IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE SCHOOL DISTRICT OF SNOW LAKE NO. 2309
(hereinafter referred to as the "District")

- and -

THE UNITED STEELWORKERS OF AMERICA, LOCAL UNION NO. 8262
(hereinafter referred to as the "Union")

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AWARD

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WILLIAM D. HAMILTON — ARBITRATOR

APPEARANCES:

ROBERT SIMPSON	COUNSEL FOR THE EMPLOYER
ROB KILBRIDE	REPRESENTATIVE OF THE UNION
JOE TRUBYK	MAST REPRESENTATIVE
MARC JACKSON	GRIEVOR

(I) GENERAL COMMENTS AND IDENTIFICATION OF ISSUES

This Grievance came before me under the provisions of the 1998 - 2001 collective agreement (the "Agreement") (Ex. 1) between the District and the Union. The hearing was held in Snow Lake, Manitoba on September 27, 2001.

At the outset, I advised the parties I had taken the required Oath of Office. Exclusion of witnesses was sought and ordered.

The parties confirmed that I had been properly appointed under the Agreement and had jurisdiction to deal with the matters at issue.

By letter dated December 1, 2000 (Ex. 2), Mr. Marc Jackson (the "Grievor") was issued a written warning by the Superintendent of the District, Mr. Scott Powers ("Powers"), in the following terms:

> "This letter is being issued so that there is no misunderstanding whatsoever on the boards position regarding your insubordination.
>
> As discussed with you at our meeting on this date, your continued criticisms of the competence and actions of the board of trustees in the public media is unacceptable. It is accepted that you have rights as a parent and as a commentator on community events, however the District as your employer has an expectation of faithfulness from you as an employee. This faithfulness includes a demonstration of discretion when speaking about your employer and a loyalty from you as an employee.
>
> As the supervisor/maintenance, you are or ought to be, aware of policies GBC and GBCA, which deal with staff ethics and conflict of interest.
>
> Your actions are a breach of this duty of fidelity and only serve to frustrate the employer/employee relationship.
>
> Even though you have been informally spoken to about this in the past you continued to publicly belittle board decisions. The district has endured these attacks in the past, and will not tolerate these acts of insubordination any longer.
>
> Any further incidents of insubordination will lead to further disciplinary action, up to and including termination of your employment."

On December 20, 2000, the Grievor filed the Grievance (Ex. 3) claiming that he had been unjustly disciplined and, as a remedy, he sought that "…The letter of discipline and any reference to it be removed from my file."

The District's position is that the Grievor breached his duty of loyalty to his employer by publicly criticizing the District in two newspaper articles written by the Grievor. These articles were published in the November 24, 2000 issue of the Flin Flon Reminder and the November 2000 issue of The Underground Press, a local paper in Snow Lake. In broad terms, the impugned articles related to the (potential) amalgamation of school districts. In all of the prevailing circumstances *(to be discussed, infra)*, the District says that the Grievor exceeded the accepted limitations on the right of an employee to publicly criticize his/her employer. The Grievor was not speaking of any *bona fides* working condition or Union issues which were worthy of public comment.

The Union's position is that no employment offence has been disclosed and that the remarks made by the Grievor in the two publications reflected his *bona fides* opinions as a parent and taxpayer and, in

those capacities, he was entitled to express the opinions that he did. Further, the Union maintains that, when interpreted in context, the comments made by the Grievor cannot be properly viewed as a "criticism" of his employer, as this offence has been distilled in arbitral jurisprudence. The Grievor was commenting on a matter of public interest and, in doing so, he neither made use of confidential information which he acquired in his capacity as an employee of the District nor did he breach the two policies upon which the District relied.

(II) THE EVIDENCE

The District called Powers who, since August of 2000, has been the District's Superintendent and the Principal of the only school in the District. Powers reports to an elected Board of Trustees (the "Board") as does the Secretary-Treasurer of the District. He attained a Bachelor of Education at the University of New Brunswick and a Masters of Education from the University of Manitoba in 1993. Since 1987, and prior to joining the District, he primarily worked in administrative positions with First Nations communities in Manitoba.

The Grievor testified on his own behalf. He started with the District in June of 1977 and was promoted to the position of Maintenance Supervisor in September of 1979, a position he has occupied since that time. The Grievor is responsible for looking after the physical plant at the school. He is responsible for maintenance and custodial functions one would typically associate with such a position. The Maintenance Supervisor is an "in-scope" position. The Grievor supervises 2 full-time employees, 1 permanent part-time employee and 2 or 3 casual employees. Over the years, the Grievor has occupied various positions with the Union, including that of Shop Steward, Recording Secretary and President. The Local Union in Snow Lake is now amalgamated as a sub-Local with the larger Local in Flin Flon but he is still the Unit Chairperson of the sub-Local. In addition to the support workers covered by the Agreement, the Snow Lake Local also covers educational assistants working at the school (11 or 12) and some 90 members who work at one of two local mines. The Grievor has a 16 year old son and a 13 year old daughter.

Arising out of the testimony of these two witnesses and the Exhibits filed, there are a number of material facts which are not in dispute. Before turning to the evidence of the two witnesses on more contested matters, these material facts may be summarized as follows:

1. The one School in the District covers Kindergarten to Grade 12 and has a student population of approximately 270. There are 17.5 FTE on the teaching staff and approximately 12 support staff positions. There are 5 Trustees on the Board and they are all elected at large. The Board regularly meets on the first and third Tuesday of each month;

2. The population of Snow Lake is approximately 1,350;

3. In terms of access to media publications, the community of Snow Lake has access to (i) the two Winnipeg newspapers; (ii) the Snow Lake News which is published on a weekly basis, (iii) the Thompson Citizen which is published on a daily basis, (iv) the Opaskew Times which is published on a daily basis out of

The Pas, (v) the Flin Flon Reminder which is published on a daily basis, and (vi) The Underground Press;

4. The Underground Press is an independent monthly publication which has existed in Snow Lake for some years. In September of 1996 the Grievor started to write a column for the then editor of this newspaper. He wrote a column focusing on the activities of the Town Council. When the prior editor left the community, the Grievor became the editor in January of 1997. There is no charge for The Underground Press and it receives no advertising revenue. The Grievor gives his time freely and expenses such as printing or copying are provided by one of the mining companies. Approximately 300 hard copies of The Underground Press are distributed in the community each month. It also has a website which, according to the Grievor, receives some "400 hits a month", although he acknowledged that the same person could access the website on more than one occasion;

5. According to the Grievor, [confirmed by my review of Exs. 7 and 8], The Underground Press publishes articles of local interest to the Snow Lake community. It contains regular features such as A QUESTION OF HEALTH, focusing on personal health issues; Food for Thought, also focusing on health related issues; a feature entitled "Looking Back Through The Eyes of…" which is a biographical sketch of long time residents of the community; and an article entitled "Whatever Happened To…" which focuses on the activities of residents who have left the community. The Underground Press also covers local police, court, lifestyle and sports issues. The Grievor reports on the activities of the Town Council in an article entitled "THE CHAMBERS". He also writes an *EDITORIAL*;

6. Two Policies were adopted by the District on April 25, 1978. They have been in effect since that time. One policy addresses STAFF ETHICS ("GBC") (Ex. 4) and it states as follows:

> "An effective educational program requires the services of men and women of integrity, high ideals, and human understanding. To maintain and promote these essentials, all employees of the Snow Lake School District are expected to maintain high standards in their school relationships. These standards include the following:
>
> The maintenance of their own efficiency and knowledge of the developments in their fields of work.
>
> The transaction of all official business with the properly designated authorities of the school system.
>
> Restraint from using school contacts and privileges to promote partisan politics, sectarian religious views, or

selfish propaganda of any kind.

Directing any criticism of other staff members or of any department of the school system toward the improvement of the school system. Such constructive criticism is to be made directly to the particular school administrator who has the administrative responsibility for improving the situation and then to the Board if necessary.

The proper use and protection of all school properties, equipment, and materials."

7. The second policy "STAFF CONFLICT OF INTEREST" ("GBCA") (Ex. 5) states as follows:

> "No employee of the Snow Lake District shall engage in or have financial interest, directly or indirectly in any activity that conflicts or raises a reasonable question of conflict with his duties and responsibilities.
>
> Employees shall not engage in work of any type where the source of information concerning customer, client, or employer originates from any information obtained through the school system."
>
> The Grievor acknowledged that he knew these two policies existed. They have been in existence for the entire time he has been publishing The Underground Press;

8. When Powers was first appointed as the Superintendent and Principal in the late spring of 2000, the Grievor interviewed Powers by phone and published an article on Powers in the July, 2000 issue of The Underground Press. The headline was "SCHOOL DISTRICT TO GO WITH "SUPER" POWERS". Powers did not know the Grievor personally at that time. This article summarizes Powers' background, education and experience and distils some of Powers' views on his philosophy of education and related matters. Powers said he was not overly concerned with this article, although the title caused him some personal concern (i.e. the reference to "Super"). He acknowledged that he never mentioned this concern to the Grievor;

9. The Grievor regularly writes an article for the Flin Flon Reminder under his own name. The article is entitled "My Take on Snow Lake". The Grievor wrote an article in the November 24, 2000 issue of the Flin Flon Reminder (Ex. 6). After commenting on a number of local Snow Lake issues (not in dispute here), the last four paragraphs of the Grievor's article read as follows:

"With the future amalgamation of some of the smaller school districts in the province becoming a distinct possibility, the School District of Snow Lake will be discussing some of their options during an upcoming conference in Brandon.

The District only has one school, with about 270 K-12 students in it. Any legislation put forward by the Provincial Government that proposes amalgamation will likely include the District in its focus.

The District has stated that they would prefer to leave things as they are, but added they will prepare for all eventualities.

The government has offered a $10,000 grant to any district that amalgamates on their own, within a certain time period, and this will no doubt play a part in any decision the district makes." (my italics);

10. In the November, 2000 issue of The Underground Press, the Grievor wrote an Editorial which is attached as Appendix A to this Award. The portions in Appendix A which I have underlined were the portions which were the subject of comment by Powers in his testimony. The Grievor also wrote his regular article entitled "THE CHAMBERS" in this issue. This column is attached as Appendix B. Again, I have underlined the portion of this article which was the subject of comment by Powers; and

11. It is common knowledge that the Provincial Government has been considering the amalgamation of school districts throughout the Province and that the Province has invited school districts to voluntarily amalgamate.

In his direct examination, Powers said that when he first came to Snow Lake in August of 2000, members of the Board and the Secretary-Treasurer generally apprised him of the District's employees. He was advised that there had been concerns in the past regarding the Grievor. It was noted that an arbitration had just been resolved involving the Grievor. He first met the Grievor in a formal way in August of 2000 and discussed getting the School ready for the coming academic year. Powers told the Grievor that he wished to keep the communication lines open and that the two of them should meet on the Monday prior to any Tuesday Board meeting to discuss any maintenance concerns. Powers said he wanted to avoid a "…hit and miss" approach on these issues. These meetings were held regularly. Powers said his relationship with the Grievor was initially a cordial one and they were essentially "…feeling each other out". However, Powers said that the relationship "…gradually went down hill". He recalled a meeting with the Grievor on September 29, 2000 to discuss some concerns and the two of them got into a long discussion. Powers said that "…I got a feeling that it was a management vs. worker position". He said the Grievor told him that, due to his own past experiences, he (the Grievor) would prefer to have things written down in the future. Powers said that he told the Grievor his own preference

was to have an open dialogue and not engage in a formal process. He preferred the Grievor simply to come to see him and not leave written notes.

As to the past concerns regarding the Grievor, Powers said that he wanted to view all of this as "…water under the bridge" and he preferred to "…start afresh". When asked whether the Grievor was prepared to adopt this approach, Powers said that "…my impression was no". He said the Grievor felt that "…I was totally against workers and the Union or that I was picking on him". As matters progressed throughout the fall of 2000, Powers said that the Grievor had "…at best, a tolerance for my view". Powers said that the Grievor thought of himself as the "…moral authority of the Town" and there was always "…an edge to everything" in his dealings with the Grievor. There was "…sort of a tolerance" on the Grievor's part regarding Powers' authority. Powers said that he told the Grievor he did not have to agree with a particular decision but it must be accepted.

Powers said that the Grievor never refused to meet but he almost always wanted to have another Union member present. Powers disagreed with this because they were not dealing with Union or working issues and this demand to have someone else present created tension. Powers added "…at the end of the day I did not deny it". Powers said the Grievor maintained that it was the right of any employee to have a Union Steward present. By late November and into early December of 2000, Powers said that "…we were obviously on opposite sides of the line regarding procedures". Powers expressed the view that the Grievor felt the Maintenance Department was his own, "…separate from the District". At or about this time, Powers said that the Grievor would comply with his orders or directions but did so reluctantly.

As to amalgamation generally, Powers said that discussions were initiated in the spring of 2000 when the Government invited school divisions to voluntarily amalgamate. By the fall of 2000, the Minister wanted the divisions and/or districts to engage in serious discussions. By November of 2000 the public would generally be aware that such general discussions were going on but, for educational administrators, "…nothing formal had been done". By the mid-fall of 2000, the Board was aware of what the Minister of Education had been requesting but they were waiting for further details. In the late fall, the Board was in a position of having to decide on a plan of action.

Powers said that amalgamation of school districts was a matter of concern to the community at large. It is a sensitive issue. For example, to be potentially included in a school division headquartered some 2 hours away was a concern. Powers said he could see no conceivable advantage to such an amalgamation but "…nobody knew for sure". Powers said the Board did not want to cause any undue concern over this issue and wished to report to the public on a factual basis.

Powers said that some of the comments in the Flin Flon Reminder article (Ex. 6 - p. 8, *supra*) led to the warning. In particular, the last paragraph was of concern to Powers where reference is made to the Government offering "…a $10,000 grant to any district that amalgamates on their own within a certain period and this will no doubt play a part in any decision the district makes". Powers said that this comment was totally incorrect. The Government had offered $10,000 to any district only for the purpose of undertaking a study regarding potential amalgamation but the Grievor's comments implied that the

Board would make a decision to amalgamate based upon the receipt of $10,000. To make a decision on this basis would not, said Powers, be in the best interest of the community and "…this was poor information to put out to the public, at the least". Powers said that the views expressed by the Grievor in this article were an extension of the problems he had encountered with the Grievor in the fall. As Powers put it "…he *(i.e. the Grievor)* was now commenting in public regarding his employer and it was a more public voicing of concerns he always had". Powers said that the Flin Flon Reminder is available to all communities between Snow Lake and Thompson.

The November issue of The Underground Press (Appendix A) was also covered by the warning. Powers characterized certain comments in this Editorial as "…misleading, inaccurate and belittling of the employer". In particular, Powers said that the references to MAST were inappropriate. The comments in the first paragraph of this editorial implied that the District had no autonomy and that it simply followed the directives of MAST. Powers said the District makes its own decisions. A second concern related to the remarks in the second paragraph regarding his own position (i.e. Superintendent) and that of the Secretary - Treasurer. Powers said that "…I felt that this was a major slight on my own abilities and reputation". Powers' third concern related to the reference to the $10,000 grant. The manner in which this portion is written could lead people to believe that the $10,000 figure was an incentive to amalgamate and that such a comment "…puts me in a position to answer questions that should not have to be asked". A fourth concern related to the reference to "…Our autonomy (such as it is)". Powers said this was an "…inappropriate statement for an employee to make".

Powers was asked how these comments correlated with the discussions he had had with the Grievor during the fall of 2000. Powers said that the two of them may not always have agreed but they must listen to each other. Powers felt that the Grievor's approach was that his views were the "…only ones which count". This approach set a tone for how things were done and he felt he was placed in a position of either not dealing with the Grievor because it was not worth the hassle or he could deal with him but it was "…like pulling teeth".

Powers also had concerns with comments in THE CHAMBERS article where reference is made to a letter having being sent by the District to the Town Council (see Appendix B). Powers said that "…I took it as a shot at the school board and me" because the comment implied that the public was being bypassed. These comments were inappropriate. Powers said that when the Board had full, complete and appropriate information it would inform the public and the parents. Powers felt that the suggestion was that the information should be provided to The Underground Press first.

After reviewing the statements in the two articles and, "…in the context of the events of the fall", Powers felt that the comments were "…inappropriate and out of line for an employee to be making". He felt this matter had to be brought to the Grievor's attention in a formal manner. He scheduled a meeting with the Grievor for December 1, 2000. Initially, Powers met alone with the Grievor but the Grievor wanted another Union member present. Powers said he felt this was not needed but did allow the Grievor to have someone else present. The meeting reconvened and the Grievor had someone with him, as did Powers himself. Powers said he reviewed his concerns regarding the two articles with the Grievor. The Grievor's response was twofold. First, the Grievor maintained that under the Constitution he had the right to freedom of expression and secondly, "…what he does on his own time is none of the Board's

business". Powers said he told the Grievor that freedom of speech is not absolute and that an employer has an interest in comments made by an employee. He told the Grievor he must be loyal to his employer. Powers said the Grievor responded with words to the effect that "…he was doing this as an individual outside of working hours". The Grievor told Powers that his own life after 4:00 p.m. was no interest to his employer and, again, asserted that he had the right to freedom of speech. Powers said he discussed an employee's obligation to be faithful and loyal to an employer but the Grievor maintained his 2 basic position and asserted that he could "…do as he pleased".

Powers said that he had Ex. 2 prepared at the time of the meeting because they were the points to be discussed.

In Powers' view, articles were contrary to the first paragraph of the STAFF CONFLICT OF INTEREST policy (Ex. 5 - *supra*) because the Grievor's activities raised a reasonable question of a conflict with the Grievor's duties and responsibilities. Powers also said it would not be appropriate for an employee to use information which he had received in his capacity as an employee. As to the STAFF ETHICS policy (Ex. 4 - *supra*), Powers said that if an employee has a criticism to make of his employer's policies then there is a duty on the employee to follow internal processes initially. Only then ("perhaps") could communications be made to members of the public. Powers felt the Grievor had not follow these internal procedures.

Powers said that his reference in Ex. 2 to the Grievor having been "…informally spoken to about this in the past" referred to discussions he had had with the Grievor in the fall. As to the reference to the District having "…endured these attacks in the past", Powers said that he was advised of at least one situation where the Grievor was spoken to about similar matters. This was prior to Powers coming to the District.

On cross-examination, Powers said that there was no union at his previous First Nations employer. Powers acknowledged that the prior arbitration involving the Grievor was a Union matter and went beyond the Grievor's personal concerns. Powers agreed that the arbitration involved the reduction of the Grievor's hours of work and that the Grievor had his hours restored by the arbitrator. Powers' interpretation of this award was that the breach involved the fact that the Grievor had not been consulted. It related to a procedural error. He said the Grievor's hours have remained the same since the award. Powers agreed that some of the discussions with the Grievor in the fall of 2000 did relate to Union - management matters but some related to normal day to day working issues. He said he told the Grievor he had nothing against unions but advised the Grievor that everything that may arise on a day to day basis was not necessarily a union matter.

Powers acknowledged that one of the issues he and the Grievor discussed related to an increase in a Librarian's hours of work without her having been officially notified. He agreed that the Grievor showed up at a meeting with the Librarian and that he (Powers) expressed the view that the issue was of no concern to the Grievor. He recalled the Grievor saying that he was speaking on the Librarian's behalf. Powers acknowledged that the Librarian did not object to the Grievor's presence or to his capacity as her

spokesperson. Powers agreed that the Union has the right to keep things formal (in writing) but only when it was appropriate to do so. He acknowledged that he and the Grievor disagreed on this issue and that it is only when an action is taken in violation of the Agreement or believed to have been in violation of the Agreement that the Union should be involved. Powers said he could not recall any situation where the Union was not notified of a change in the Board's policies.

Powers agreed that there have been 3 different Superintendents over the last 4 or 5 years. He reiterated that he felt the Grievor had ulterior motives, based on his (i.e. the Grievor's) past experiences. When Powers was asked whether the Grievor ever expressly stated that Power's opinion did not count, Powers said "…the impression left with me was that my opinion did not count because the Grievor would say 'that's your opinion'."

As to the excerpts from the Flin Flon Reminder (p. 8, *supra*), Powers agreed that the first paragraph was correct. He said the second paragraph was not a fair comment because it implied or assumed that the Provincial Government would be including the District in an amalgamation. He said the overall problem is that "…no one clearly understands what is intended by the Government". While many people believe there will be cost savings, this is by no means certain. As Superintendent, Powers said he has no idea why the Government is contemplating amalgamating districts and the Government has only advised that there "…may be cost savings". However, this has never been expressed as a goal of the Government directly to himself. He said a common concern of all administrators is that there is nothing clear-cut in these amalgamation discussions and that if an acceptable reason can be given for not amalgamating then he was under the impression it would not be a forced result. Powers acknowledged that, by the fall of 2000, the responsible Minister wanted districts to enter into serious discussions on amalgamations.

Powers acknowledged that there was nothing in the Flin Flon Reminder which mentioned him either by name or by position. When asked whether it was his opinion that the last paragraph implied that he would sell out the District for a payment of $10,000, Powers said "…that was the feeling, yes". This was his interpretation. He said the use to which this potential $10,000 could be put was reported erroneously. The article implied that he would not report to the Board in an appropriate manner.

As to the comments made in The Underground Press regarding MAST, Powers said that he works for the District. MAST only functions in an advisory capacity. The District can seek advice and assistance from MAST but it still makes its own decisions. MAST has no direct authority over himself or the District. He agreed that monies are paid to MAST. He agreed that MAST is not comprised just of districts from Winnipeg but is comprised of local and regional representatives from all boards of trustees across the Province. Powers did not believe the references to MAST were fair statements and the Grievor's comment - "…the way I see it, autonomy is no longer in the picture" - was unfair. Powers could not think of an example where the Board had gone against a MAST proposal since he has been with the District.

The Editorial referred to the deletion of the Superintendent position itself. Powers said that "…I would like to believe I would be considered in the running for any new position that may emerge". He felt this

the article questioned his own abilities. He again took issue with the "$10,000" comment. Powers agreed that the Superintendent is generally paid more than a Principal but, if one Superintendent position is deleted, it would not necessarily mean a cost saving because a Superintendent for a much larger area may receive an increase in salary.

Powers was directed to the Grievor's comments in the Editorial on the possible deletion of the Grievor's own position of Maintenance Supervisor and was asked whether this brought the District in disrepute. Powers said "…but that's my position". Powers said that the Editorial reflects the view that he did not have the abilities to function in any new position and "…I was concerned what he was saying about me". Powers said it was his view that these statements were derogatory of his own abilities. He acknowledged that a reader of the article would have to infer that Powers' abilities were being brought into disrepute.

Powers then commented on the references to "bulk buying" and potential cost savings in Appendix A. He said there might well be cost savings achieved through bulk buying but there may not be cost savings arising from the recruitment of specialty teachers. Powers felt that the sentence regarding "tax savings" being spread among two communities was inaccurate because it was by no means clear how taxes would be spread or allocated. After these articles were published, Powers agreed that a report has been completed by the District and 2 other districts on the issue of bulk buying. This report is available at the Board's office for anyone who wishes a copy.

Powers believed that the Board's minutes are published in the Snow Lake News. The Board also issues other public notices on an as required basis. Powers said that he has expressed his general views on amalgamation in the Snow Lake community, although there has been nothing specific. He believed that an interview with him was published sometime during the past school year.

Shortly after he arrived at Snow Lake, Powers said he became aware of the fact that the Grievor regularly reported on Board matters. When asked whether he was asserting that the Grievor used any "confidential" information arising out of his employment, Powers said that "…he may have had access to it". He added that people might believe the Grievor had access to such information because he is an employee of the District. He agreed that Grievor never identified himself as an employee in these articles. Powers said he could not point to anything in the two articles which would be confidential information arising from the Grievor's employment. He acknowledged that the problem is one of perception in that it might be perceived that he has inside information as an employee. Powers acknowledged that this was a concern of his when he imposed discipline but he said his primary concern was the inaccurate reporting itself. When asked specifically whether he believed the Grievor was using confidential information, Powers said "…I would say no". Powers acknowledged that no one was referred to by name in either Exs. 6 or 7 but added "…I am the Superintendent and Principal". While acknowledging that the Grievor never identified himself as a District employee, Powers said that many people in the local community know that the Grievor is an employee of the District. He said there was "…a fair chance" people who read the Flin Flon Reminder would also know this, but he has never been told this fact by anyone from Flin Flon or elsewhere.

Powers said that he was approached by a Ms. Forsyth about the articles. Ms. Forsyth runs the Snow Lake News and she brought the article in the Flin Flon Reminder to his attention. Powers said there was no public outcry arising from these articles at the time.

Powers agreed that the November 2000 issue of The Underground Press was the last issue of that paper until recently. He agreed that the Grievor ceased publication at or about the time he was disciplined.

Powers said that he and the Board are open for constructive criticism on the amalgamation question. When asked whether he saw any direct criticism in either article of what the Board had either done or had not done, Powers said that "…they implied that the Board would not act on their own and would take money to make a decision". He said these comments were a direct criticism. He felt the other statements were direct criticisms of the Board.

In his direct examination, the Grievor said he initially approached the prior editor of The Underground Press because he felt a local publication offered a valuable service to the community. This was why he assumed the editorship. The Grievor said he has never received any complaints from the Board in the past regarding any articles he has published or written. There have been no prior complaints from his employer regarding his not being loyal.

The Grievor said he essentially relies on 3 sources of information. He attends the public meetings of the Board and Council. He also has access to the public minutes of these meetings. The third source is based on information from individuals who come to see him and who raise questions or suggestions.

The first time the Grievor was made aware of the fact that there were problems with these articles was when Powers called him to the office on December 1st and handed him Ex. 2. After being allowed to obtain a Steward for this meeting, Powers told the Grievor that he was not happy with some of the things he (the Grievor) had written, and that "…if I continued on I could be disciplined to the point of being let go". The Grievor said Powers told him he had breached the two policies. When asked whether Powers' testimony of what transpired at this December 1st meeting was accurate, the Grievor said "…yes, in the majority".

As to his Editorial in The Underground Press, the Grievor said that there had been a full 2 page insert in the Flin Flon Reminder on the amalgamation of school districts. The source of the insert was the minutes of the Flin Flon School Board. The Grievor said "…the Editorial was basically my opinion because I think issues like this need to come out in a small community". The Grievor said that he never had any intention of belittling the Board. Rather, he simply wanted "…to put the issue out there and state my opinion on it". Aside from Powers, the Grievor said he was not approached by anyone from the Board or from Snow Lake community at large expressing any concerns with these articles.

As to the two Policies, the Grievor said "…I just don't think I breached these policies". The Grievor said that he had not used any information from his place of work and he was only stating his opinion as a parent and tax payer and "…that was it". The Grievor said he did not think that either of these articles had any effect on what he did for the District.

The Grievor testified that whenever he does interviews he will identify himself as being a representative of either or both papers. In the past, he said he has sought cooperation from the Board by sending a letter of making a phone call and "…they have always accommodated". He said he had interviewed the prior Superintendents. All meetings he attends are open to the public. The Board has cooperated with The Underground Press in the past.

On cross-examination, the Grievor reaffirmed that he did not recall ever being disciplined in the past. However, when specifically asked whether he recalled being disciplined for his involvement with a Trustee, the Grievor said "…yes". The Grievor said that there are approximately 900 union members of the Local in Flin Flon. He will go to meeting of that Local but the first one he attended was last month.

The Grievor acknowledged that it would be widely known in the Snow Lake community that he was the Maintenance Supervisor for the only school in the District. The members of the public in and around this local area would be well aware of his employment capacity. He agreed that people reading The Underground Press would know that he is the Maintenance Supervisor.

When asked whether the Secretary-Treasurer of the District spoke to him in December of 1998 regarding his public criticism of his employer, the Grievor said "…he did speak to me, yes". However, the Grievor did not recall any discussion in March of 1999 regarding his criticism of the District in The Underground Press.

The Grievor acknowledged that, as the Maintenance Supervisor, it is important for him to have a good working relationship with the Superintendent. It is also valuable to have a good relationship with the Board. When asked whether anything that adversely affects these relationships could adversely affect his own job, the Grievor said that he did not believe these articles had any such effect. The Grievor did not believe he had a strained relationship with Powers. He acknowledged that Powers did have concerns and so did a Board member. The Grievor did not know if the 2 articles had affected his working relationship with his employer.

The Grievor said that he is now aware of the fact that his comments on the $10,000 payment were incorrect. When asked whether, on reflection, he could understand how a school board with a 2 million dollar budget could be concerned over a remark like this - i.e. that $10,000 could affect such an

important decision - the Grievor said "…that is what I believed at the time and I have since printed a retraction in both papers". He agreed this retraction was published in the last issue of The Underground Press (i.e. the September 2001 issue).

When asked whether the "$10,000 remark" in the Flin Flon Reminder gave the clear suggestion that this amount of money could affect a decision to amalgamate, the Grievor said "…I don't think so but they might consider it that way".

As to his Editorial in The Underground Press (Appendix A), the Grievor acknowledged that he did comment on the issue of autonomy in the first paragraph and that his comments did reflect on the ability of the Board to make decisions on its own. He acknowledged this comment was directed to his own employer. In respect of the MAST reference (i.e. "tow the line"), the Grievor said that, "…from what he has seen, boards do what MAST tells them". He said he was not writing this as a Maintenance Supervisor. He did not agree that this was a criticism of his employer.

The Grievor did not believe that his comments regarding the "Challenge 2000" review of the curriculum and his rhetorical question as to why money was being spent on such a study was a criticism of his employer. As to his comment in THE CHAMBERS article regarding the letter sent by the District to the Town Council and the comment "…I guess that's why they sent it to the Town instead of one of the papers", the Grievor said that this was not "…a shot" but, rather, was "…an aside" and added "…it was a comment I made as a column writer".

(III) POSITIONS OF THE PARTIES

(A) The District

Mr. Simpson submitted that it was well known throughout the community that the Grievor was an employee of the District. He is the Maintenance Supervisor in the only school in the District. He cannot divorce himself from this position. Mr. Simpson stressed that no issue is taken with the right of the Grievor to be the editor of The Underground Press and no suggestion is being made that he should not be involved in the community. The exception is that there are limitations arising out of the Grievor's employment relationship with the District. The Grievor cannot and ought not publicly criticize his employer, be it the Board itself, the Secretary-Treasurer or the Superintendent. As an employee, the Grievor has an obligation not to speak out critically in a public forum. Rather, if he has any pressing concerns, he must pursue them through appropriate internal channels.

Mr. Simpson said that some cases address situations where a person who holds a union office will publicly address collective bargaining matters or working conditions but this perspective does not arise here at all. There is no suggestion that the Grievor was speaking other than as an individual. The articles must be viewed in the context of his relationship with Powers and the Board. There can be no doubt

there was a "…strained relationship", notwithstanding Powers' efforts to put past issues to rest. Powers' evidence of the strain in the relationship which had developed by the late fall of 2000 was not contested.

There is no doubt amalgamation is a controversial issue with parents. In the fall of 2000, these discussions were in their infancy and the Board was proceeding cautiously in terms of its dealings with the public. The two impugned articles must be interpreted in the context that the Grievor, being an employee of the District for over 20 years, would be clearly identified with the District when he speaks of things directly related to his own employer.

As to the article in the Flin Flon Reminder, the Grievor told readers that the District would receive a $10,000 grant if it amalgamated with another district. There is no dispute that this statement was inaccurate. However, said Mr. Simpson, the article goes on to state that payment of this money "…will not doubt play a part in any decision". This can only be characterized as a criticism of the employer. As to the Editorial in The Underground Press, an employee of the District is telling the readers in Snow Lake that "…his employer" cannot make a decision independently, without first checking with MAST. Mr. Simpson said that how could any Trustee be other than insulted by such a remark from a long term employee. And then, there was the inaccurate reference to the $10,000 a second time. The Grievor also implied that the positions of Superintendent and Secretary-Treasurer would be deleted. The Editorial also implies that the Board has wasted money on the Challenge 2000 program. The remark made in THE CHAMBERS article cannot be viewed merely as an "aside".

It was submitted that all of these comments constitute criticisms of the employer through a public medium. While the Grievor said he did not believe these articles have affected his role as Maintenance Supervisor, he nevertheless acknowledged that a good relationship with the Superintendent and the Board is important. These events can only have an adverse effect on his functioning as the Maintenance Supervisor. The articles have certainly had an adverse effect on his working relationship with Powers. While it may not have affected how he performs his physical duties as Maintenance Supervisor, the Grievor nevertheless acknowledged that a co-operative effort was required.

It was important to remember the Grievor acknowledged that he had been spoken to on a prior occasion by the Secretary-Treasurer regarding his critical remarks of the District in The Underground Press.

The Grievor offered no valid defense at the December 1st meeting. He did not recognize that there were any limitations on what he could do or say *vis-à-vis* his employer. There was no indication the Grievor attempted to vent any concerns he may have had internally either with the Superintendent or with the Board itself. Given his position as an employee, the Grievor is not simply an outside observer and it would be a reasonable assumption on the part of a member of the public that he had more knowledge and authority than a member of the public.

Mr. Simpson said that the disciplinary sanction imposed in this case was minimal. All that is required is that an arbitrator reach a reasonable inference or conclusion that the behaviour of the employee had adversely affected the employment relationship. Here, the Grievor almost conceded that there may have been an impairment of the relationship. In all of the circumstances, a disciplinary response on the part of the District was warranted and the nature of the sanction imposed was reasonable and appropriate.

Mr. Simpson referred to the following authorities:

1. Para. 7:3330 of **Brown and Beatty, Canadian Labour Arbitration (3d ed)** where the topic "Duty of Fidelity: Untrustworthiness and Conflict of Interest" is discussed. Particular reference was made to the following passage:

> "Beyond such direct conflicts of interest, arbitrators have held that public servants and indeed all employees violate their duty of loyalty if they engage in public criticism which is detrimental to their employer's legitimate business interest. In determining whether an employee has behaved improperly, arbitrators have considered such factors as the accuracy or truthfulness of the criticism or information, the confidentiality of the information, the manner in which the criticism was made public, the extent to which the employer's reputation and ability to conduct its business was compromised, the interest of the public in the information, etc. Applying these factors, it has been held that employees may be disciplined, and indeed even discharged, for public criticisms of their employer's administration where such attacks involved a concerted effort to provoke the employer and disrupt operations, vitriolic denunciation, or gross misrepresentations of the truth and which were not channeled through internal mechanisms which were designed for such purposes. And where their criticisms compromise their credibility, public servants may be transferred to alternate duties. In the view of several arbitrators these general principles of arbitral law have not been affected by the entrenchment of the Charter of Rights."
> (emphasis added);

2. **Re Serco Facilities Management Inc. and Public Service Alliance of Canada (2000) 91 L.A.C. (4th) 1 (Oakley)** where an employee received a 3 day suspension for breach of his duty of fidelity and loyalty. That employee reported his (safety) concerns regarding the use of new recruits in the place of fully qualified firefighters to a customer. Serco provided fire protection services to the Department of National Defence at Goose Bay. Serco argued that the grievor had the opportunity to bring his "safety" concerns regarding manning levels to his own employer but had failed to do so. The employer was concerned that, as a professional fire fighter, the grievor had put doubt in the mind of the public, or at least in the mind of a customer, regarding the

level of service being provided. The union's position was that there had been no intent by the employee to harm his employer and that he simply raised a safety concern which he had previously brought to the attention of management.

In the letter of discipline, the employer characterized the grievor's behaviour as "…a blatant act of malice to undermine the relationship Serco… has with their customer, DND". The arbitrator did not find any evidence to support the allegation of malice. The arbitrator found that no harm was intended and no actual harm was caused. At pp. 299 and 301:

> "Were the Grievor's actions appropriate? The Grievor did not make inquiries of the Employer to determine the facts related to his allegations. If he had checked the facts, he would have learned that the Employer was complying with the DND contract and the manning requirements were being met. The Grievor was under an obligation to determine the facts prior to making such a statement to the customer, especially given that the serious nature of the statement that could potentially harm the relationship between the Employer and the Customer."

After finding that the grievor directly approached the customer before according the employer a reasonable amount of time to investigate and respond to the compliant, the arbitrator went on to state:

> "…there is both arbitral and judicial precedent that an employee has a duty of loyalty and fidelity to the Employer, that such a duty is an implied term of every employment contract, and that the duty applies to those employees whose employment is subject to a collective agreement. The duty of loyalty and fidelity is described in *CRC - Evans Canada Ltd. v. Pettifer (1997), 26 C.C.E.L. (2d) 294 (Alta Q.B.)* at p. 303, as follows:
>
> > 'It has long been accepted that there is a fundamental term implied in every contract of employment. The employee is expected to serve his employer honestly and faithfully during the term of his employment. This duty of fidelity permeates the entire relationship between employer and employee. It is a flexible concept that is paramount to the basic relationship. There is an implied obligation placed on the employee to act in the best interest of his employer at all time. The employee shall not follow a course of action that harms or places at risk the interests of the employer.'
>
> Arbitrators have discussed an employee's duty of loyalty

and fidelity in relation to an employee's public criticism of the employer. The issue of public criticism is discussed in *Re: Simon Fraser University and A.U.C.E., Local 2 (1985), 18 L.A.C. (3d) 361 (Bird)* at p. 368:

> 'Experience shows that, except in the most unusual circumstances, such as in the case of academics, public criticism of the employer almost inevitably leads to a deterioration of working relationships with bad consequences for the employer, the employee, or both. Only when some higher purpose is served such as to expose crime or serious negligence, to serve the cause of higher leaning, to fairly debate important matters of general public concern related to the employer or those in authority over him, as examples, can the employer be publicly criticized about the employer's conduct without breaching the duty of loyalty. Even then the criticism must be fair in that a deliberate omission or negligent misstatement of significant facts will be treated as a breach of the duty of loyalty and so will the failure to exhaust all reasonable opportunities to resolve the issue internally before making matters public. The employer's legitimate goals must be accorded respect by employees who are required to work towards accomplishing those goals'."

In Serco, the arbitrator noted the fact that the employee's comments were made to a customer was still to be characterized as a public comment "…in the sense that it was made to a person who is outside of the Employer". After finding that Serco had just cause to impose some discipline, the arbitrator reduced the 3 day suspension to 1 day because Serco had imposed the penalty based upon an incorrect finding of malicious intent and placed undue influence on deterrence; and

3. **Re Wainwright School Division No. 32 and Canadian Union of Public Employees, Local 1606 (1984) 15 L.A.C. (3d) 344 (Laux)** where a school secretary of 12 years service, with no disciplinary record, was given a written reprimand for certain comments she made about the school board in a letter written by her and distributed to the local home and school association. The details of this letter are set forth at pp. 346 and 347 of this decision. The letter took the association and its (parental) membership to task for its failure, as perceived by the secretary, to take a positive and appropriate posture in respect of the matters of concern relating to the affairs of the school. There certainly appeared to be considerable concern regarding the manner in which a particular school was being operated. The comment which disturbed the employer read:

> "…It is time to insist that the Board of the Wainwright School Division came clean, explain why they are making the cut, and give real, believable reasons, not a blizzard of double-talk as has been done in the past."

The school board found this remark to be insubordinate and defamatory because it implied wrongdoing on the part of the school board. The grievor maintained that she wrote what she did in her capacity as a parent and as a member of the home and school association. She was concerned with the impact on her child's education. The arbitration board found that that grievor did write the letter as a concerned parent and not in her capacity as employee. The board also found that, while the words were somewhat intemperate, they did not trespass the standard of fair comment that the law affords to a citizen speaking publicly about elected officials relative to the latter's performance and public office. The board then comments at p. 348:

> "However, the Grievor was, at the same time as being a concerned parent and taxpayer are also an employee of the very entity which she was publicly criticizing, the school board. Clearly, some of the rights and freedoms that a person may otherwise express with impunity, may well be lost to him or her by virtue of an employment relationship."

The arbitration board referred to the seminal case of **Re: Fraser and Public Service Staff Relations Board (1982) 142 D.L.R. (3d) 708**, a decision of the Federal Court of Appeal (the "*Fraser*" case). I will discuss this case in more detail later. After quoting from *Fraser,* the Wainwright board then states at p. 349:

> "In that case the court was of the view that the correct question for the arbitrator to ask himself was whether the conduct of the employee was such as to be "incompatible with the employment relationship" and "detracted from" or "impaired his usefulness to his employer"."

At p. 350:

> "It is important to note that, when an arbitrator is called upon to adjudicate a case of this type, it is not necessary that there be direct evidence that the conduct of the employee in fact impaired the employment relationship, but, rather, that there be evidence of a behaviour which the adjudicator could reasonably conclude would impair the relationship. In the words of Pratte J. in *Fraser* at p. 715…:
>
> > 'For an adjudicator to conclude that a civil servant has been guilty of misconduct because he acted so as to impair his usefulness as a civil servant, it is not necessary that there be evidence of that

> impairment before the adjudicator; it is sufficient that there be evidence of a behaviour which, in the adjudicator's opinion, is such as to impair the usefulness of the civil servant'."
>
> The board noted that each case is to be resolved on its own merits, taking into account all of the surrounding circumstances. The arbitration board found that the disciplinary response of a written reprimand for this one-time indiscretion constituted "...an overreaction with a long term effect on the employment record of the grievor". The board found that the correct approach would have been to issue an oral caution to the employee to refrain from further public utterances using objectionable language. After reciting the factors which led to this conclusion at pp. 351 to 352 (to be discussed, *infra*), it was ordered that the letter be removed from her file.
>
> Mr. Simpson primarily relied on this case for the principle that a finding of actual impairment of the employment relationship was not a precondition to a disciplinary response.

(b) <u>The Union</u>

In response to the District's submission, Mr. Kilbride said there was no evidence that the employment relationship here had been impaired. He noted the reference to two cases at pp. 349 and 350 of the Wainwright case where there was a clear finding of impairment of these relationships. Mr. Kilbride also noted that I should have regard to the facts in the *Fraser* case. In the Grievor's circumstances, I cannot conclude that there had been an adverse impact on the employment relationship.

It was submitted that Powers' evidence disclosed that there were difficulties over Union - management issues. There was nothing wrong with the Grievor's desire to reduce matters to writing and nothing adverse can be drawn from this evidence. As to the requirement to exhaust internal procedures first, I must carefully examine the factual circumstances in the cases where this precondition is enunciated. There was no real internal mechanism which could be used in the circumstances before me. There was certainly no basis upon which the Grievor could file a grievance under the Grievance Procedure. The Grievor was not addressing his or anyone else's "working conditions" under the Agreement.

In his main submission, Mr. Kilbride referred to the same passage from Brown and Beatty, *supra*, and noted some of the criteria enumerated therein. First, a public criticism must be "detrimental" to an employer's legitimate business interest. It was submitted that this criterion had not been met. While one part of the Editorial (Appendix A) was erroneous, this information had been taken from the Flin Flon School Board's own minutes. The rest of the impugned article is simply the Grievor's own opinion. There was no use made of any "confidential information". Brown and Beatty also speak of "compromising" the employer's reputation and ability. Here, said Mr. Kilbride, the Board is comprised of elected officials and there is no evidence that their functions have been compromised. In fact, Powers said that the existence of the Flin Flon article had been mentioned to him by a local editor but no one else. Mr. Kilbride submitted that the public had "…an interest" in the information. The Grievor made his views known, as he was entitled to do. He even referred to the potential deletion of his own position.

Mr. Kilbride also referred to the Wainwright case. He asked me to compare the nature of the criticism made by that employee to the statements made by the Grievor here. He submitted the comments in Wainwright were, on their face, more detrimental but the arbitrator nevertheless found them to be "minor" transgressions. Nothing the Grievor did here, argued Mr. Kilbride, was "…incompatible" with his employment, a test enunciated in *Fraser*.

The Grievor had been reporting on Town Council and Board activities for 5 or 6 years in The Underground Press. Doing so was not incompatible with his duties during these years. Given the Grievor's actual position, it could not be argued that he has "…impaired his usefulness" to the District.

I was asked to compare the nature of the Grievor's employment to that of the employee in *Fraser. In this regard, I pause to note that the employee in Fraser was a relatively high ranking civil servant who took issue with the Government of Canada's metric conversion policy. He wrote a number of letters to newspapers criticizing the policy on metric conversion. The grievor received a 3 day suspension for these public statements against Government policy, coupled with a direction to refrain from making such public statements criticizing a Government department or an agency. After this initial suspension was grieved, the employee continued to challenge the Government. He aired his grievance in public, criticizing the manner in which the Prime Minister and his Government were governing the country and that they could not curtail his right to freedom of speech. These remarks received wide publicity and he also cultivated further media attention by granting interviews and appearing on open line radio shows. For this, the grievor received a 10 day suspension, again directing him from refraining from making these public statements. Nevertheless, that grievor continued his public pronouncements following which he was dismissed. The first grievance was allowed. The arbitrator found that sending a letter to an editor of a newspaper criticizing the metric conversion policy and participating in a public demonstration against that policy did not impair his usefulness or effectiveness as a civil servant (i.e. that grievor worked in a different department). However, the grievor's subsequent conduct was found to exceed the bounds of proprietary and there were valid grounds for the second suspension and ultimate discharge. It was found that the grievor had "…in effect impaired his usefulness and effectiveness as a civil servant". The Federal Court of Appeal upheld the arbitrator's decision(s).*

Mr. Kilbride said it appears that the assumption is being made the employment relationship will be adversely impacted because Powers himself feels slighted. This is an overreaction and overstatement. The relationship will be impaired if Powers continued to maintain his own attitude.

Mr. Kilbride referred to the factors which were critical in the Wainwright case, *supra*, and said many of these factors are applicable here. In particular:

? The Wainwright board found that the letter was written by that grievor as a concerned parent and was not intended to protect or further her interest as an employee in any way. Here, it was submitted that the Grievor was not only a concerned parent but was also an editor and reporter of a local newspaper and he was not furthering his own interest as an employee;

- The Wainwright board noted that the comments were directed to elected officials as a collective entity and such officials must be "…considerably less sensitive to criticism than private persons or entities". It was submitted that this factor was "on the mark" in the Grievor's case;

- The Wainwright board found that that grievor "…acted honestly and in good faith" when making the comments she did. The same is true of the Grievor here and there should be an open discussion on the amalgamation issue;

- The Wainwright board noted there was no evidence that the grievor had engaged in adverse comments about the board on other occasions or in any other forum. In other words, it was a one time incident with no persistent course of conduct, as in *Fraser*. Here, the Grievor has been commenting on the Board and Town Council for 5 years with no adverse consequences;

- The grievor in Wainwright had no prior disciplinary record over 12 years. The Grievor has been employed for approximately 25 years and was no disciplinary record; and

- The Wainwright board found the school board's reaction of accusing the grievor of being untruthful and deceitful to be an overstatement. It was submitted that the reaction here was also one of overstatement.

Reference was also made to Re: Simon Fraser University and Association of University and College Employees, Local 2 (1985) 18 L.A.C. (3d) 361 (Bird) which held that imposing discipline on an employee for publicly criticizing his/her employer did not violate *The Charter*. The accepted arbitral principles reflected limitations that were demonstrably justified. However, Mr. Kilbride relied on the quotation from Simon Fraser that an exception to the duty of loyalty was where a "higher purpose" is served such as "…fairly debating important matters of general public concern…".

It was submitted that the Grievor's articles reflected a rational debate on amalgamation. It was important to bear in mind the following factual context:

1. The Underground Press is not a publication related solely to Board or Town Council issues. Rather, it covers a broad range of topics of general interest;

2. The Grievor's sources were published minutes, his attendances at public meetings and interviews which he conducted after revealing his identity;

3. No article identifies the Grievor as a District employee;

4. No claim is made in these articles that the Grievor possess superior knowledge because of his position as an employee; and

5. The Grievor provides a valuable service to this small community.

Mr. Kilbride submitted that the well known KVP tests are relevant to the two policies upon which the District relies. The policies do not meet relevant KVP criteria. As to the Staff Ethics policy, there is no evidence the first 4 paragraphs were violated and the Grievor's remarks did not constitute "criticism" within the meaning of the 4th paragraph. Further, the Conflict of Interest policy was not violated by the Grievor. In any event, these policies are neither reasonable nor clear and unequivocal under the KVP criteria.

Mr. Kilbride also replied on the following authorities:

1. **Re: Metropolitan Separate School Board and Ontario English Catholic Teachers' Association (1994) 41 L.A.C. (4th) 353 (Charney)**, particularly the remarks at p. 386 regarding KVP. *Aside from this reference, my review of this case reveals that it is not at all similar to the issue before me because it related to grievances concerning a job assignment and job posting;* and

2. **Re: Boeing Canada Technology Ltd. and Canadian Auto Workers, Local 2169 (1997) 62 L.A.C. (4th) 395 (Hamilton),** particularly my own reference to the KVP criteria at p. 417. *As I noted during the hearing, this particular case is not on all fours with the situation before me here. The primary basis for that decision was my finding that the grievor in Boeing was singled out because no discipline of the nature imposed on him had been imposed on employees for similar and even more serious conduct in the past*.

Mr. Kilbride urged that one cannot focus on the fact that the Grievor only received a written warning. This is a form of discipline. The District was trying to "muzzle" the Grievor from reporting on matters of public concern. To uphold the discipline would be to enter a "slippery slope". It was submitted that I ought to order the written warning be removed from the Grievor's file. In the alternative, Mr. Kilbride submitted that, at most, I could adopt the view of the Wainwright board and find that the Grievor only ought to have received an oral caution.

(c) <u>Reply of District</u>

The strain in the relationship between the Grievor and Powers did not relate to Union affairs *per se* but, rather, the strain was caused by the Grievor's attempt to formalize and bring the Union into everything that was discussed.

Amalgamation was a sensitive issue and was potentially disruptive in the community. The Board was proceeding on a cautious basis. It was not in the Board's interests to have any position on amalgamation be distributed by its Maintenance Supervisor. This had to undermine the authority of the employer. Disseminating such information was the role of the Board.

Finally, there was no intention to "muzzle" the Grievor. The District's intent was to have the Grievor recognize that there are limitations on what he can do and say, given his employment with the District. The Grievor did not recognize these limitations. Beyond the articles themselves, the responses of the Grievor at the December 1st meeting corroborated the District's legitimate concerns.

(IV) DECISION

An Overview of Governing Legal Principles

The passage quoted at p. 25, *supra*, from Brown and Beatty distils the salient principles in general terms. Succinctly put, an employee owes a duty of loyalty to his/her employer and cannot publicly criticize the employer in such a manner so as to adversely affect the employer's legitimate interests or compromise the employer's or the employee's ability to function. The duty of loyalty and fidelity is an implied term of any contract of employment and it equally applies to employees covered by a collective bargaining relationship (see Serco at pp. 26 and 27, *supra*). The parties differ on the application of these principles to the facts of this case.

Fraser is the leading case on the duty of loyalty owed by public servants. The decision of the Federal Court of Appeal (see p. 29, *supra*) was appealed to the Supreme Court of Canada. That unanimous decision of the Supreme Court, as written by Dixon, C.J., is reported at (1985) 2 S.C.R. 455. He affirmed that a balance has to be struck between the duty of loyalty and freedom of expression. At p. 457, Dixon, C.J. noted that the central issue in *Fraser* was to determine "…the proper legal balance between (i) the right of an individual, as a member of the Canadian democratic community, 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". A review of the major principles established by *Fraser* is in order here.

That the question before me is ultimately a question of fact was confirmed by the Federal Court of Appeal in *Fraser*. At p. 710 of the reported decision of that Court, *supra*, Thurlow, C.J.C. states:

> "Whether conduct in respect of which an employee is disciplined destroys or detracts from the employee's usefulness to the employer is not a question of law. Nor is the question whether

> disciplinary action awarded by the employer is appropriate a question of law. Both are questions of fact…".
>
> At p. 714, Mr. Justice Pratt states:
>
> "The applicant's counsel challenged that decision on many grounds. First, he argued that the adjudicator had been wrong in rejecting his submission that a civil servant is entirely free to criticize the government and its policies, provided that those criticisms are not related to his work, his department or his superiors in the department. I see no merit in that argument. In my opinion, the adjudicator quite correctly assumed, first, that a civil servant was guilty of misconduct if he acted in a manner which impaired or was likely to impair his usefulness or effectiveness as a civil servant and, second, that a civil servant could impair his usefulness as a civil servant by criticizing government policies which were not related to his department. I add that whether or not, in a given case, the behaviour of the civil servant is such as to constitute misconduct and justify the employee's suspension or dismissal is, in my view, a question of fact that should be left to the adjudicators."
> (my emphasis)

Similar remarks were made by Ryan, J. in his concurring judgment.

The Supreme Court upheld the decision of the Federal Court of Appeal and found that the adjudicator had acted within his jurisdiction and had applied the proper principles of law. The Supreme Court addressed two fundamental questions, the first being the employee's contention that criticism of government policies, unrelated to the work of the employee's own department, could not form the basis for any disciplinary action. The second question was the assertion that the adjudicator had erred in finding that the employee's effectiveness as a public servant was impaired by his public statements when there was no direct evidence to that effect.

On the first question, Dixon C.J. accepted the adjudicator's implicit assumption that "…the degree of restraint which must be exercised is relative to the position and visibility of the civil servant." At p. 466 he stated:

> "…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 commissioner 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.
>
> On the other side, however, it is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one thus, for example, we have laws dealing with libel and slander, sedition and blasphemy. We also have laws imposing restrictions on the press in the interest of, for example, ensuring a fair trial or protecting the privacy of minors or victims of sexual assaults.
>
> A similar type of balancing is required in the present appeal. Public servants have some freedom to criticize the government. But it is not an absolute freedom. To take but one example, where 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 polices at the same rally"

Chief Justice Dixon noted that a public servant's position or job has two perspectives, "…one relating to the employee's tasks and how he or she performs them, the other relating to the perception of a job held by the public" (p. 468).

Dixon, C.J. also addressed the characteristics of "loyalty". After noting that (federal) public servants must be loyal to their employer, he said:

> "…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 may not engage, as the appellant did in the present case, in a sustained and highly visible attacks on major government polices. 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."

On the second question, Dixon C.J. stated that, in terms of impairment to perform a specific job, "…I think the general rule should be that direct evidence of impairment is required" (p. 472). He went on to note that this rule is not absolute and where "…the nature of the public servant's occupation is both important and sensitive and when, as here, the substance, form and context of the public servant's criticism is extreme, then an inference of impairment can be drawn" (p. 472). He found that the adjudicator's inference that Fraser's conduct could or would give rise to public concern, unease or distress of his ability to perform his employment duties was not an unreasonable inference to draw on the facts prevailing in that case. Dixon, C.J. went on to state that direct evidence of impairment, from a wider perspective, is not necessarily required. This, too, may be the subject of a reasonable inference by adjudicators. The Supreme Court upheld the adjudicator's findings on all questions.

Mr. Kilbride submitted I must have regard to the facts in the Fraser case. I distilled the essence of the factual background in *Fraser* at pp. 32 and 33, *supra*. Again, I note that the arbitrator determined that the initial criticism made by Fraser of government policies was not properly the subject of any disciplinary sanction and this ruling was upheld by both the Federal and Supreme Courts. This decision is reported as Re Fraser and Treasury Board (Department of National Revenue) (1985) 5 L.A.C. (3d) 193 (Kates). At p. 223, Deputy Chairman Kates found that the initial 3 day suspension for Fraser's attendance at a public gathering where he publicly criticized the Government's metric conversion policy was improper discipline. He found that if such activity did not prejudice either the functions performed by the department in which Fraser was employed or the duties being performed by him then no cause for employer concern about the effectiveness of the public service was warranted. The dismissal of Fraser was upheld due to his subsequent behaviour in newspapers and on open line radio and television shows. Dixon C.J. characterized this behaviour as "vitriolic and vituperative" and it was this behaviour that led to the ultimate result because the grievor went public not only with continued criticisms of government polices, casting dispersions on the character and integrity of individuals, but also in respect of his own grievance on the initial 3 day suspension.

Another case worthy of note is Stewart v. Public Service Staff Relations Board (1978) 1 F.C.R. 133, a decision of the Federal Court of Appeal. At p. 135, Jackett C.J. (as he then was) states:

> "Having regard to counsel's emphasis on the need for proof of actual impairment or detriment, I may say that, in my view, where there is a group of employees working as a unit, there must *prima facie* be direction, which involves a directing mind to which the members of the unit must, as far as their work is concerned, submit, for, otherwise, there can be no coherent effort by the group but only chaos. It follows, that, where an important member of such a unit challenges the legally established leader of the unit, prima facie it will impair the working of the unit; and evidence of such a challenge gives rise to a factual presumption of misconduct."

I pause to reiterate that the existence of the *Charter* does not, in and of itself, affect the duty is of loyalty and fidelity voluntarily undertaken by virtue of a person entering into a contract of employment. See Metropolitan Separate School Board case, *supra* and Haydon v. Canada [2001] 2 F.C. 82 (Fed CT. Trial Division) where, after a lengthy analysis, Tremblay-Lamer, J. concludes at p. 110 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". This is not to say that the *Charter* is totally irrelevant and, depending on the circumstances, the values expressed in the *Charter* may be a relevant template to be used.

A recent case of interest is Re Treasury Board (Health Canada) and Chopra (2001) 96 L.A.C. (4th) 367, a decision of the Public Service Staff Relations Board (the "PSSRB"). Dr. Chopra, who was Drug Evaluator in the Bureau of Veterinary Drugs, Health Protection Branch of Health Canada received a 5 day suspension for remarks he made in a speech that he gave as a member of a panel at the Heritage Canada Employment Equity Annual Meeting. In his address at this public conference, Dr. Chopra said words to the effect:

> "…you heard from our Human Resources Director General yesterday, Bob Jaubert. Every word, everything I can tell you now, I wasn't there, would be a lie because there is nothing happening in HC and we are at NCARR are considering filing a charge of contempt of court against all three departments, that is Treasury Board, Public Service Commission and Health Canada."

Dr. Chopra, when he was the past president of the National Alliance on Race Relations ("NARR"), had filed a complaint with the Canadian Human Rights Commission ("CHRC") alleging discrimination by Health and Welfare Canada (now Health Canada) against persons who are visible minorities employed in his own department. In 1997, the CHRC ordered Health Canada to implement a special corrective measures program in matters relating to the employment of minorities and race relations generally. In a lengthy decision, the PSSRB found the employer had not established that Dr. Chopra had engaged in any misconduct. The meeting at which Dr. Chopra spoke was mainly attended by public servants. He was not disciplined for having been present at the meeting nor for having spoken thereat but, rather, was disciplined for the substance of his comments. It was critical to the PSSRB that the grievor had been invited to participate on the panel with a view to sharing his personal conclusions on the subject of racism and "…presumably not simply to rubberstamp the government's efforts in these matters". The PSSRB came to the conclusion that the grievor only expressed a personal opinion and, given the purpose of his presence on the panel, he was entitled to do so, even if it was not shared by Health Canada. The PSSRB found that he was entitled to hold his opinions "…even if to some people he was wrong…". At p. 387:

> "Dr. Chopra's comments did not affect his ability to perform his duties

> as a drug evaluator and he has not violated his duty of loyalty. The *Fraser* decision, *supra*, recognizes that there are exceptions to the duty of loyalty. It enumerates those exceptions, although not exhaustively. I am of the view that Dr. Chopra's comments constitute an exception to the duty of loyalty and that he was speaking on an "important public issue" (*Haydon, supra*). In my view, racism and employment equity are issues which transcend an individual's station in life and constitute "issues of public interest."

The PSSRB found it strange that the public servant had the right to complain of racism and discrimination before human rights tribunals but allegedly breached his duty when he complained of discrimination at a conference to which he was expressly invited to speak.

The *Haydon* case is also worthy of comment. Two drug evaluators (including the same Dr. Chopra) employed in the Human Safety Division of the Bureau of the Veterinary Drugs of Health Canada received letters of reprimand/instruction for allegedly breaching their duty of loyalty following certain public comments they made during an appearance on a national television program (Canada A.M.) regarding the drug review process within Health Canada. The employees were also directed not to speak to the media without the consent of management. The remarks which these employees made are quoted at pp. 91 to 93 of *Haydon*. To say that their remarks were critical of the Department is an understatement. Two or three examples will suffice:

> "And our department is not listening to us. Department people, managers at the top do not have any science, or if they do, any science that's not relevant to the issue, and then because they're managers they bring pressure on us and they're doing all kinds of tricks to subvert our scientific knowledge and contribution" (Chopra).

Haydon alleged that her authority as a scientist was being completely undermined by the Department. Chopra said drug evaluators were "…being pressured to approve drugs of questionable safety and the department is not willing to look into the matter". The Associate Deputy Minister (the "ADM") denied the employees' grievances contesting the reprimands. I pause to note that the employees had endeavoured on several occasions to have their concerns addressed internally without success.

The Court set aside the ADM's decision and referred the matter back to him with the direction that he consider the grievances in accordance with the reasons of the Court. The Court rejected the employer's contention that the employees had made vague, unspecific and unchallengeable attacks on management, based on the evidence that the issues had already been pursued internally on a number of fronts (see pp. 113 to 115). At p. 117, the Court states:

"[112] This demonstrates that the ADM did not consider the possibility that the applicants' statements amount to a public concern issue. By focusing primarily on the applicants' duty of loyalty to his employer, the ADM failed to examine the applicants' right to freedom of expression on an issue of public interest where internal redress was unsuccessful. As a general rule, I believe that public criticism will be justified where a reasonable attempt to resolve the matter internally would have been unsuccessful.

[113] The applicants' statements essentially pertained to their concerns regarding the drug evaluation process within the BVD and its potential threat to public health. The mandate of the Health Protection Branch is the protection of the health and safety of Canadians in accordance with the provision of the *Food and Drugs Act*. Therefore, as drug evaluators, the applicants are responsible for conducting objective, scientific evaluations of new veterinary drug submissions to ensure that new drugs comply with the human safety requirements set out in legislation.

[114] There is no evidence demonstrating the negative impact their statements have had on their ability to perform their duties as drug evaluators. In fact, the applicants were not dismissed from their positions. It is also clear that in making public criticism of the drug approval process, the applicants had no personal interest at stake. Their public statements were an effort to correct the problems related to the drug review process. Furthermore, notwithstanding the pre-existing poor working climate which appears to have plagued the BVD for several years, there is also no evidence with respect to whether the applicants' statements created disruption among co-workers or damaged the reputation of the BVD.

[115] Finally, I am of the opinion that the ADM erred in finding that the directive contained in the reprimand letter to "refrain from further unauthorized speaking to the media", does not amount to an absolute prohibition on the applicants' freedom of expression.

[116] The directive to refrain from unauthorized contact with the media imposes an absolute ban on speaking to media if denied authorization by management. In upholding this directive, I believe that this reflects the notion that the ADM does not accept that there are exceptions to the duty of loyalty as established in *Fraser*. In this regard, I find it relevant to cite an excerpt of B.C. labour arbitration decision wherein two senior corrections officers employed by the Corrections Branch within the Government of British Columbia were dismissed after making critical comments about the operations of the Corrections Branch during several appearances on television:…". (my emphasis)

Justice Tremblay-Laner ended his judgment with a succinct and useful summary (p. 119), as follows:

"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.

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.

The possibility of engaging in a balancing of 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 ensures that proportionality is secured. In cases that fall within the *Fraser* qualifications, the public interest outweighs the objective of an impartial and effective public service.

The applicants essentially made statements regarding the drug approval process within the Bureau of Veterinary Drugs. But, more particularly, the applicants discussed their health and safety concerns with respect to the approval of growth hormones and antibiotics, maintained that they were being pressured to approve drugs of questionable safety, and that Health Canada was unwilling to address those concerns. The public statements made by the applicants expose their frustration, however, they disclose a legitimate public concern with respect to the efficacy of the drug approval process within the Bureau of Veterinary Drugs.

More importantly, public criticism aired on national television was not the first step taken in order to have the issue of the safety and efficacy of the drug approval process addressed. The applicants endeavored on several occasions to have their concerns addressed internally without success. As a general rule, public criticism will be justified where reasonable attempts to resolve the matter internally are unsuccessful.

This was largely discounted by the Associate Deputy Minister in his examination of the reasonableness of the Department's action in issuing the reprimand/instruction letter.

The Associate Deputy Minister of the Ministry of National Health and

> Welfare disregarded the context that led to the comments made publicly on national television and failed to proceed with a fair and complete assessment of the competing interests. The Associate Deputy Minister therefore committed an error in the application of the *Fraser* test."

While I recognize that the factual situation in the Grievor's case is distinguishable from the factual circumstances which were evident in *Fraser*, *Chopra* and *Haydon*, those decisions point to the considerations which are relevant in assessing cases of this nature.

The law protects statements made by a person acting in an official Union capacity where he/she is asserting rights or criticizing working conditions arising out of the collective bargaining relationship itself. In the absence of malice, union officials have a wider scope to speak out on matters of safety and similar issues without fear of reprisal. I addressed the principles regarding the (qualified) "immunity" for union officers or representatives in their dealings with management in EH Price Limited and Sheet Metal Workers' International Association, Local Union No. 511 (unreported, May 2, 1994), particularly at pp. 24 to 27. But, the protections afforded to union officials are not absolute either and they do not extend to statements that are malicious in the sense that they are knowingly or recklessly false. I agree with Mr. Simpson that no such "qualified" protection applies here because the Grievor was not acting in an official union capacity. He wrote the articles in his private capacity as a reporter and/or editor.

Assessment of the Facts

Against the backdrop of these legal principles, I turn to the facts of this case. I make the following findings:

1 The Grievor was/is entitled to write a column for the Flin Flon Reminder, reporting on affairs of local interest in Snow Lake, and was/is entitled to be the Editor of The Underground Press. The District takes no issue with the Grievor's right to engage in these activities. Standing alone, the assumption of these roles/capacities are not inimical to the Grievor's role as the Maintenance Supervisor;

2 As a reporter and/or editor, the Grievor was/is entitled to express his own views or opinions on matters of public interest and he was/is entitled to criticize policies of his employer, provided he does not cross the recognized boundaries evident in the authorities to which I have referred. For example, it would be an abuse of the Grievor's role as a reporter and/or editor to pursue complaints which he has with the District in his capacity as Maintenance Supervisor or complaints which he may, in his Union capacity, be pursing through the grievance

procedure on behalf of the Union or (an) employee(s) of the bargaining unit. In these situations, the Staff Ethics Policy would be applicable and proper internal channels must be (first) exhausted (see *Haydon*, *supra*). A noted exception is the law regarding "whistleblowers" but this is a discrete topic and simply does not apply in this case;

3 In his capacity as a taxpayer and parent, the Grievor was/is entitled to hold opinions and views on "amalgamation". This is a matter of public concern and, as such, falls within the *Fraser* and *Haydon* exceptions. Without bringing the District or one of its officers into disrepute, the Grievor is not only entitled to hold views on this issue but he is also entitled to express them publicly, either at an appropriate public meeting of the Town Council or the Board or to express his views in the media. In the latter case, he, like any person, could do so in a letter to the editor. The fact he has assumed the more direct roles of editor and reporter here is not a factor which casts greater limitations on his right to express views;

4 The right of the Grievor to hold and express such views stands to be tested against the position he occupies and it visibility (see *Fraser*, *supra*). He is the Maintenance Supervisor. The Grievor conceded that members of the Snow Lake community would know that he is an employee of the District and I reasonably conclude that the vast majority of people in this small community would also know that he is the Maintenance Supervisor. *However*, I find that members of the public would not conclude that the Maintenance Supervisor would have access to confidential information available only to the Board or would otherwise be privy to information unavailable to the public;

5 I cannot conclude that the views which the Grievor expressed in the articles adversely affected his ability to perform the job of Maintenance Supervisor. Adopting the Supreme Court's perspective from *Fraser* (see p. 41, *supra*), there was no direct evidence that the Grievor was impaired in his ability to do the job of Maintenance Supervisor. That there may be "tensions" between he and Powers or that the Board may have concerns with the Grievor regarding the manner in which he prefers to deal with management in the workplace are distinct issues, separate and apart from the publication of the 2 articles. I believe my primary perspective must be an objective review of the articles themselves;

6 I accept that the Grievor neither had access to nor did he use any confidential information arising out of his

employment. Powers acknowledged this fact (p. 17, *supra*). Given the nature of the Grievor's position, I do not share Powers' view that a reasonable member of the public might perceive that he had inside information as an employee of the District when he put pen to paper and wrote the articles in question;

7 I am satisfied that the Grievor did not write the articles maliciously or with any intent to belittle either the Board or Powers. When the articles are read in their entirety, such a finding cannot reasonably be reached or inferred. The Editorial is only one portion of The Underground Press which focuses on a wide-ranging number of topics of interest to the local community;

8 I accept the Grievor's evidence that he has reported on the affairs of the Town Council and the Board for a number of years and, aside from the one occasion when he was spoken to by the Secretary-Treasurer (acknowledged by the Grievor on cross-examination - details not made known to me), he has not encountered any untoward difficulty; and

9 I do not find that the Grievor was in breach of the *Conflict of Interest* Policy. This Policy addresses situations beyond the Grievor writing articles of this nature and I accept that the information upon which the Grievor relied came either from public meetings or public minutes. The only portion of the *STAFF ETHICS* Policy which would arguably be relevant was the second last paragraph which prescribes that constructive criticism of other staff members or of any department regarding improvements to the school system should be made directly to the particular school administrator and, then, to the Board if necessary. In my view, his comments on amalgamation do not fall within the scope of this Policy. To the extent Mr. Kilbride invited me to apply the KVP tests, and find that these Policies, in whole or in part, were either unreasonable or not clear and unequivocal is not an issue relevant to this proceedings. In my view, these longstanding Policies are reasonable on their face.

The Grievor admitted that Powers' recitation of what transpired at the December 1st meeting was essentially accurate. So, the Grievor does not dispute that he told Powers that he could do and say as he pleased by reason of the *Charter* and that what he did outside of working hours was "…his own business". The Grievor was obviously wrong on both counts. He cannot say and do as he pleases and what one does or says during "off-duty hours" may still fall within his employer's disciplinary reach, provided, of course, that there is a nexus or connection to the employment relationship. I do not intend to pursue this principle any further because it is well established by arbitral jurisprudence.

I now turn to an analysis of the statements in the articles which were of concern to Powers. In my view, there are only 2 statements which *potentially* "cross the line". The first is reflected in the Grievor's comments on the "$10,000 grant" in both the Flin Flon Reminder and The Underground Press. I will say that the first 3 paragraphs in the Reminder article (p. 8, *supra*) do not cause me any concern whatsoever. However, the Grievor now acknowledges that the manner in which he reported the purpose of the $10,000 grant was inaccurate. I agree with Powers that the implication of these statements is that the District would receive $10,000 if it decided to amalgamate in the sense that this sum of money was available as a reward or incentive for amalgamating with another district. The Grievor also admitted that he retracted these statements in the September, 2001 publication of The Underground Press (apparently he resumed publication at that time). While the Grievor's comments on the "$10,000 grant" were factually incorrect and led to an erroneous conclusion on his part, I find that he honestly believed it to be true at the time. He ought to have sought clarification from a Board member of Powers regarding the purpose of this available grant.

Secondly, the comments regarding MAST do imply that the Board does not function in an autonomous manner. The Grievor maintained that this was simply his opinion "…based on what he has seen". It is a view he is entitled to hold, "…even if to some people he was wrong" (see *Chopra*, *supra*). While this was an intemperate remark, it is not one which impairs his functioning as the Maintenance Supervisor *per se*.

Powers made reference to other statements in these articles. The balance of the Grievor's comments on "amalgamation" in The Underground Press Editorial (Appendix A) do not cause me any concern. The Grievor, as a citizen and parent, is entitled to express his views on matters such as cost savings, the merits of amalgamation, perceived tax relief, the potential benefits of bulk buying and like matters. I include in this analysis the Grievor's reference to the positions of Superintendent, Secretary-Treasurer and his own position of Maintenance Supervisor. Powers' interpretation that these comments constituted an attack on his own abilities to assume any new "merged" Superintendent position are an overstatement and, in my view, were influenced more by the difficulties he was encountering with the Grievor during the fall of 2000 than what can be gleaned from an objective reading of the Editorial itself. The Grievor's comments regarding the "Challenge 2000" program are not objectionable and his editorial comment on the costs associated with the study were based on his own review of this public study. His comments in *The Chambers* (Appendix B) regarding the letter received by the Board from the District, whether viewed, in the eyes of some, as a "shot" or simply as an "aside" do not trespass any limiting boundary of public comment, at least in my judgment.

Mr. Kilbride's invitation to compare what the Grievor wrote with the letter that the *secretary* wrote in the Wainwright case is well taken. A secretary of 12 years service would be more closely identified by parents with the administration of a school board than would a Maintenance Supervisor. Her comments (see p. 28, *supra*) clearly constituted a very direct criticism of her employer and went well beyond anything the Grievor wrote in his 2 articles. Mr. Kilbride commented on the factors which were relevant to the Wainwright board. I distilled his comments at pp. 33 and 34 and I find that his observations were, in the main, an accurate comparison of the similarities between the 2 situations.

While I do not have to find an "actual impairment" of a District interest and only need to find that there be behaviour from which I can reasonably conclude that the employment relationship would likely be impaired (see *Fraser* at pp. 29 and 30, *supra*), it is my conclusion that such an inference cannot reasonably be drawn even by reference to the 2 statements to which I have specifically referred in my analysis, *supra*.

Regrettably, it certainly appears that tensions did develop between Powers and the Grievor and that these tensions were primarily caused by the manner in which the Grievor insisted on interacting with Powers on day to day issues. But, these tensions or "workplace" concerns were not the subject of any commentary in the Grievor's articles (and it would be inappropriate for him to publicly comment on these concerns). They are indeed matters to be dealt with internally. I can understand Powers' frustration on the Grievor's insistence to have a Union member always present. Absent a provision in a collective agreement, there is no automatic right to representation every time an administrator wishes to speak to an employee about day to day problems or the functioning in the workplace (e.g. a faulty boiler or a classroom that must be cleaned). Representing other employees in respect of working conditions or having a Union member present when discipline is being imposed and/or discussed are, of course, different situations.

In Re British Columbia Railway and Canadian Union of Transport Employees Local 6 (1982) 8 L.A.C. (3rd) 233, Arbitrator Hope wisely said that an industrial plant is not a debating society and "…respect, in that context, is not extended or withheld on the basis of personalities" (p. 249). He also noted that it is not enough for an employee to say that he does not respect a supervisor and his obligation, as an employee, is "…to extend respect because he must be prepared to accept authority and adopt a posture of at least token respect" (p. 250). Yet, the dealings between Powers and the Grievor (real or perceived) address their relationship in the workplace. In my view, the manner in which Powers viewed his relationship with the Grievor did affect the interpretations or inferences which *he* placed on or gleaned from the articles. Having reviewed the articles in the context of both the findings of fact I have made, *supra*, and in the context of the articles as a whole, commenting, as they did, on matters of public interest/concern, I have difficulty drawing the same inferences that Powers did.

Conclusions on "Cause for Discipline"

While the "$10,000" and "MAST" comments were somewhat intemperate (but not nearly as intemperate as the remarks in Wainwright) and the Grievor ought to have exercised more caution, I have concluded that the District has not established that there was cause to discipline the Grievor. In my view, the Grievor neither breached his duty of loyalty to the District nor did his written comments constitute "insubordination", as the District contended in its letter of discipline. This is supported by my factual findings that: (i) the Grievor did not make any statements maliciously or with any intent to belittle his employer; (ii) he was commenting on a matter of public concern in his private capacity as a reporter, editor and/or citizen/taxpayer; (iii) publicly elected officials (i.e. the Board itself) must expect some criticism; (iv) these articles reflected a continuation of the Grievor's participation in roles he had undertaken for some years without being formally disciplined; (v) his comments did not impair his own role as Maintenance Supervisor; and (vi) his comments cannot be interpreted as an attack on Powers or the Board from which I am prepared to draw the reasonable inference that the employment relationship generally has been impaired.

I gave consideration to the two positions which the Grievor advanced with Powers on December 1st. While his assertions were wrong, as a matter of law, they cannot be used to assess the articles in a more severe manner. After all, the articles had already been written. By the issuance of this Award, the Grievor is now on *express notice* that he cannot seek comfort and relief in these two blanket assertions.

After balancing the interests which are applicable in this case, I find that the District's concerns regarding the 2 articles could have been brought to the Grievor's attention verbally but without the imposition of formal discipline. Mr. Kilbride invited me (in the alternative) to consider the Wainwright disposition, namely, that the Grievor ought to have been given an oral caution or reprimand. I am not inclined to adopt this approach because it still has disciplinary characteristics and opens up that gray area as to whether oral cautions constitute (grievable) disciplinary sanctions. Quite frankly, adopting this approach would be inconsistent with my finding on "cause". *Therefore, I order that the written warning be rescinded and removed from the Grievor's file. However, I wish to be clear that this Award may be relied on by the Board and/or the Superintendent in the future, as express notice to the Grievor of the following realities*:

(i) While the Grievor may continue to be the Editor of The Underground Press and write articles for other publications, he must recognize, at all times, that he is subject to certain limitations by reason of his role as an employee of the District;

(ii) The fact that he assumes these capacities outside of working hours does not affect his duty of loyalty to the District;

(iii) The existence of the *Charter* is not an answer to an alleged breach of his duty of loyalty;

(iv) He may not use any confidential information which may come into his possession by virtue of his position as an employee of the District;

(v) While he may comment on and express his opinion on matters of legitimate public concern, he cannot, in a reckless or wanton manner, publish conclusions based upon erroneous facts; and

(vi) Notwithstanding my finding that the Grievor's references to the positions of Superintendent, Secretary and his own position in The Underground Press editorial did not transgress any of the limitations on freedom of expression (when read in context), this finding does not change the principle that statements or comments which either directly criticize or which could reasonably be perceived to be a direct criticism of or attack on the abilities, integrity or performance of his administrative superiors are to be avoided. To the extent such issues may be relevant to a workplace or collective agreement dispute then they must be dealt with through internal channels, as contemplated by the *STAFF ETHICS* policy (see also *Fraser* and *Haydon, supra*) or through the grievance procedure in the Agreement.

I believe that the foregoing distils salient principles which the Grievor must bear in mind when assuming the roles that he has chosen for himself and to which the District (quite properly) takes no objection. I cannot deal with all problems of the workplace within the scope of my mandate here but the Grievor acknowledged that it was important to have a good working relationship with the Superintendent and a good relationship with the Board. I concur.

I wish to state that nothing in this Award is to be taken as a finding that Powers made the decision he did other than in good faith and for what he perceived to be in the best interests of the District. Indeed, Powers' response to the Grievor's two assertions at the December 1st meeting were correct. My disposition reflects what I have concluded to be the proper "balance" in these circumstances, having due regard to the governing legal principles.

I express my sincere appreciation to Messrs. Simpson and Kilbride for the manner in which this case was presented, distilled and argued.

Issued in Winnipeg, Manitoba this 30th day of October, 2001.

William D. Hamilton
Arbitrator