful and well expressed discussion of the competing considerations facing public servants who wished to make comment.

Speaking for the Court, the Chief Justice acknowledged that there was a balance to be struck.

> The act of balancing must start with the proposition that some speech by public servants concerning public issues is permitted. Public servants cannot be, to use Mr. Fraser's apt phrase, 'silent members of society'.[8]

But balanced against that are equally powerful considerations.

> The tradition [of the public service] emphasizes the characteristics of impartiality, neutrality, fairness and integrity. A person entering the public service or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints. One of the most important of those restraints is to exercise caution when it comes to making criticisms of the Government.[9]

Dickson CJ identified three reasons why public servants had some right to make public comment.

> 32. First, our democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion.
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> 33 Secondly, account must be taken of the growth in recent decades of the public sector--federal, provincial, municipal--as an employer. A blanket prohibition against all public discussion of all public issues by all public servants would, quite simply, deny fundamental democratic rights to far too many people.
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> 34 Thirdly, common sense comes into play here. An absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit. Can anyone seriously contend that a municipal bus driver should not be able to attend a town council meeting to protest against a zoning decision having an impact on her residential street? Should not a provincial clerk be able to stand in a crowd on a Sunday afternoon and protest a provincial government decision cutting off funding for a day care centre or a shelter for single mothers? And surely a federal commissionaire could speak out at a Legion meeting to protest against a perceived lack of federal support for war veterans. These examples, and many others could be advanced, demonstrate that an absolute prohibition against public servants criticizing government policies would not be sensible.

Those are comments that could be applied directly in Australia, with appropriate changes to the settings of the examples. But the balancing process is always important.

> Public servants have some freedom to criticize the Government. But it is not an absolute freedom. To take but one example, whereas it is obvious that it would not be 'just cause' for a provincial Government to dismiss a provincial clerk who stood in a crowd on a Sunday afternoon to protest provincial day care policies, it is equally obvious that the same Government would have 'just cause' to dismiss the Deputy Minister of Social Services who spoke vigorously against the same policies at the same rally.[10]

Further on His Honour said:

> 39 This analysis and conclusion, namely that Mr Fraser's criticisms were job-related, is, in my view, correct in law. I say this because of the importance and necessity of an impartial and effective public service. There is in Canada a separation of powers among the three branches of government--the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.
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> 40 The federal public service in Canada is part of the executive branch of Government. As such, its fundamental task is to administer and implement policy. In order to do this well, the public service must employ people with certain important characteristics. Knowledge is one, fairness another, integrity a third.

41 As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. 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. And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant 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 perception of that ability. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government.

42 As the Adjudicator pointed out, there is a powerful reason for this general requirement of loyalty, namely the public interest in both the actual, and apparent, impartiality of the public service. The benefits that flow from this impartiality have been well-described by the MacDonnell Commission. Although the description relates to the political activities of public servants in the United Kingdom, it touches on values shared with the public service in Canada:

> 'Speaking generally, we think that if restrictions on the political activities of public servants were withdrawn two results would probably follow. The public might cease to believe, as we think they do now with reason believe, in the impartiality of the permanent Civil Service; and Ministers might cease to feel the well-merited confidence which they possess at present in the loyal and faithful support of their official subordinates; indeed they might be led to scrutinise the utterances or writings of such subordinates, and to select for positions of confidence only those whose sentiments were known to be in political sympathy with their own.
>
> If this were so, the system of recruitment by open competition would provide but a frail barrier against Ministerial patronage in all but the earlier years of service; the Civil Service would cease to be in fact an impartial, non-political body, capable of loyal service to all Ministers and parties alike; the change would soon affect the public estimation of the Service, and the result would be destructive of what undoubtedly is at present one of the greatest advantages of our administrative system, and one of the most honourable traditions of our public life.'

See paragraphs 10-11 of c. 11 of MacDonnell Committee quoted in Re Ontario Public Service Employees Union and Attorney-General for Ontario (1980), 31 OR. (2d) 321 (C.A.), at p. 329.

43 There is in Canada, in my opinion, a similar tradition surrounding our public service. The tradition emphasizes the characteristics of impartiality, neutrality, fairness and integrity. A person entering the public service or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints. One of the most important of those restraints is to exercise caution when it comes to making criticisms of the Government.

I have quoted from this case at some length because it is not only the starting point of the extensive Canadian jurisprudence, but it stands as a very thoughtful analysis of the competing considerations for public servants who want to take part in public debate.

Canada: More Recent Developments

We can trace the development of Canadian caselaw more rapidly from this point. The key decisions are *Osborne v Canada*[11]; *Haydon v Canada*[12] (*Haydon No 1*), and, most recently, *Haydon v Canada*[13] (*Haydon No 2*) in which the same Dr Haydon found herself disciplined for a second time for an entirely different set of public remarks.

After *Fraser*[14]*,* the Supreme Court returned to the topic of the public service in *Osborne.* However, on this occasion it was considering the rights of public servants to take part in public debate in the context of s 1 of the Charter, which is similar in effect to the proportionality requirements of art 19(3) of the ICCPR. It did not directly discuss the precise content of the duty of loyalty and fidelity. Instead it considered the impact of a particular legislative provision that prohibited involvement by public servants in political campaigns.

However, under the heading 'Minimal Impairment', Sopinka J (with whom the majority of the Court agreed) made some important comments about the significance of tailoring restrictions on the rights of public servants to make comments according to their rank and level. 'To apply the same standard to a deputy minister [the equivalent of a departmental secretary in Australia] and a cafeteria worker appears to me to involve considerable overkill…'[15].

His Honour went on to note the evidence that 'a substantial number of public servants neither provide policy advice nor have any discretion with respect to the administration'. Other evidence suggested a line could be drawn, roughly, at the managerial level, 'which would allow the bulk of the public service below the line to be politically freed, while maintaining the neutrality of the public service as an institution'. Comparisons were drawn with the public service in the UK and in most of the Canadian provinces, which made such a distinction in determining the extent of restriction on the rights of public servants to take part in public debate.

It must follow from this analysis that, if the scope of the duty of fidelity and loyalty is to be based on reasonableness,[16] it could not fail to differentiate between public servants at different levels of the hierarchy. Conversely, if it did not make that differentiation, it would inevitably fail the test of proportionality required in art 19(3). It would probably also fail the implied constitutional guarantee of freedom of political communication for the same reason, but that is not for HREOC to determine.

Superficially *Haydon No 1* involves the application of the Canadian Charter. However, closer analysis shows that, in fact, the crucial parts of this decision relate to the content of the duty of fidelity and loyalty.

In this case, Her Honour was dealing with public comment made by two public servants on national TV. The public servants were doctors employed by the national agency responsible for testing drugs. The comments were highly critical of government policy and programs for testing drugs. The public servants had been disciplined for making public comment, and had also been prohibited from making further public comment without authority.

Note that this case clearly involved both disclosure and comment: the public servants disclosed problems within the drug testing agency and made comments about the ineffectiveness of the agency's procedures. It is a classic example of the frequent interrelationship between disclosure and comment. Without disclosure the comments would have been pretty meaningless. With disclosure the comments revealed a potentially grave danger to public safety and public health.

Her Honour concluded that the common law duty of fidelity and loyalty, as set out in *Fraser*, passed the proportionality requirements of s 1 of the Charter[17]. This is an important point, because it highlights the flexibility and adaptability of the duty to meet particular requirements. If it passes the proportionality test for the Charter, it seems inevitable that it would pass the same test for both art 19 and the implied constitutional guarantee in Australia. It was to the content of that duty to which Her Honour then turned.

Her Honour concluded that the original decision-maker had erred in law by failing to understand that there were exceptions to, or limits on, the duty of loyalty and fidelity as expounded in *Fraser.* She drew particular attention to the exception for 'disclosure of policies that jeopardize the life, health or safety of the public'[18]. She set out the way in which the issue in the case had been raised within the agency, and had become a matter of public importance. She did not think it important that the comments also reflected a degree of frustration with management[19] and described the original decision as having 'failed to proceed with a fair and complete assessment of the applicant's right, as members of the Canadian public, to speak on an important public issue'[20].

Of significance to the Australian situation is Her Honour's conclusion[21] that the blanket ban on making further public comment went beyond the scope of the duty of loyalty as established in *Fraser.* It is clear that a restriction which has the practical effect of banning any contact with the media, for example, goes beyond the scope of the duty of loyalty and fidelity.

Her Honour summed up the situation[22]:

> Where a matter is of legitimate public concern requiring a public debate, the duty of loyalty cannot be absolute to the extent of preventing public disclosure by a government official. The common law duty of loyalty does not impose unquestioning silence.

By the time *Haydon No 2* had been decided in May 2004, there had been a number of decisions of Canadian courts and employment tribunals which had considered the duty of loyalty from a number of different angles. *Haydon No 2* is useful in providing something in the nature of a checklist of issues to be looked at in determining the scope of the duty of loyalty in relation to public servants who wish to make public comment or disclosure, drawing on the whole of recent Canadian jurisprudence.

In this case, the very same Dr Haydon was interviewed by a reporter for the *Globe and Mail,* Canada's major national newspaper, over a ban on the importation of beef from Brazil. There was some concern that Brazilian beef might not be rigorously tested and hence involve a risk of such diseases as BSE. Dr Haydon spoke generally to the reporter about the issues, but along the way made comments that in her opinion the ban on Brazilian beef was only about trade, not about a danger to health. These comments found their way into the article in the paper, ascribed to Dr Haydon who was described as a 'Canadian government scientist'.

She was suspended for 10 days (later reduced to 5) and she appealed, ultimately, to the Federal Court. Martineau J reviewed all the authorities[23] and included in his analysis some comments of tribunals that had been accepted as stating general principles to do with the scope of the duty.

His Honour cited[24] with approval extracts from an earlier decision of the British Columbia Arbitrator in *Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees' Union*[25]:

> In my view, each case must be decided on its own facts, taking into account among other factors, the content of the criticism, how confidential or sensitive was the information, the manner in which the criticism was made public, whether the statements were true or false, the extent to which the employer's reputation was damaged or jeopardized, the impact of the criticism on the employer's ability to conduct its business, the interest of the public in having the information made public and so forth.
>
> *The duty of fidelity is not designed to protect the employer from all criticism. Nor is an employee's duty of loyalty aimed at the personalities who may occupy a particular position in the corporation or bureaucracy.* An employee's duty of fidelity extends to the enterprise not the particular individual who may be managing the enterprise. By the same token, a public servant's loyalty extends to the Government, not the political party who happens to be in office (emphasis added).

His Honour summarised his own reasons[26]:

> In summary, the question before the adjudicator was whether the applicant breached her duty of loyalty thereby giving the employer cause for discipline. The applicant did not enjoy an absolute license, as a public servant, to publicly criticize policies of the Government or to cast doubt on their appropriateness. Considering all of the relevant factors, including the context, the manner and the timing of the reported statements, the decision of the arbitrator to find the applicant guilty of misconduct was one that could reasonably have been made based on the evidence on the record. The adjudicator did not err in law. His interpretation was consistent with the Charter. The duty of loyalty

> constitutes a reasonable limit to the freedom of expression. Clearly, there has been a balancing of the competing rights. This case is distinguishable from *Haydon, supra*, and the other cases cited by the applicant. A large and liberal interpretation should be given to the exceptions mentioned in *Fraser, supra*. However, at the same time, it must be consistent with the objective of maintaining an impartial and effective public service. Clearly, this is not a case of 'whistle blowing'. The applicant's reported statements, in my opinion, do not involve public interest issues of the same order as in *Haydon, supra*. They do not address pressing issues such as jeopardy to public health and safety (or Government illegality). Moreover, the evidence reveals that the applicant did not check her facts or address her concerns internally before she spoke to The Globe and Mail. It also appears that her statements were not accurate. Nevertheless, they carried significant weight because the applicant is a scientist and they had an adverse impact on the operations of the Government of Canada. As a result, the adjudicator found that the applicant breached her duty of loyalty and that discipline was warranted. In this regard, I am unable to find any material error.

Canada: The Principles Summarised

Let me briefly return to a point made several times. While most of the Canadian cases generally talk about 'comment', they are applicable to 'disclosure' as well, because of the close connection between the two in many situations. Also, *Haydon No 1,* one of the key decisions in this jurisprudence, expressly deals with disclosure as well as comment.

Hence the extent of the duty of fidelity and loyalty in connection with disclosure can be measured in many situations by the discussion in the caselaw about comment.

Tying all these cases together, then, the following principles emerge:

1 The duty of fidelity and loyalty owed by public servants involves a balancing process that takes account of the countervailing rights of public servants to take part in a democratic society;

2 The purpose of the duty is to defend both the actual and perceived impartiality of the public service, and thereby enable government agencies to function effectively;

3 The duty is owed to the government of the day, not the political party in power;

4 The duty is owed to the agency that employs the person, and to the government as a whole, rather than to any individual supervisor of the person;

5 However, the duty is not intended to prevent dissent, because dissent can in some cases be beneficial to the agency as well as a reflection of the public servant's right to participate in a democratic society;

6 The duty is not absolute in all cases, but is tailored precisely to meet the circumstances of the particular case;

7 The duty involves restraint on the part of a public servant;

8 The exceptions to the duty should be given a large and liberal interpretation;

9 Where the disclosure of information involves information received by the government in confidence, or which affects national security, more restraint is required;

10 The more senior the position, the more restraint is required; 'senior' in this context is judged by the rank and the degree of involvement in the administration and policy-making of the particular public servant;

11 The closer the connection between the topic of the comment or disclosure and the duties of the public servant, the more restraint is required;

12 The duty does not prevent disclosure or comment on matters of public safety, public health, or illegal government conduct;

13 The duty does not prevent disclosure or comment on matters of legitimate public interest or debate;

14 As a general rule the public servant should first raise concerns internally in relation to matters of concern before making public comment or disclosure;

15 A greater degree of restraint is required where the public servant is to be identified as a public servant in the publication of the comment or disclosure;

16 As a general rule the public servant should check their facts before making a public comment or disclosure in order to ensure that the facts are correctly stated.

Reading the list, one is struck by three things.

First, the principles represent the striking of a careful balance between legitimate government needs for confidentiality on the one hand, and the rights of public servants to take part in public debate on the other.

Second, the principles are flexible, and adapt to particular situations.

Third, the principles seem to reflect common sense. None of them seems in the least bit startling or threatening to good order. National security and effective government are well protected, while giving public servants reasonable opportunities to take part in public debate. The principles also reflect the public interest in whistleblowing, which was conspicuously absent from both the old public service regulation in Australia and, arguably, the new one too.

One point is clear beyond argument. Any attempt to ban comment or disclosure indiscriminately goes far beyond the scope of the duty, and hence the duty cannot support such a ban. This is one of the explicit conclusions of the judge in *Haydon No 1*, and is well supported by the comments of the Supreme Court in *Fraser* and *Osborne.*

I would suggest, therefore, that if Australia were to accept the principles developed in Canada, there would be no need for any express regulation of the public service dealing with disclosure or comment. On the basis of the Canadian jurisprudence, the sky is most definitely not falling in relation to disclosure by public servants.

As a postscript to the Canadian discussion, Dr Haydon has recently had another win. In *Chopra and Haydon v Canada*[27] the Federal Court of Canada overturned, on the merits, the decision of the public service arbitrator to dismiss the protagonists in what I have called *Haydon No 1.* The decision turns on the way in which that particular decision was made, and sheds no particular light on the law relating to disclosure. However, it seems that Dr Haydon's battle continues.

The New Regulation in Australia

In the light of the Canadian experience there was probably no need for the Australian Government to replace the regulation invalidated by Finn J with anything at all. There is no

obvious reason why Australian courts would not have found the Canadian discussion persuasive and helpful in defining similar principles for this country.

However, the government chose to amend the Public Service Regulations 1999 by inserting a new regulation 2.1[28]. That regulation lasted barely six months before being disallowed by the Senate. Whether the government intends to re-submit the regulation now that it has a majority in the Senate is anybody's guess, but I would assume that this takes a very low priority compared with all the other legislation the government wants to put through the newly-compliant Senate.

The disallowed regulation, however, is worth looking at briefly[29].

It seems clear that it was not drafted in the light of the Canadian caselaw. It lacks anything remotely approaching the careful development of principles derived from those cases. Nor did it use another useful model, the extensively-discussed principles in Part IV of the FOI Act.

Parts of it can be traced to the reasons of Finn J. But the rest of it seems to be a new attempt to define the extent of a public servant's ability to disclose information. And like its predecessors, it seems to have the same problem. In attempting to regulate disclosure in a sentence or two, the drafters are missing much of the point of Finn J's decision, let alone the flexible and extensive principles developed in Canada.

It is simply impossible to set out in one or two sentences the occasions on which disclosure should or should not take place. Nor is a 'one size fits all' approach going to give the necessary flexibility.

The advantage of the Canadian jurisprudence is that it has produced a set of principles that can be adapted with relative ease to many different situations. By contrast, reg 2.1 looked heavy handed, lacked certainty, and might possibly have ended up not doing any more than the common law anyway. It was at least arguable that reg 2.1.5(c) would have imported the common law tests, and thus ended up allowing the common law to regulate the situation rather than the regulation itself.

Is there any need for a regulation at all? I accept that for the purposes of certainty of effect, it might be necessary to have a regulation which recognises the common law duty of fidelity and loyalty and connects it with the criminal sanction in, say, s 70 of the Crimes Act. But beyond that very limited purpose, I think the common law as developed in Canada has produced a sensible set of principles that ought to be allowed to inform the duty of fidelity and loyalty in this country.

And that means that reg 2.1 ought to stay disallowed. On one view it was probably completely ineffective anyway, as it allowed the common law duty to override the regulation. Assuming it had some effect, though, that effect was unclear and was likely to cause yet more problems and lead to yet more court challenges.

The sky did not start falling when Finn J handed down his decision in *Bennett*. The common law had already dealt with most of the problems, and it should be allowed to continue to do so. The common law has a demonstrated flexibility and adaptability that will enable it to pass the tests of proportionality applied in Australia through the implied constitutional guarantee and art 19 of the ICCPR. Regulation 2.1, on the other hand, was a court challenge waiting to happen. It might be naïve in the extreme to suggest that we leave it to the Australian courts to develop principles that are likely to be similar to those developed in Canada – but is our track record any better so far in trying to deal with the issue by regulation?

Endnotes

1 (2003) 78 ALD 93.
2 At pars 74 and 75.
3 Public Service Regulations (Cth) reg 41(a).
4 Ibid.
5 Counsel for the Commonwealth.
6 (1997) 189 CLR 520.
7 [1985] 2 SCR 455.
8 At par 31.
9 At par 43.
10 At par 36. As far as I can tell a Deputy Minister in the Canadian public service is the equivalent of the Secretary of an Australian department.
11 [1991] 2 SCR 69 (Supreme Court of Canada).
12 [2001] 2 FC 82 (Federal Court of Canada - Trial Division).
13 [2004] FC 749 (Federal Court of Canada – Trial Division).
14 See note 7.
15 Above note 11 at 99.
16 Which underlies the decision in *Fraser*.
17 At par 89.
18 At par 100.
19 At par 108.
20 At par 111.
21 At par 115-117.
22 At par 120.
23 Including the earlier *Haydon* decision.
24 Note 13 at par 46.
25 (1981) 3 LAC (3d) 140 at 158-59.
26 At par 69.
27 [2005] FC 595.
28 2.1 Duty not to disclose information (Act s 13)
(1) This regulation is made for subsection 13 (13) of the Act.
(2) This regulation does not affect other restrictions on the disclosure of information.
(3) An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies or programs.
(4) An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if the information:
(a) was, or is to be, communicated in confidence within the government; or
(b) was received in confidence by the government from a person or persons outside the government;
whether or not the disclosure would found an action for breach of confidence.
(5) Subregulations (3) and (4) do not prevent a disclosure of information by an APS employee:
(a) in the course of the APS employee's duties; or
(b) in accordance with an authorisation given by an Agency Head; or
(c) that is otherwise authorised by law.
(6) Subregulations (3) and (4) do not limit the authority of an Agency Head to give lawful and reasonable directions in relation to the disclosure of information.
29 Because reg 2.1 was made and tabled before the commencement of the Legislative Instruments Act 2003, the Acts Interpretation Act 1901 continues to apply to it (Legislative Instruments Act s 57). Section 48(6) of the Acts Interpretation Act provides that the disallowance of a regulation is to have the same effect as if it were repealed. However, s 48(7) negates the rule that the repeal of a regulation does not revive the law as in force before the repeal. The effect of this is that the regulation declared invalid in *Bennett* revives but as it is invalid, it is unenforceable. However, it will remain on the legislation register until it is formally repealed.