

QUÉBEC, QUEBEC, NOVEMBER 29, 1996

**CORAM:**PRATTE,  
HUGESSEN  
DESJARDINS, J.J.A.

**BETWEEN:**CLAUDE LABONTÉ, an investigation and monitoring officer, domiciled and residing at 6, du Plateau in Lévis, G6B 7X8, Province of Quebec

Appellant

**AND:**

GUY ST-HILAIRE, in his capacity as chairman of the appeal board established pursuant to section 31 of the *Public Service Employment Act*, R.S.C. 1985, c. P-33, 200 boul. René-Lévesque ouest, Complexe Guy-Favreau, 1st Floor, East Tower, Montréal H2Z 1X4

-and-

THE PUBLIC SERVICE COMMISSION, a body politic duly constituted pursuant to the provisions of the *Public Service Employment Act*, Ottawa, Ontario K1A 0M7 and having an office in Montréal at 200 boul. René-Lévesque ouest, Complexe Guy-Favreau, 1st Floor, East Tower, Montréal

-and-

THE DEPUTY HEAD OF THE EMPLOYMENT AND IMMIGRATION COMMISSION, for the purposes of enforcing the *Public Service Employment Act*, office of the executive director, Quebec region, 200 boul. René-Lévesque ouest, Complexe Guy-Favreau, 1st Floor, East Tower, Montréal H2Z 1X4

Respondents

### **J U D G M E N T**

The appeal is allowed with costs, the decision of the Trial Division is quashed, the appellant's application for judicial review is allowed, the decision of the appeal board is quashed, and the matter is returned for a hearing and determination by another appeal board, which shall, in making its decision, take into account the evidence concerning the appellant's medical status at the time of the recommendation.

"Louis Pratte"

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J.A.

Certified true translation

Christiane Delon

CORAM:PRATTE,  
HUGESSEN  
DESJARDINS, J.J.A.

BETWEEN:

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Respondents

Hearing held in Québec, Quebec, Friday, November 29, 1996.

Judgment pronounced at the hearing, November 29, 1996.

REASONS FOR JUDGMENT OF THE COURT BY:

HUGESSEN J.A.

CORAM:PRATTE,  
HUGESSEN  
DESJARDINS, J.J.A.

BETWEEN:

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REASONS FOR JUDGMENT OF THE COURT  
(Pronounced at the hearing in Québec, Quebec,  
Friday, November 29, 1996)

HUGESSEN, J.A.

The appellant was the subject of a recommendation that he be released for incompetence under section 31 of the *Public Service Employment Act*.<sup>1</sup> At the hearing of his appeal of this recommendation, the appellant presented medical evidence (the substance of which was confirmed by the Department's medical expert) to the effect that at the time of the recommendation and during at least the two previous years the appellant was, unknown to him, suffering from a depression that rendered him

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<sup>1</sup>R.S.C. 1985, c. P-33

31. (1) Where an employee, in the opinion of the deputy head, is incompetent in performing the duties of the position the employee occupies or is incapable of performing those duties and should be appointed to a position at a lower maximum rate of pay, or released, the deputy head may recommend to the Commission that employee be so appointed or released, in which case the deputy head shall give notice in writing to the employee of the recommendation.

(2) Within such period after receiving a notice under subsection (1) as the Commission prescribes, the employee may appeal against the recommendation of the deputy head to a board established by the Commission to conduct an inquiry at which the employee and the deputy head, or their representatives, shall be given an opportunity to be heard.

(3) The Commission, on being notified of the decision of the board on the inquiry into a recommendation conducted pursuant to subsection (2), shall, in accordance with the decision,

(a) notify the deputy head concerned that the recommendation will not be acted on ;  
or

(b) appoint the employee to a position at a lower maximum rate of pay, or release the employee.

(4) If no appeal is made against a recommendation of a deputy head under subsection (1), the Commission may take such action with regard to the recommendation as the Commission sees fit.

(5) The Commission may release an employee pursuant to a recommendation under this section and the employee thereupon ceases to be an employee.

31. (1) L'administrateur général qui juge un fonctionnaire incompetent dans l'exercice des fonctions de son poste ou incapable de remplir ces fonctions peut recommander à la Commission soit le renvoi de ce fonctionnaire, soit sa rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur. Dans les deux cas, il en avise par écrit le fonctionnaire.

(2) Dans le délai imparti par la Commission après réception de l'avis mentionné au paragraphe (1), le fonctionnaire peut faire appel de la recommandation de l'administrateur général devant un comité chargé par la Commission de faire une enquête, au cours de laquelle les parties, ou leurs représentants, ont l'occasion de se faire entendre.

(3) Après notification de la décision du comité, la Commission, en fonction de cette dernière:

a) avertit l'administrateur général qu'il ne sera pas donné suite à sa recommandation;

b) rétrograde ou renvoie le fonctionnaire.

(4) En l'absence d'appel, la Commission peut prendre, à l'égard de la recommandation, toute mesure qu'elle estime opportune.

(5) La Commission peut renvoyer un fonctionnaire en application d'une recommandation fondée sur le présent article; le fonctionnaire perd dès lors sa qualité de fonctionnaire.

unable to fulfil the duties of his position. According to the doctors, appropriate treatment would enable the appellant to resume his duties.

The appeal board dismissed the appellant's appeal, essentially for the following reason:

[*Translation*]

According to the judgment of the Federal Court of Appeal when it quashed an appeal board decision in *Attorney General of Canada v. Fournier* (May 30, 1980, file A-49-80), inadequate output, as in this case, demonstrates incompetence. Furthermore, according to the judgments of that Court in *Lemieux v. Public Service Commission of Canada* (March 4, 1985, A-481-84), *Clare v. A.G. Canada* (January 18, 1993, A-466-91) and *Canada (Attorney General) v. Stewart et al. (Vance case)* (March 11, 1993, A-96-92), an appeal board reviews the decision of the deputy head and in this capacity can take into account only the facts existing at the time of the recommendation, since to do otherwise would "give the appeal board the benefit of the passage of time when it assesses the reasonableness of a recommendation".

In this instance, when the designated representative of the deputy head decided to recommend release on March 11, 1993, he had no information that would allow him to doubt that the inadequate output was attributable to anything other than incompetence. The possibility of some other cause such as depression arose only in the following June or July. Although the depression might in fact have existed since 1990, the knowledge of its existence appeared only in July and July 1993, several months after the decision. In the circumstances of this case, I think the Department cannot be censured for not having thought of the possibility that the source of the inadequate performance was illness or depression. This is indeed a factor subsequent to the recommendation, which an appeal board cannot consider in assessing the reasonableness of the recommendation at the time it was made. [Appeal Record, pp. 70-71]

The trial judge refused to intervene.

We are all of the opinion that the appeal board erred in law. It correctly summarized the effect of the judgments it cited when it stated that it could take into account only "the facts existing at the time of the recommendation". However, it erred when it confused the existence of certain facts and the knowledge of those facts. In the case at bar, the appellant's depression had existed, according to the medical evidence, since 1990, long before the date of recommendation of release. However, the knowledge of this fact was acquired only in July 1993, several months after the recommendation. The board of appeal should have taken this into account, not in order to "censure" the Department but to assess the merit of the recommendation.

The appeal will be allowed with costs, the decision of the Trial Division will be quashed, the application for judicial review will be allowed, the decision of the appeal board will be quashed, and the matter will be returned for a decision by another appeal board after re-hearing, with the understanding that it shall take into account the evidence concerning the appellant's medical status at the time of the recommendation.

"James K. Hugessen"

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J.A.

Certified true translation

Christiane Delon

Federal Court of Appeal

A-30-95

BETWEEN:

**CLAUDE LABONTÉ**, an investigation and monitoring officer, domiciled and residing at 6, du Plateau in Lévis, G6B 7X8, Province of Quebec

Appellant

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Respondents

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REASONS FOR JUDGMENT OF THE COURT

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**FEDERAL COURT OF CANADA**  
**APPEAL DIVISION**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

FILE NO. A-30-95

APPEAL FROM A JUDGMENT OF THE TRIAL DIVISION RENDERED ON DECEMBER 22,  
1994. TRIAL DIVISION FILE NO. T-2530-93

STYLE:Claude Labonté v. Guy St-Hilaire et al.

PLACE OF HEARING:Québec, Quebec

DATE OF HEARING:November 29, 1996

REASONS FOR JUDGMENT OF THE COURT (PRATTE, HUGESSEN AND DESJARDINS  
JJ.A)

PRONOUNCED AT THE HEARING BY: HUGESSEN J.A.

**APPEARANCES:**

Dominique Bélanger for the appellant

Alain Lafontaine for the respondent

**SOLICITORS OF RECORD:**

PAQUET BÉLANGER  
Québec, Quebec for the appellant

George Thomson  
Deputy Attorney General of Canada for the respondent