

Office of the Conflict of Interest and Ethics Commissioner Commissariat aux conflits d'intérêts et à l'éthique

Referrals from the Public Sector Integrity Commissioner: the Heinke and Charbonneau Report

made under the CONFLICT OF INTEREST ACT



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Mary Dawson Conflict of Interest and Ethics Commissioner Referrals from the Public Sector Integrity Commissioner: the Heinke and Charbonneau Report

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For additional copies of this publication, please contact:

Office of the Conflict of Interest and Ethics Commissioner Parliament of Canada 66 Slater Street, 22nd Floor Ottawa, Ontario K1A 0A6

Telephone: (613) 995-0721 Fax: (613) 995-7308 Email: <u>ciec-ccie@parl.gc.ca</u>

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PREFACE

The Conflict of Interest Act, S.C. 2006, c.9, s. 2 (Act) came into force on July 9, 2007.

Pursuant to section 68 of the Act, if a matter is referred to the Conflict of Interest and Ethics Commissioner by the Public Sector Integrity Commissioner pursuant to subsection 24(2.1) of the *Public Servants Disclosure Protection Act*, the Conflict of Interest and Ethics Commissioner must provide a report to the Prime Minister setting out the facts in question as well as the Commissioner's analysis and conclusions in relation to the referral. A copy is provided to the public office holder or former public office holder who is the subject of the report and to the Public Sector Integrity Commissioner. The report is also made public.

TABLE OF CONTENTS

OVERVIEW	1
THE REFERRALS	2
THE PROCESS	3
INFORMATION GATHERED	5
Allegations	5
Previous Challenges to the Board Decisions	5
Mr. Heinke's Submissions	6
Mr. Charbonneau's Submissions	7
ANALYSIS AND CONCLUSIONS	8
ADDITIONAL OBSERVATIONS	9
SCHEDULE - PROCESS FOR REFERRALS FROM THE PUBLIC SECTOR INTEGRITY COMMISSIONER	0

OVERVIEW

This is the first report I have issued as a result of a referral from the Office of the Public Sector Integrity Commissioner. It relates to 167 disclosures referred to my Office by that Commissioner.

The Public Sector Integrity Commissioner is mandated to review and investigate disclosures of wrongdoing by public servants. When he or she is of the opinion that the subject-matter of such a disclosure falls within my jurisdiction, he or she is required to refer the matter to my Office.

When I receive a referral in this manner, the *Conflict of Interest Act* (Act) requires that I issue a public report setting out the facts in question and my analysis and conclusions. If the subject matter of the referral falls within the jurisdiction of my Office and I have reason to believe that a contravention of the Act has occurred, I determine whether an examination is warranted. If that is the case, I launch an examination under section 45 of the Act. Even if I do not launch an examination, I must nonetheless write a report. A description of the process for referrals from the Public Sector Integrity Commissioner and the relevant statutory provisions are set out in further detail in the Schedule.

In this case, the referrals I received related to decisions issued by the Canada Industrial Relations Board (Board) in 2010 and 2011 affecting Air Canada and one of its unions, the International Association of Machinists and Aerospace Workers (Union).

It was alleged that two Board members who participated in those decisions – Mr. Patrick Heinke, an employer-representative member, and Mr. Daniel Charbonneau, an employee-representative member – were in a conflict of interest because of their past associations with the parties affected by the decisions.

I sought clarification from individuals who had made the disclosures to the Public Sector Integrity Commissioner and obtained additional information from Mr. Heinke and Mr. Charbonneau. None of the information gathered indicated that either Mr. Heinke or Mr. Charbonneau had any private interests that could have been furthered by their participation in the decisions in question.

I therefore did not have reason to believe that either Mr. Heinke or Mr. Charbonneau had contravened the Act and did not pursue the matter further.

THE REFERRALS

In August and October 2011, the then interim Public Sector Integrity Commissioner referred to me, under subsection 24(2.1) of the *Public Servants Disclosure Protection Act*, a total of 167 disclosures that he had received. These disclosures related to decisions taken by the Canada Industrial Relations Board (Board) in 2010 and 2011 affecting Air Canada and one of its unions. All 167 disclosures were made by individuals who appeared to be members of that union.

The first disclosure, referred to me in August 2011, contained allegations against Mr. Patrick Heinke, an employer-representative member of the Board, concerning a decision issued on January 31, 2011 relating to a bargaining unit restructuring following the sale of the maintenance division of Air Canada, from Air Canada to Aveos Fleet Performance. The union involved was the International Association of Machinists and Aerospace Workers (Union). The allegation made against Mr. Heinke was that he was in a conflict of interest when he participated in this decision because of his previous employment with Air Canada and his related retiree travel privileges.

In October 2011, my Office received another 166 referrals from the then interim Public Sector Integrity Commissioner, each containing an additional disclosure. These disclosures were all based on the same template. They repeated the allegation that Mr. Heinke was in a conflict of interest when he participated in the above-mentioned Board decision.

These disclosures also cited two other Board decisions involving Air Canada and the Union, in relation to which they argued that Mr. Heinke was in a conflict of interest for the same reasons. The decisions were issued in August 2010 and involved complaints against the Union for breach of duty of fair representation relating to the transactions between Air Canada and Aveos.

In addition, the 166 disclosures received by my Office contained allegations against Mr. Daniel Charbonneau, an employee-representative member of the Board. The allegation made against Mr. Charbonneau was that he was in a conflict of interest when he participated in the three Board decisions referred to above because of his previous employment with Air Canada, during which time he also held a position with the Union.

The 166 disclosures also made reference to the Chairperson of the Canada Industrial Relations Board, who had assigned Mr. Heinke and Mr. Charbonneau to the case that resulted in the January 31, 2011 decision. They argued that the Chairperson should not have chosen Mr. Charbonneau or Mr. Heinke to hear this case in light of their previous connections to Air Canada. With respect to the Chairperson, I determined that no further action was required, as the disclosures provided me with no information suggesting that the Chairperson may have contravened the Act.

THE PROCESS

The referrals did not provide me with reason to believe that either Mr. Heinke or Mr. Charbonneau had contravened the *Conflict of Interest Act* (Act). I determined, however, that it would be appropriate to seek further information.

On October 31, 2011, in order to obtain more information about the allegations in the referrals, my Office spoke with the individual who made the first disclosure. This individual provided additional documents on November 3, November 28 and December 3, 2011.

My Office also communicated with one of the individuals whose disclosure was included among the 166 received in October 2011, to clarify which Board rulings the disclosures were referring to.

I wrote to Mr. Heinke on December 6, 2011 and to Mr. Charbonneau on January 3, 2012, to inform them that I had received these referrals. In my letters I explained that I was seeking additional information necessary for me to evaluate the merit of the concerns raised in the disclosures and that I would then determine whether I had reason to believe that a contravention had occurred and, if so, whether an examination was warranted under section 45 of the Act. I notified them that I was obliged to issue a report on my findings whether or not I proceeded to an examination.

My letters provided Mr. Heinke and Mr. Charbonneau with an opportunity to respond to the allegations. The disclosures raised general conflict of interest concerns but did not cite any provisions of the *Conflict of Interest Act* (Act). In order to facilitate their responses, I identified section 5 and subsection 6(1) as the provisions that could be applicable.

Section 5 requires that all public office holders arrange their private affairs in a manner that will prevent them from being in a conflict of interest. Subsection 6(1) prohibits public office holders from making or participating in making a decision related to the exercise of an official power, duty or function if the public office holder knows or should reasonably know that doing so would place himself or herself in a conflict of interest.

Section 4 defines the circumstances in which a public office holder is in a conflict of interest within the meaning of the Act. It reads as follows:

4. For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.

In my letter to Mr. Heinke, I asked him to provide me with the terms of his Air Canada pension benefits, and to describe any other private interests he may have had in Air Canada or other companies affected by the Board decisions described in the referrals. I also invited him to provide me with any other relevant information, including his views as to whether the decisions cited in the referrals could have furthered his private interests.

Office of the Conflict of Interest and Ethics Commissioner Referrals from PSIC: The Heinke and Charbonneau Report, made under the Conflict of Interest Act In my letter to Mr. Charbonneau I asked him to describe any private interests he may have had in any companies or unions affected by the decisions. I also invited him to provide me with any other relevant information, including his views as to whether the decisions described in the disclosures could have furthered his private interests.

I asked Mr. Heinke to respond by December 21, 2011. Mr. Heinke requested an extension until February 15, 2012 to prepare his response, to which I agreed. Mr. Heinke sent me his response on January 23, 2012.

I asked Mr. Charbonneau to respond by January 18, 2012. He asked for an extension until February 24, 2012 and I agreed. Mr. Charbonneau sent me his response on February 15, 2012.

Having considered the information before me, I determined that I still had no reason to believe the Act had been contravened and therefore I did not begin an examination.

Prior to publication of this report, Mr. Heinke and Mr. Charbonneau had an opportunity to comment on the factual sections (The Referrals, The Process, Information Gathered and the Schedule: Process for Referrals from the Public Sector Integrity Commissioner) and to make further representations.

INFORMATION GATHERED

The following sets out the allegations made in the disclosures, information about previous challenges to the Board decisions and the information received from Mr. Heinke and Mr. Charbonneau.

Allegations

The first disclosure raised concerns about the participation of Mr. Heinke in a decision taken by the Board on January 31, 2011, but provided no details about the decision.

The individual who made the disclosure told my Office that these concerns related to a decision granting an application by Air Canada and Aveos Fleet Performance Inc. for a bargaining unit restructuring as a result of a sale of Air Canada's maintenance, repair and overhaul business to Aveos in 2007.¹ Detailed reasons for the January 31 Board decision were issued on March 2, 2011.²

The group of 166 disclosures raised concerns related to the participation of Mr. Heinke and Mr. Charbonneau in three matters.

The first matter related to the January 31, 2011 Board decision referred to in the disclosure I received in August 2011.³

The other two related to Board decisions issued in August 2010. My Office sought clarification from one of the individuals who had made the disclosure. The decisions in question involved complaints filed by numerous Union members against the Union for allegedly breaching its duty of fair representation in connection with the Air Canada and Aveos transactions.⁴ The complaints were dismissed by a unanimous board.

Previous Challenges to the Board Decisions

I note that several challenges to the Board decisions were made. The Union filed an application for judicial review of the January 31, 2011 Board decision in the Federal Court of Appeal on March 1, 2011, requesting, in part, that the matters be heard by a differently constituted Board. This application was discontinued on March 9, 2011.

One of the Union members filed applications for reconsideration of one of the August 2010 decisions⁵ on various grounds, including that there appeared to be conflicts of interest or bias on the part of Mr. Heinke and Mr. Charbonneau. The Board issued a unanimous decision dismissing these applications.⁶

² Office of the Conflict of Interest and Ethics Commissioner

¹ CIRB-28234-C

² CIRB LD 2515

³ CIRB-28234-C

⁴ 2010-CIRB-539 and 2010-CIRB-540

⁵ 2010-CIRB-539

⁶ 2011-CIRB-570

The decision was based on a determination that the relevant Board policy had been properly applied. This policy provides that representative members would not be assigned, for a period of two years, to files where they had previous involvement with one of the parties.

Representative members are also not appointed to any files in which they had a direct interest at any time in the past. Mr. Heinke had been with the Board for more than five years and Mr. Charbonneau for more than ten years when the complaints were heard. The applicants had not at that time alleged that either Mr. Heinke or Mr. Charbonneau had any personal relationship with any of the parties or any personal interest in the outcome of the complaints.

Mr. Heinke's Submissions

Mr. Heinke's position is that he did not contravene the Conflict of Interest Act (Act).

He told me that he had worked for close to 35 years at Air Canada and occupied the position of Senior Director, Labour Relations, from 1997 to 2002. In this role he was responsible for the negotiation and administration of collective agreements for some 14 unions representing, at that time, over 38,000 employees.

Mr. Heinke wrote that he had provided labour relations advice to senior and executive management teams and developed and implemented a strategic plan to integrate the unionized workforces of Canadian Airlines and Air Canada during the merger process which took place from 2000 onwards. In March 2002, Mr. Heinke left his position as Senior Director, Labour Relations and shortly thereafter retired from Air Canada.

After his retirement from Air Canada, Mr. Heinke started a labour relations and human resources consulting company. He also held positions with Canadian and international employer associations.

In 2005, Mr. Heinke was appointed as an employer-representative member of the Board. His appointment was renewed in 2008 and he left the Board in 2011. Mr. Heinke told me that, at the time that he participated in the decisions that were the subject of my review, he had not been an employee of Air Canada for over eight years.

Mr. Heinke is in receipt of the executive level retirement compensation package, to which all other retired Air Canada executives are entitled, which includes travel privileges. Mr. Heinke accumulated stock options during his period of employment as part of his overall compensation package, but these were cancelled when Air Canada declared bankruptcy in 2003 and were not replaced.

Mr. Heinke wrote that, since leaving Air Canada in 2002, he has had no other private interests in Air Canada or any other company affected by the Board decisions that are the subject of this report. He said that he does not own shares, stock options or other corporate securities in those companies. He stated that neither his relatives nor his friends benefited from his participation in these cases.

Mr. Heinke said that all complaints referred to the Board are initially investigated by regionally-based industrial relations officers. If mediation at this level is unsuccessful the case is referred to national headquarters, where a panel is assigned to hear, determine or mediate the

matter. The Chairperson of the Board is responsible for assigning cases to panel members. Assignments take into consideration experience, expertise, skill set and linguistic capabilities. The Board policy is not to assign any member to a case involving a former employer for a period of two years from the date of appointment to the Board.

Mr. Heinke said that at no time during the hearing of the applications before him in relation to Air Canada were allegations of bias raised.

Mr. Charbonneau's Submissions

Mr. Charbonneau's position is that he did not contravene the Act.

He told me that he worked for Air Canada from 1977 to 1990. During his time at Air Canada, he held a position with the Union. In 1980, he was elected President of the client services shop committee at Dorval Airport. During that time, his salary continued to be paid by Air Canada and the only payments he received from the Union were for the reimbursement of expenses.

Mr. Charbonneau wrote that, on January 1, 1990 he ceased his involvement with the Union and returned to work for Air Canada. He then left his employment at Air Canada at the beginning of September 1990 in order to become a representative for the Service Employees Union, Local 800. Mr. Charbonneau said that this union had no links with the International Association of Machinists and Aerospace Workers.

Mr. Charbonneau said that he was on unpaid leave from Air Canada for three years, but never returned to work at Air Canada and did not again become a member of the Union. In July 1994, Mr. Charbonneau severed all employment links to Air Canada, including withdrawing all of his Air Canada pension fund money. He said that he received neither severance pay nor any flight privileges upon leaving Air Canada. He said that he does not own shares, stock options or other corporate securities in Air Canada.

On March 28, 1999, he was appointed as an employee-representative member of the Board where he remains as of the date of this report.

Mr. Charbonneau stated that neither he nor his relatives or his friends benefited from his participation in the cases that are the subject of this report.

With respect to his participation in the decisions referred to in the disclosures I received, Mr. Charbonneau said that the Chairperson of the Board assigns three members to each panel that hears and decides upon disputes. The Chairperson takes several factors into account when selecting panel members, including experience and linguistic ability. The Chairperson will also consider any possible conflicts of interest and will assign a file to members who have not had a link to the parties in dispute during the previous two years. Panel members may express a preference for a case but may not influence the Chairperson's decision as to who should be on the panel.

Mr. Charbonneau noted that he believes he had been chosen to sit on the panel as the employee representative for the cases discussed in this report because of his knowledge of the industry and his past experience with the Union and Air Canada.

 Office of the Conflict of Interest and Ethics Commissioner

 Referrals from PSIC: The Heinke and Charbonneau Report, made under the Conflict of Interest Act

ANALYSIS AND CONCLUSIONS

As mentioned earlier in this report, the information contained in the 167 disclosures referred to me by the then interim Public Sector Integrity Commissioner did not give me reason to believe that a contravention of the *Conflict of Interest Act* (Act) had occurred. I considered it appropriate to seek further information from individuals who had made the disclosures and from Mr. Heinke and Mr. Charbonneau.

After reviewing the additional information from the disclosers and from Mr. Heinke and Mr. Charbonneau, I still did not have reason to believe that either Mr. Heinke or Mr. Charbonneau had contravened the Act, and I did not pursue the matter further. As no examination was conducted, this section sets out an analysis of my decision not to pursue the matter.

The allegation was that Mr. Heinke and Mr. Charbonneau should not have participated in the Board decisions because, in light of their previous employment with Air Canada, they were in a conflict of interest. In the case of Mr. Heinke, his retirement travel privileges were also cited. In the case of Mr. Charbonneau, his previous involvement with the Union was also cited.

Mr. Heinke confirmed that he does have travel privileges as a retired Air Canada executive and that he receives an executive pension. He retired from Air Canada eight years before his involvement in the Board decisions. Mr. Heinke told me that he has not held stock options or other private interests in Air Canada since 2003. Mr. Heinke's retirement pension and benefits were a matter of legal entitlement and as such would not have been affected by the Board decisions.

Mr. Charbonneau told me that he severed all employment links to Air Canada in 1994 and cashed out his pension at that time. He did not receive any flight privileges upon leaving Air Canada. He said that he does not own shares, stock options or other corporate securities in Air Canada. He also holds no positions with the Union.

Based on this information, and the absence of any information to the contrary provided to me by the individuals who made the disclosures that were referred to me, I determined that I did not have reason to believe that either Mr. Heinke or Mr. Charbonneau had a private interest that could have been furthered as a result of the decisions in question.

Although section 5 and subsection 6(1) of the Act had been identified by my Office as provisions that may apply, in light of the information I have received I have no reason to believe that either Mr. Heinke or Mr. Charbonneau has contravened the Act and will not pursue the matter further.

ADDITIONAL OBSERVATIONS

At the time of the Board decisions in question, Mr. Heinke and Mr. Charbonneau were reporting public office holders subject to the *Conflict of Interest Act* (Act). Members of administrative tribunals are also subject to the broader rules of natural justice in administrative law. A fundamental rule concerns bias: administrative tribunal members must be free from bias and, where any bias exists, they have a duty to recuse themselves from the matter before them.

Conflict of interest is a type of bias where an administrative decision maker has a private interest relating to the official matter under consideration. The Act would apply in such a case. However, the Act would have no application to other types of bias, such as where a decision maker has made public comments indicating prejudgement of the issue.

Where someone wishes to challenge a decision based on alleged bias in the broader administrative law context and where a private interest under the Act is not at issue, the proper recourse is generally to the tribunal in question, and ultimately to the courts through an application for judicial review. In cases where a private interest is also at issue, my Office will also have jurisdiction to review these matters.

One of the Union members also filed applications with the Board for reconsideration of one of its August 2010 decisions, raising the issues of conflict of interest and bias on the part of Mr. Heinke and Mr. Charbonneau. These applications were dismissed.

I note as well that an application for judicial review was filed by the Union in respect of the January 31, 2011 Board decision, requesting, in part, that the matters be heard by a differently constituted Board panel. That application was withdrawn.

The comprehensive statutory regime of the *Canada Labour Code* provides recourses to the Board and to the Federal Court where the issue of bias of Board members is alleged. In this case, that was the appropriate forum as I have received no information supporting the claim that Mr. Heinke or Mr. Charbonneau had any private interests that could have been affected by the decisions in question.

SCHEDULE - PROCESS FOR REFERRALS FROM THE PUBLIC SECTOR INTEGRITY COMMISSIONER

Subsection 24(2.1) of the *Public Servants Disclosure Protection Act* requires the Public Sector Integrity Commissioner to refer to my Office any disclosures received, the subject-matters of which, in his or her opinion, fall within my mandate. That subsection reads as follows:

24.(2.1) The Commissioner must refuse to deal with a disclosure or to commence an investigation if he or she is of the opinion that the subject-matter of the disclosure or the investigation is within the jurisdiction of the Conflict of Interest and Ethics Commissioner under the Conflict of Interest Act and must refer the matter to the Conflict of Interest and Ethics Commissioner.

Section 68 of the *Conflict of Interest Act* (Act) provides that where a matter is referred to my Office by the Public Sector Integrity Commissioner under subsection 24(2.1) of the *Public Servants Disclosure Protection Act*, I must issue a report setting out the facts in question as well as my analysis and conclusions. Section 68 reads as follows:

68. If a matter is referred to the Commissioner under subsection 24(2.1) of the Public Servants Disclosure Protection Act, the Commissioner shall

- (a) provide the Prime Minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions;
- (b) provide a copy of the report to the public office holder or former public office holder who is the subject of the report;
- (c) provide a copy of the report to the Public Sector Integrity Commissioner; and
- (*d*) make the report available to the public.

Although section 68 of the Act requires a report, I do not interpret section 68 to require a complete examination in respect of every referral. In my view, I must deal with information I receive from the Public Sector Integrity Commissioner in the same way as I would treat any information received from any other Agent of Parliament or from the public about a possible contravention of the Act.

Where, as a result of information provided to my Office from the public or in a referral under the *Public Servants Disclosure Protection Act*, I have reason to believe that a contravention has occurred and I determine that an examination is warranted, I will initiate an examination under section 45 of the Act.

If I do not have reason to believe that a contravention has occurred, I may, where appropriate, seek further information, including from the individual who made the disclosure, the individual who is the subject of the disclosure or anyone else who may have relevant information. On the

basis of any information received, I then reassess whether I have reason to believe that a contravention of the Act has occurred and, if so, whether an examination is warranted.

Section 68 requires that I issue a report whether or not I proceed to an examination.

 Office of the Conflict of Interest and Ethics Commissioner

 Referrals from PSIC: The Heinke and Charbonneau Report, made under the Conflict of Interest Act