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Citation: **2008 PSLRB 62**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

FRANK BRAZEAU

Grievor

and

DEPUTY HEAD
(Department of Public Works and Government Services)

Respondent

Indexed as
Brazeau v. Deputy Head (Department of Public Works and Government Services)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Marie-Josée Bédard, adjudicator

For the Grievor: Karen Brook, Canadian Association of Professional Employees

For the Respondent: Richard Fader, counsel

Heard at Ottawa, Ontario,
May 13 to 16, 20, 21, 26 to 28 and 30, 2008.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Frank Brazeau ("the grievor") held the position of Principal Consultant at Consulting and Audit Canada ("the CAC"). On September 24, 2004, he was suspended with pay pending an investigation into his contracting practices. On October 17, 2005, that initial suspension was changed to a suspension without pay. The letter of suspension reads as follows:

. . .

> *As you are aware, the Department retained the services of KPMG to conduct a detailed review and analysis of contracting practices of Consulting and Audit Canada which included contracts managed by you.*
>
> *You were provided with two reports prepared by KPMG, dated June 3 and July 21, 2005, concerning your involvement in the management of contracts as part of your duties of Principal Consultant at CAC. I am aware that you have requested a copy of the third KPMG report dealing with contracts handled by CAC officials other than yourself. A severed copy of that report is attached.*
>
> *The two reports you received revealed indications of various breaches of contracting rules including contract splitting, contract back dating and manipulation of the procurement process to facilitate the directing of contracts to specific contractors. On the basis of the evidence available to date, I have determined that this Department can no longer tolerate keeping you on the payroll until such time as our investigation into potential misconduct is finalized. Therefore, you are hereby suspended without pay, pending completion of the investigation, effective today at the close of business.*

. . .

[2] On January 23, 2006, the grievor's employment was terminated. The termination letter contains the following:

. . .

> *I have received a copy of the internal Administrative Review Committee report dealing with contracts you managed at Consulting and Audit Canada (CAC). As you know, this report was prepared in response to the KPMG review reports of CAC contracting practices. A copy of this report is attached.*
>
> *On the basis of the above reports, I have concluded that you are culpable of deliberately violating several important policies in*

> *place while performing your duties at CAC. First on numerous occasions you placed yourself in a position of conflict of interest in breach of the Conflict of Interest and Post-Employment Code for the Public Service by participating in contracting activities involving the firm of a person with whom you had both a family and a personal relationship. I find that you did not divulge this relationship to your superior and that you lacked forthrightness about your family relationship during the administrative review, which is an aggravating factor. Secondly, I find that on numerous occasions you wilfully manipulated a procurement process in order to facilitate the award of contracts to specific firms in violation of the fairness principles enunciated in the government contracting policies. Third, I find that you engaged in other inappropriate contracting practices involving false invoicing or false contract periods to allow payment for work done outside the contract period, which constituted violations of the CAC Code of Ethics and Professional Conduct.*
>
> *Your conduct violated some of the most important points stated in this department's Statement of values, such as honesty, fairness and upholding the public trust, in the context of providing contracting services to our client departments, which is one of our core service. I consider your actions to constitute an extremely serious misconduct which demonstrates a lack of the integrity necessary in functions of responsibility such as yours within PWGSC. You have irreparably breached the relationship of trust that must exist between an employee and the employer.*
>
> *Therefore, pursuant to section 12(1)c) of the* Financial Administration Act, *you are hereby terminated from the Public Service, for misconduct. Your termination is effective 17 October 2005, at the close of business.*
>
> *If you feel that this action is unwarranted, you have a right of redress under the grievance procedure in accordance to section 208 of the* Public Service Labour Relations Act*.*
>
> . . .

[3] The grievor grieved both his suspension without pay and his termination. During his opening statement, counsel for the Department of Public Works and Government Services ("the respondent") dropped the ground of termination relating to false invoicing and false contract periods.

II. Preliminary Matter

[4] At the commencement of the hearing, counsel for the respondent raised a preliminary objection to my jurisdiction concerning the grievance contesting the suspension. He submitted that the suspension was administrative and that it does not fall within the adjudicable matters detailed in section 209 of the *Public Service Labour*

Relations Act (*PSLRA*). Counsel for the respondent also submitted that the grievance is moot, given that the termination was retroactive to the original date of the suspension. I took this objection under reserve and proceeded to the hearing of the grievances.

III. Summary of the evidence

[5] The CAC hired the grievor in July 2000 as a senior consultant in the Project Management Team ("PM team"). He had prior experience with the public service as he was employed in different departments from 1989 to 1998, after which he left to work in the private sector.

[6] The grievor and Kevan Taylor, who was at all relevant times the director of the PM team, both testified about the general context of work at the CAC, which is relevant to understanding the grievor's duties and responsibilities. As their testimonies on that matter were complementary and not contradictory, they have been summarized together.

[7] The CAC was a separate operating agency attached to Public Works and Government Services Canada (PWGSC) that provided consulting, audit and contracting services for professional services to federal government departments and agencies. Originally, the contracting services were limited to low-value sole-source contracts.

[8] The CAC was dependent on revenue and had to recover the full costs of its operation. As the pressure to generate revenue and the demand for contracting services increased, the CAC changed its focus and got involved in much more complex contracting services.

[9] In 2001, the CAC created the PM team in an effort to take advantage of growing business opportunities in contracting services. The PM team was composed of consultants who were responsible for selling contracting services for professional services to government departments and agencies. The CAC offered full-cycle contracting services, which included everything from preparing pre-procurement documents to handling the procurement process to awarding and managing the contracts.

[10] The consultants, who were referred to as project managers, worked with client departments and agencies to define their requirements and to prepare the essential elements of the contracting process. They also elaborated the evaluation criteria.

[11] Once completed, the procurement documentation was sent to the Control Procurement Unit (CPU), which reviewed the documentation, and prepared and issued the Request for Proposals.

[12] Three different sourcing methods were used, based on the expected value of the contract. Sole-source contracting was used for contracts with an expected value under $25,000 (which were not the responsibility of the PM team), a limited tender process was used for contracts valued between $25,000 and $84,400, and an open tender process was used for contracts valued over $84,400.

[13] When the estimated value of the contract was between $25,000 and $84,400, a minimum of 3 potential contractors had to be invited to bid. Project managers identified potential bidders through a search of the computerized Skills Registration System (SRS) and were allowed to add other potential bidders to the initial list.

[14] Once the proposals were received, the project manager assigned to the project, and on occasions other members of the team, evaluated the proposals based on the evaluation criteria. The contract was then awarded to the winning bidder and the project manager carried out the administrative follow up of the contract.

[15] The grievor's career progressed rapidly within the PM team. When he joined the CAC, he was initially appointed as a senior consultant (ES-05) on a term basis. On January 2, 2002, he was offered an indeterminate appointment as a principal consultant (ES-06). On July 24, 2003, he was appointed Interim Director (Acting Portfolio Manager (ES-07)) to replace Mr. Taylor, who left for language training. Upon his return, Mr. Taylor made the decision to retire in January 2005 and was assigned to special projects until then. Consequently, the grievor remained in his acting position and performed the operational supervision of the team until his suspension.

[16] Mr. Taylor testified at great length about the grievor's performance. He stated that the grievor's main responsibility was to develop business. Mr. Taylor described the grievor as being very good at marketing and selling contracting services to potential clients, at networking, and at maintaining contact with clients, even in highly sensitive projects.

[17] According to Mr. Taylor, the grievor was a leading member of the PM team and was very much appreciated. The grievor's performance evaluations, prepared by

Mr. Taylor, for the period from October 2002 to March 31, 2004, indicate superior business performance.

[18] Mr. Taylor and the grievor stated that the volume of work in the PM team and the pressure to generate revenue increased substantially from 2001 to 2004, and the projects became more complex. According to Mr. Taylor, both the PM team and the CPU were in a “catch-up situation” since the workload was increasing while the resources were not.

[19] Individual and team contracting targets were established. The grievor testified that in his first year, the team’s target was $8 million; in 2003-2004, the target was $35 million. The grievor stated that he generated one-third of the CAC’s total contract revenues. His Employee Contribution Reports for the period from April 2001 to March 2004 show an impressive growth in the revenue he generated.

[20] The grievor explained that his role evolved over time. As he became increasingly involved in generating business, he did less hands-on work and relied more on colleagues to prepare statements of work and evaluation criteria and to proceed to the evaluation of bids in different projects.

[21] Regarding the procurement policies, the grievor testified that when he began working at the CAC, he did not know anything about procurement and contracting. He learned on the job from the manager of the CPU and sought advice from more experienced colleagues and directors.

[22] Regarding the CPU’s role, the grievor stated that it was responsible for approving the statement of work and evaluation criteria prepared by the project manager before issuing the Request for Proposals. He would sometimes receive a phone call from the manager of the CPU because the statement of work he wrote was too vague or because the evaluation criteria were too stringent or too vague.

[23] Robert Burwash, the former director of the Innovation Technologies team, who also played an advisory role with the PM team and with the CPU, testified at the request of the grievor. He stated that the CPU’S role was to monitor the fairness of the procurement process. Once project managers were given the green light from the CPU, they could assume that the process was in compliance with the procurement policies.

[24] The grievor stated that value that the CAC added for its clients was speed. One of the reasons clients used the CAC was that it was faster than the procurement and contracting services offered by PWGSC. The PM team promised short timelines and was focused on revenue generation and client satisfaction.

[25] The following events led to the suspension and ultimately to the termination of the grievor.

[26] David Marshall was appointed Deputy Minister of PWGSC in June 2003. He testified that in the summer of 2004, he gave the Chief Auditor of PWGSC the mandate to perform an audit of the CAC's contracting practices and its compliance with federal government policies and regulations. Mr. Marshall explained that his decision to perform an audit was based on the fact that the structure of the CAC, as an agency acting separately from PWGSC, did not provide him with an overview of its conduct.

[27] Mr. Marshall explained that a month after the internal audit began, the Chief Auditor informed him that there were concerns and issues regarding the CAC's contracting practices.

[28] Two weeks later, the Chief Auditor informed him that he had been contacted by the Royal Canadian Mounted Police (RCMP), which was conducting an investigation of its own that involved some contracts managed by the CAC and more particularly by the grievor.

[29] Mr. Marshall explained the context of the RCMP's investigation. The National Compensation Policy Centre (NCPC) of the RCMP had engaged in outsourcing the administration of the RCMP's pension plan. Within that process, it had retained the CAC to provide procurement and contracting services to assist the NCPC in finding resources to work on the project. The RCMP had launched an investigation into the procurement and contracting practices of the NCPC, and some of the contracts raising concerns had been managed by the CAC on behalf of the RCMP. The grievor was the CAC consultant identified for those contracts. Mr. Marshall stated that at that time, the RCMP suspected wrongdoing.

[30] Based on that information and on a subsequent meeting he had with an RCMP investigator, Mr. Marshall stated that he became concerned with the potential of fraud and that he decided to go further with a more extensive audit of the CAC's practices

and involvement in the NCPC project. He asked the Chief Auditor to mandate KPMG, an independent firm, to perform the audit.

[31] On September 24, 2004, the Director General of the CAC decided to suspend the grievor with pay pending the investigation.

[32] Mr. Marshall stated that KPMG's mandate was carried out in different phases. In the first phase, it was asked to review 31 contracts put in place by the CAC on behalf of the RCMP for the NCPC project. The grievor was the identified project manager for 30 of those contracts. KPMG reported to Mr. Marshall that in some contracts, the procurement process seemed to have been manipulated to facilitate directing them to specific contractors. Furthermore, he was told that contracts had been directed through a company of convenience, Abotech Inc., owned by David Smith, who was a member of Parliament.

[33] Based on that information Mr. Marshall asked KPMG to continue its review of contracts managed by the grievor. KPMG reviewed an additional 14 non-NCPC contracts managed by the grievor that had been awarded to specific contractors who had also been awarded NCPC contracts. According to Mr. Marshall, KPMG found the same pattern of contracts directed to specific contractors along with violation of other contracting policies.

[34] Mr. Marshall then decided to ask KPMG to carry out an additional review of other contracts managed by the grievor that were considered high-risk contracts. Mr. Marshall stated that KPMG reported the same findings.

[35] Mr. Marshall stated that at that point, he began taking things very seriously. He also stated that when asked to give his point of view, the grievor had responded that he was working in the same manner as the other CAC consultants. He therefore decided to ask KPMG to look into contracts managed by other CAC consultants. He stated that based on a review of 200 contracts managed by other consultants, KPMG had observed questionable procurement practices but not with the same degree of facilitation or violation of policies as was observed in the projects involving the grievor.

[36] Based on those findings, Mr. Marshall decided to change the original suspension with pay imposed on the grievor to a suspension without pay pending a final decision and sent him the letter of suspension on October 17, 2005.

[37] On October 24, 2005, *The Globe and Mail* newspaper published an article revealing information about KPMG's review and the grievor's suspension. The journalist wrote that a senior federal official had supplied the information. The grievor testified that he became really upset and "ticked off" about the leak in the press. He was also exasperated by the great length of time that had passed since the beginning of the investigation. The grievor added that he clearly felt that he was being targeted and that he was convinced he would not be treated fairly.

[38] The grievor replied to Mr. Marshall's letter of suspension on that same day. His response reads as follows:

> . . .
>
> *. . . I have at all times during my employment with CAC carried on my duties in accordance with the CAC policies and practices which were in place at the time.*
>
> *I have at all times co-operated in the investigation and I remain willing to meet with the administration committee. I had been advised by Gary Curran and Andre Auger that the committee would ask me questions and I would have an opportunity to respond. I am surprised that this opportunity had been withdrawn. I would welcome an opportunity to respond to allegations arising from the on-going investigation.*
>
> *I protest the violations of my right to privacy in having unproven allegations regarding my conduct published in the media.*
>
> *As a Principal Consultant I had no authority to sign contracts. As well, I am not an expert on contracting. I relied at all times on the Central Procurement Unit at CAC to ensure CAC met its obligation respecting contracting rules and policy.*
>
> *I am particularly concerned that the KPMG Draft Report of September 25, 2005 which reviewed other "high risk contracts" did not constitute a detailed audit for adherence to the FAA and all contracting rules and regulations. In contrast, the files on which I worked were subject to a forensic audit and all supporting information was considered by KPMG. I fail to understand why I am being specifically targeted when we all operated in the same manner.*
>
> . . .

[39] Mr. Marshall stated that based on all the information he had at that point and on the grievor's response, he decided to create an internal Administrative Review Committee ("the ARC"), to analyze the whole situation, conduct interviews it deemed necessary and provide him with conclusions and recommendations about the grievor's conduct. According to Mr. Marshall, the ARC was composed of an expert in procurement (John Reed), an expert in human resources (Jean Quevillon) and a legal expert. The ARC started its work in November 2005 and produced its report on January 2006.

[40] The letter attached to the ARC's report outlines its main conclusions as follows:

. . .

> *Based on the information available, our understanding of the CAC environment is that it focused primarily on generating revenues. To attain this objective, CAC staff strove to satisfy clients who were willing to pay a service fee to CAC in order to have their contracting needs for professional services fulfilled expediently. CAC's advertised value added was that they could do the clients' contracting more efficiently and with more flexibility than PWGSC's Acquisitions Branch.*
>
> *In 2000 CAC decided to move from the relatively simple business of low value sole source contracts (under $25K) in support of specific CAC projects, into larger and more complex contracting activities. In spite of some management interventions, it appears that CAC had not reached a sufficient level of organizational knowledge to meet the reasonable standards expected of a quality contracting organization. We note that CAC staff responsible for crucial stages of the contracting process were insufficiently trained or did not have sufficient knowledge and/or experience for the level of complexity involved.*
>
> *Within that environment, Mr Brazeau generally appears to have participated in questionable procurement practices. Based on the evidence gathered, it appears that most were tolerated within CAC's way of doing business. Given the preceding, we do not characterize Mr Brazeau's general procurement practices as a wilful disregard of the policies in place. Moreover, based on a review of information about other CAC Project Managers who handled contracts (KPMG Phase III report sample), and having considered the witnesses' statements, we do not conclude that Mr Brazeau was much different from other CAC staff engaged in this work. He likely participated in questionable practices more often than other CAC staff, which would be expected as he was recognized as the leading CAC contributor to revenues and his sales success resulted in the need to be involved in, or be responsible for, more contracts.*

> *Notwithstanding the above, we found that there is sufficient evidence to conclude that Mr Brazeau went beyond what is our understanding of CAC's tolerated practices. We conclude that in several cases he wilfully facilitated a client's wishes by unfairly and inappropriately manipulating the procurement process in order to award a contract to a specific contractor/resource.*
>
> *We also conclude that in awarding contracts to one firm, Abotech, Mr Brazeau acted in a way that created a situation of at least an appearance of conflict of interest, in contravention of the Conflict of interest and Post-Employment Code for the Public Service. His relationship with Abotech's owner had not been declared through a Confidential Report. In addition, he was not forthright in responding to this ARC's questions in this regard, which constitutes in our view an aggravating factor.*
>
> . . .
>
> [Emphasis added]

[41] As the last two issues mentioned in the ARC'S correspondence were ultimately retained as the grounds for terminating the grievor, I will summarize the evidence relating to those issues and will return later to the ARC'S report and to Mr. Marshall's decision to discharge the grievor.

A. Manipulation of the procurement process

[42] The evidence presented related to three different contracts.

1. Contract 560-3107, awarded to Abotech (Michael Onischuk)

[43] In 2004, Anthony Koziol was a consultant with the RCMP and was working on the NCPC project. The RCMP needed to hire consultants to work on the project. At that time, Michael Onischuk, a former RCMP member, was a consultant on a short-term contract with the NCPC, and Mr. Koziol wanted to find a way to keep him on the project.

[44] Mr. Koziol and Mr. Onischuk both testified. They stated that they met with the grievor on June 24, 2004, about the services that the CAC could offer with respect to the NCPC project, and during that meeting the grievor explained the CAC's contracting process. They also discussed Mr. Onischuk's employability. Since he was a former RCMP member, he could not be awarded a direct contract if the estimated value was over $100,000. They stated the grievor suggested that Mr. Onischuk proceed through a contractor. Both Mr. Koziol and Mr. Onischuk confirmed that the only contractor suggested by the grievor was Abotech. They also stated that the grievor said that he

would personally be involved in the evaluation of the bids. Their statements agreed with the personal notes they took of the meeting. After that meeting, Mr. Onischuk did enter into an agreement with Abotech, which submitted a proposal and was awarded the contract relating to the CNPC project.

[45] The grievor testified about that meeting, and his version is different from the version related by Mr. Koziol and Mr. Onischuk. The grievor stated in examination-in-chief that Abotech was one of the firms he suggested to Mr. Onischuk. In cross-examination, he confirmed that naming a few firms was always his way of doing things but added that he could not recall the specifics of that conversation.

[46] Concerning the evaluation of the proposals, it appears from the documentation that was produced that there were four points separating Abotech and the second bidder. Both companies were given the same scoring on the “Experience in procurement” criterion, as both were recognized as having nine years of experience. The second bidder’s proposal claimed nine years of experience, but Abotech’s proposal only claimed three years of experience for its proposed consultant, Mr. Onischuk.

[47] In his testimony, Mr. Koziol stated that, in his opinion, Mr. Onischuk had no experience in procurement *per se* but that his overall RCMP experience and his knowledge of the project qualified him, and he wanted to keep him “on board.”

[48] In its report, the ARC indicates that when questioned about the scoring awarded to Abotech, the grievor stated that Mr. Onischuk’s résumé, which was attached to the proposal, referred to many years of experience in procurement matters.

[49] The grievor testified that he recalled having performed the evaluation of the proposals and that he still stands behind his evaluation. He did not otherwise detail or comment on his evaluation.

[50] In its report, the ARC concludes as follows:

. . .

> *. . . Mr Koziol (consultant for RCMP’s NCPC) introduced Mr Onischuk to Mr Brazeau in June 2002 and asked him how they could bring him on board for a longer period as Mr Onischuk had just recently worked for the RCMP under a sole source done through RCMP procurement for May-June 2002. When questioned about the KPMG bid evaluations issue of the first CAC contract (560-3107) respecting the high marks given to Mr Onischuk (the*

> *resource) for his limited procurement experience (two months according to KPMG) , Mr Brazeau pointed out that Mr Onischuk's CV refers to many years of experience in procurement matters. Having thoroughly reviewed the file information, we note that even Abotech's submission of Mr Onischuk stated he had three years of experience while the second bidder has over 9 years. Even if we accept Mr Brazeau's contention that some of the information on Mr Onischuk's CV could be counted towards experience involving in providing advice on contracting, it is still apparent that his score should have been lower than at least that of the second bidder. This is because the evaluation grid provided for 21-30 points for experience over one year, while all three bidders received 29 points. As the difference between Abotech's bid and the second bidder was only 4 points, it is entirely possible that Abotech could have lost on the basis on this criteria alone.* ***We therefore conclude on the balance of probabilities that Mr Brazeau voluntarily gave unjustified weight to Mr Onischuk's CV in this bid evaluation so that the client would get the resource it requested.***
>
> . . .
>
> [Emphasis in the original]

[51] Mr. Reed, a member of the ARC, testified that from his point of view there should have been a difference between the points given to Abotech and to the second bidder for the "Experience in procurement" criterion, since the second bidder's proposed consultant had much more experience than Mr. Onischuk. In his opinion, when looking for more experience, a proposal claiming three years of experience should receive fewer points than a proposal claiming nine years of experience.

[52] Mr. Burwash reviewed the file at the request of the grievor's representative. In his opinion, Mr. Onischuk's résumé showed that his experience in procurement was probably equivalent to the others. He also added that it was reasonable to double-check the information provided in the proposals and to assess the résumés of the proposed consultants. He added that he would not satisfy himself with what was claimed by a firm in a proposal. However, in cross-examination, he acknowledged that it was not possible to determine from Mr. Onischuk's résumé which portion of a given period he actually spent doing procurement work.

2. Contract 560-5198, awarded to Cabinet Conseil Valsar Inc.

[53] In that project, the contract was awarded to Cabinet Valsar Inc. ("Valsar"). It appears from the documentation that was produced that in the pre-procurement process, the grievor requested that Valsar be added to the bidders list. It also appears

that Valsar had been awarded previous contracts with Natural Resources Canada ("NR Can").

[54] When examining the documents related to that project, the grievor does not appear to have been the project manager, but he did complete the evaluation grid. In his testimony, the grievor stated that he did not recall his involvement in that project but recognized his handwriting on the evaluation grid. He did not otherwise comment on his evaluation of the proposals.

[55] With respect to the evaluation of the proposals, the scoring was very tight between the first three bidders: Valsar obtained 84.9 points, the second bidder obtained 84.8 points and the third bidder obtained 84.1 points. The evaluation grid indicates that there were several changes to the scores given to those three bids.

[56] In its report, the ARC provided details on the changes in the scoring and concluded that the evaluation process was flawed:

. . .

> *The final and main issue raised by KPMG in this series of 6 contracts is that it appears that the bid evaluation done for the last contract (560-5198) by Mr Brazeau was flawed. This is because of the pattern in these contracts and because the client was waiting for a bridging contract at the time of the evaluation, and Valsar won by 0.1 point.*
>
> *We note that 9 bids were evaluated. Five (5) had no changes to their point ratings after the initial record was made. However, the lowest-priced bid was changed extensively. Also the eventual winning bid had one change – the addition on one (1) point to one evaluation rating. The eventual #2 bidder, who ultimately "lost" by 0.1 point was reassessed in four (4) areas. It is conceivable that points for the lowest price bidder were adjusted downwards so that low price would not be a determining factor; and that the winning bid had one (1) point added just so that it would in fact win. We note that the point rating system used in other files was relatively imprecise, making a winning margin of 0.1 points highly questionable - effectively, the two top bids were equivalent, and we believe it impossible that CAC on objection, could have justified such a small differential. We do not accept Mr Brazeau's justification that he relied on the CPU to pick up such issue.* ***We conclude on the balance of probabilities that Mr Brazeau changed the evaluation points so that the client would get the resource it requested.***

. . .

[Emphasis in the original]

[57] In his testimony, Mr. Reed maintained that a scoring change must be documented in a file and that in this case, none of the changes had been documented. In his opinion, that creates significant uncertainty about the basis upon which the ratings were made. Furthermore, the fact that a one-point change was made to the winning proposal, which resulted in a difference of 0.1 points between the winning proposal and the second proposal, gives the impression that the change was made to bring that bid up to the highest point rating.

[58] For his part, Mr. Burwash testified and stated that, in his opinion, it was not possible to draw any conclusions about the evaluation process simply by looking at the evaluation grid and at the changes that appear to have been made to the scoring.

3. Contract 560-3106, awarded to Intoinfo Inc.

[59] It appears from the documentation that was produced, that the grievor was the project manager and that Intoinfo Inc. ("Intoinfo"), along with another contractor, were added to the bidders list at the grievor's request.

[60] The grievor testified that he recalled having performed the evaluation of the proposals in that project but did not otherwise comment on his evaluation.

[61] It appears from the documentation that the contract was awarded to Intoinfo, which won by 2.5 points.

[62] With respect to the evaluation of the proposals, the following two requirements were at issue:

> *R-2: The resource has developed Web sites for federal government departments using current Government Online specifications for Web-based applications.*
>
> *R-3: The proposal indicates experience developing and documenting approaches for Web site content mapping and analysis with demonstrated ability to perform in compressed timeframes.*

[63] For requirement R-2, Intoinfo claimed 15 years of experience and was awarded a rating accordingly. For requirement R-3, the second bidder claimed 16 years of experience in its proposal but was not given the points corresponding to that level of experience. On the evaluation grid, the grievor explained his decision by noting the

following: "No content mapping, impossible to have 16 years with web." Based on that information, the ARC concluded that:

> . . .
>
> *. . . KPMG questioned the bid evaluation apparently performed by Mr Brazeau, stating that the loser appeared to have more experience. We reviewed the bid evaluations. In one place, Intoinfo was given the maximum points for 15 years' experience in Web site development - but for another criterion another bidder was downrated significantly because the evaluation form noted that it was "impossible to have 16 years experience with the Web".* ***We conclude on the balance of probabilities that Mr Brazeau awarded the evaluation points so that the client would get the resource it requested.***
>
> . . .
>
> [Emphasis in the original]

[64] In his testimony, Mr. Reed stated that he could not understand why it was impossible for the second bidder to have 16 years of experience with the Web, given that 15 years of experience on the same matter was recognized for Intoinfo. He further stated that, based on the information provided in the proposals, the second bidder's experience was not correctly assessed and that it should have obtained at least 18 or 19 points for the criteria in requirement R-3, not the 14 points given by the grievor.

[65] In his testimony, Mr. Burwash stated that, in his opinion, Intoinfo's proposal was stronger than the second bidder's which had proposed a resource that tended to be a high-level management resource rather than one who would actually perform the work. Intoinfo, on the other hand, had presented a very technically strong team of five resources.

[66] Mr. Taylor was questioned about the principles underlying the competitive tender process. When asked if there was a prohibition against directing contracts to specific contractors for contracts over $25,000, Mr. Taylor confirmed that the prohibition existed and added that any public service employee should be able to say that in a competition process you need to be sure that the process is fair and that it appears fair. The prohibition on directing contracts is there to ensure that the process is open. Otherwise, it is not a competitive process but a sole-source contract.

B. Evidence relating to the Abotech issue

[67] The respondent established that from June 2002 to January 2004, 12 contracts from different projects, including the NCPC contract, were awarded to Abotech. The cumulative value of those contracts is approximately $977,881. In the majority of the projects, the grievor appears, from the documentation that was produced, as the project manager, and his handwritten notes appear on different evaluation grids and request-for-contract forms. He also signed his name as the contract manager on the follow-up documents that led to the payment of several invoices.

[68] It was also established that from 1996 until June 2003, the sole shareholder and president of Abotech was Mr. Smith, who is the cousin of the grievor's mother. Both the grievor and Mr. Smith come from the same region. Mr. Smith comes from Maniwaki, and the grievor comes from the Indian reserve Kitiganzibi, which is very close to Maniwaki.

[69] Mr. Smith testified that in 2000, Abotech became a shareholder of ASM Informatiques, which sold and developed software products. He began looking into contracting opportunities for information technology business with the federal government. Since Abotech was an Aboriginal company, he began his research with the Department of Indian and Northern Affairs, which had created the Procurement Strategy for Aboriginal Business (PSAB). The program was explained to him, and he was provided with a list of PSAB coordinators for different departments. The grievor's name appeared on that list as the CAC's PSAB coordinator.

[70] Since Mr. Smith knew the grievor, he contacted him and asked to meet with him. The grievor explained the CAC's business line to him. Mr. Smith testified that he realized that federal government experience was a requirement for many tender processes. He then decided that Abotech would become an agency for consultants in the professional services field and that it would build the needed government experience from the consultants' experience.

[71] Mr. Smith registered in the CAC's SRS as a contractor for different professional services. He entered into agreements with different consultants, and in return for an administration fee, he bid on contracts on their behalf and managed contracts for them. He testified that while he did not win all the bids he proposed to the CAC, he was awarded 13 contracts. His CAC contact was the grievor.

[72] In 2003, he ceased his activities with Abotech upon being hired as a public servant with PWGSC. In June 2003, he transferred all his shares in Abotech to his wife, Anne Ethier, and their two children. He left the public service in June 2004 when he was elected as a member of the Parliament for the riding of Pontiac.

[73] Concerning his relationship with the grievor, Mr. Smith stated that the grievor's grandmother was his mother's sister. He was therefore a cousin of the grievor's mother. Mr. Smith also confirmed that the grievor, among several other volunteers, put up signs during his electoral campaign and that at a later period, which he could not specify, the grievor became a member of the Executive Committee of the Liberal Association in his riding of Pontiac. Mr. Smith stated that the grievor never gave him preferential treatment.

[74] The ARC was informed of the family relationship between the grievor and Mr. Smith in the following context.

[75] As the ARC was carrying out its review, Norm Steinberg, Director General of Audit and Evaluation, was also carrying out his own review. Joseph Ovila Robichaud, Director of Fraud Investigation and Internal Disclosure, assisted Mr. Steinberg and was asked to interview Ms. Ethier, who was, presumably, the president of Abotech at that time.

[76] Mr. Robichaud testified that prior to the interview, he had heard of a family relationship between the grievor and Mr. Smith.

[77] During the interview, held on October 25, 2005, Mr. Robichaud asked Ms. Ethier about the relationship between the grievor and Abotech. Ms. Ethier replied that the grievor came from Maniwaki and that she also came from that region. She added that the grievor was her husband's cousin, which was not a secret.

[78] Mr. Quevillon and Mr. Reed testified that on November 7, 2005, the ARC interviewed the grievor in the presence of his representative. During that interview, the grievor was asked about the extent of his relationship with Mr. Smith. Both Mr. Quevillon and Mr. Reed recalled the grievor's answers, which concurred with the personal notes they took during the interview. When asked about his relationship with Mr. Smith, they both stated that the grievor left the room to confer with his representative. They returned shortly after, and he gave the following answers: he

knew Mr. Smith, who was from Maniwaki; he had put up signs for him in the middle of the night; he did not socialize more with him than with others from Maniwaki; and he had no more to do with Mr. Smith than with John Doe.

[79] On November 7, 2005, the information collected by Mr. Robichaud about the family relationship between Mr. Smith and the grievor was sent to the ARC.

[80] On November 8, 2005, Mr. Quevillon sent an email to Karen Brook, the grievor's representative. It reads as follows:

> . . .
>
> *Karen, we have been made aware late yesterday afternoon that Ann Ethier (David Smith's wife) has provided a statement indicating that Mr. B. is her husband's cousin.*
>
> *We therefore must ask three questions at this point:*
>
> - *Is Mr. David Smith in fact Mr. B's cousin ? (or is there any other family relation?)*
> - *If so, did Mr. B ever informed his superiors at CAC of that fact, and were there any decisions made in terms of ensuring the Conflict of Interest Code was going to be respected in the context that Mr. B was handling procurement bids involving Mr. Smith's company?*
>
> [*Sic* throughout]

[81] On November 15, 2005, Ms. Brook replied as follows to Mr. Quevillon:

> . . .
>
> *The reply to the question provided by Mr. Brazeau: "Mr. Smith is in fact the cousin of my mother and my superiors were made aware at CAC."*
>
> . . .

[82] Mr. Quevillon then sent another email to Ms. Brook, asking: "Who are those that were made aware?" The reply email from Ms. Brook reads as follows: "Mr. Brazeau's response is: 'Kevan Taylor'."

[83] In his testimony, Mr. Taylor denied that the grievor ever told him about his family relationship with Mr. Smith. He said that if he had known, he would have recused the grievor from working with Mr. Smith and discussed the matter with the Director General. He added that where there is a perception of a conflict of interest, you move the employee in a way that protects his dignity and self-respect and then

you determine if you have an issue and, if so, the magnitude of that issue. His expectation was that project managers should conduct themselves with honesty, fairness and transparency and in an ethical manner. He stated that, in his experience, you do not give contracts to relatives. During cross-examination, Mr. Taylor said nevertheless that he thought that the grievor was capable of learning from his errors and that he would still be willing to work with him.

[84] The grievor testified about the Abotech issue. He recognized that he managed contracts involving Abotech but did not recall his particular involvement in each project.

[85] During his testimony, the grievor admitted that he had not disclosed his family relationship with Mr. Smith to his superiors at the CAC. However, he stated that he had introduced Mr. Smith to the Director General of the CAC and had presented him as the president of Abotech, specifying that he knew him as they both came from the same hometown, Maniwaki. He explained that at that time, he did not think that his grandmother being the sister of Mr. Smith's mother constituted a close blood relationship that he had to disclose. The grievor stated that he thought that it was sufficient to declare that he and Mr. Smith came from the same hometown and that he knew him. He added that he comes from an Indian reserve of 1700 people where in a sense everybody is somehow related. In his testimony, the grievor recognized that in not divulging that family relationship, he had made a mistake.

[86] On numerous occasions during his testimony, the grievor admitted that he should not have been involved with projects involving Abotech. He also stated that he should have disclosed his blood relationship with Mr. Smith to the Director General, Bill McCann.

[87] He also recognized that he had not been forthright about his family relationship with Mr. Smith during the ARC's investigation. He admitted that he did not divulge that relationship when asked about the extent of his relationship with Abotech and that his subsequent statement that Mr. Taylor knew of his relationship with Mr. Smith was inaccurate.

[88] The grievor attributed the inaccuracy of his previous statements to his state of mind at that time. He stated that he was very upset about the information that was leaked "by the employer" to the press on October 24, 2005. He was also upset about

the whole situation, which was not coming to an end despite several months of investigation. The grievor stated that he felt clearly that he was being targeted and that it became clear to him that no matter what his answers were, he would never get a fair process.

C. The decision to terminate the grievor's employment

[89] Mr. Marshall stated that he based his decision to terminate the grievor's employment on the ARC's findings and recommendations and on all the evidence.

[90] In its report, the ARC concluded as follows:

> *As the supposed centre of procurement expertise for CAC, the CPU was not knowledgeable or experienced enough to deal with the procurement complexities and volume at CAC. This problem was exacerbated by the large workload that the CPU was expected to handle, under tight time frames.*
>
> *The relatively loose approach to contracting used by CAC appears to have come into being largely by accident. The resulting CAC contracting system was deficient in numerous areas, placing too much responsibility on poorly or untrained staff.*
>
> *We believe that the findings of the KPMG reviews are the result of several years of "errors and omission", rather than deliberate acts to circumvent the proper process.*
>
> *With respect to the activities of Mr. Brazeau, we do not find an overall pattern indicative of general disregard for CAC policies and tolerated practices.*
>
> *At the same time, for some contracts handled by Mr. Brazeau there is sufficient evidence to conclude, on a balance of probabilities, that there were breaches of procurement policies that went beyond the already lax CAC practices:*
>
> *- Manipulation of evaluations to achieve a specific result;*
>
> *- Breach of the Conflict of Interest and Post-Employment Code for the Public Service; and*
>
> *- Breach of the Code of Conduct of CAC.*
>
> . . .

[91] In his testimony, Mr. Marshall stated that the conflict of interest issue was the most important ground for termination. In his opinion, the grievor betrayed the trust of the public service by sending contracts to a firm with which he had a personal relationship. He also added that this is a case where other firms that were supposed to be able to rely on a fair process were not given a fair chance to obtain contracts.

[92] Mr. Marshall also reacted strongly to the letter that the grievor sent him on October 24, 2005. First, he was shocked that the grievor took the position that he had always carried out his work in accordance with the CAC's policies, and he added that the fifth paragraph of the letter really "got to him." From his perspective, the grievor's claim that he was not an expert in contracting and that he relied on the CPU to ensure that the rules and policies were followed reveals a person who has violated moral and ethical values and a person in whom trust should not be placed in contracting or finance matters. He stated that the grievor washed his hands of his responsibilities for those contracts and that such an attitude was inappropriate.

[93] In the context of the adjudication of the grievance, the grievor's representative asked Larry Lancefield, a forensic accountant, to review KPMG's reports, the ARC's report, the contracting policies and the applicable codes of ethics and to provide his opinion on the ARC's findings and on the grievor's conduct.

[94] The respondent filed an objection on the admissibility of Mr. Lancefield's report and testimony. Counsel for the respondent was alleging mainly that Mr. Lancefield was not an expert in government contracting, that his report contained opinions on questions of facts that were not expert opinions and that the report was being used as backdoor evidence based solely on hearsay.

[95] After reading the report, I decided to allow the introduction of Mr. Lancefield's report and his testimony into evidence. In my oral ruling, I indicated that although I agreed in part with the respondent's counsel, part of Mr. Lancefield's report seemed admissible and relevant. I will summarize the evidence given by Mr. Lancefield that has a certain degree of relevance. I also qualified Mr. Lancefield as an expert in forensic accounting.

[96] In Mr. Lancefield's opinion, an organization driven by revenue objectives, such as the CAC, needs a strong and effective control unit. His understanding is that this was the CPU's role. He stated that revenue drivers and compliance monitors need to be segregated and that compliance monitors need to be sufficiently staffed, trained and supported, which was not the case at the CAC. In his report, Mr. Lancefield concludes as follows:

> *- After CAC restructuring there was an inherent conflict between the demands on Projects Managers to achieve revenue targets and*

> *the core value of "responsiveness" versus adherence to government contracting policies and Codes of Conduct.*
>
> *- CAC lacked the expertise, experience and understanding needed to manage contracting services.*
>
> *- CPU, CAC's control overseer lacked the staffing, training and experience needed to ensure the compliance with government contracting policies and Codes of Conduct.*

[97] Mr. Lancefield also gave his opinion with respect to the grievor's conduct. He stated that in his experience, when there are concerns about compliance with contracting policies and a potential conflict of interest, the conflict of interest and the policy compliance issues are usually considered together in assessing a person's motivation in breaching a policy or not complying with it. When assessing motivation, there is usually a personal benefit. In this case, he sees no evidence whatsoever of a personal benefit. For him, this does not add up. In a conflict of interest, the person typically puts himself or herself in a position where he or she can derive personal benefits.

D. The remedial jurisdiction

[98] Just before the final arguments, the respondent raised a jurisdictional issue with respect to my remedial jurisdiction, should I decide to rescind the termination. The respondent argued that subsequent to the termination, the grievor's reliability status had been revoked and that it bars me from ordering the reinstatement since a reliability status is a prerequisite to employment in the public service. The following evidence with respect to that issue was presented.

[99] The respondent produced a letter dated May 10, 2007, informing the grievor, who was then employed by NR Can, what his reliability status had been revoked and that as a consequence, his employment with NR Can was terminated as of May 9, 2007.

[100] Mr. Quevillon testified that reliability status was a prerequisite for employment in any position in the public service. He also added that there is a gradation in the different security levels, which start from the reliability status and follows with three different levels of security clearance. He added that reliability status being the lowest security level, the revocation of a reliability status implies the automatic revocation of a security clearance. In cross-examination, the grievor's representative asked Mr. Quevillon if it was true that, under the security policy, a security clearance could only be revoked by the Deputy Head. Mr. Quevillon answered that he was not an expert

on that matter but that he had heard of that assumption. When asked if he could enumerate the requirements for each level, he replied that his knowledge of the policy was insufficient to answer that question.

[101] The grievor, for his part, introduced a security-screening certificate dated 2001, which indicates that he was granted a Level II security clearance from December 20, 2000 to December 20, 2010. In cross-examination, he confirmed that after his termination by NR Can on May 9, 2007, he had neither received any document informing him that his security clearance had been revoked nor been informed that he still had his security clearance despite the revocation of his reliability status.

IV. Summary of the arguments

A. For the respondent

1. The suspension

[102] The respondent submitted that the grievance contesting the suspension is moot, given that the termination was retroactive to the original date of the suspension and that, according to paragraphs 7(1)(*e*) and 12(1)(*c*) of the *Financial Administration Act*, the respondent has the authority to retroactively terminate the grievor's employment.

[103] In the alternative, the respondent submitted that I have no jurisdiction over that grievance since the suspension was administrative in nature and that under section 209 of the *PSLRA* I can only adjudicate disciplinary actions.

[104] The respondent submitted that the suspension was clearly administrative in nature as it was imposed pending the conclusion of the investigation. For it to have been disciplinary, it would have had to have constituted the respondent's final response to the grievor's wrongdoing. Counsel for the respondent referred to the suspension letter and to the testimony of Mr. Marshall, who stated that the allegations against the grievor were very serious and that the situation had been dragging on too long. Consequently, he decided to change the status of the suspension to a suspension without pay until the investigation into potential misconduct was finalized. Counsel for the respondent also referred to Mr. Marshall's testimony that no final decision had been made at that point and that had the ARC concluded that there had been no wrongdoing, the grievor would have been reinstated with full pay and benefits. Counsel for the respondent submitted that the qualification of the suspension as administrative or disciplinary depended on the respondent's intention in suspending

the grievor and referred me to the Federal Court's ruling in *Attorney General of Canada v. Basra*, 2008 FC 606.

[105] In the further alternative that I found the suspension to be of a disciplinary nature, the respondent submitted that it had reasonable grounds to suspend the grievor under the circumstances. The allegations were serious, and it was within the Deputy Minister's authority under the *Financial Administration Act* to preserve the integrity and reputation of the ARC pending the completion of its report.

2. Termination of employment

[106] The termination letter refers to the violation of several policies and outlines three specific grounds for termination. As mentioned earlier, the respondent dropped the third ground for termination, which relates to false invoicing and false contract periods. Counsel for the respondent submitted that each ground for termination need not be established and referred me to *McIntyre v. Treasury Board (Revenue Canada - Customs and Excise)*, PSRB File No. 166-2-25417 (19940718).

[107] For the respondent, the most serious ground was the conflict of interest issue. Counsel for the respondent recalled to that effect the testimony of Mr. Marshall.

[108] By engaging in procurement and contracting activities involving Abotech, the grievor placed himself in a position of conflict of interest, given his family and personal relationship with Mr. Smith. The grievor should have avoided any dealings within his professional duties with Abotech and Mr. Smith and should have disclosed his family relationship to his superiors.

[109] The grievor breached the *Conflict of Interest and Post-employment Code for the Public Service*, the *Values and Ethics Code for the Public Service*, which replaced the *Conflict of Interest and Post-employment Code for the Public Service* as of June 19, 2003, the PWGSC's *Ethics Program* and its *Statement of Ethical Values,* and the CAC's *Code of Ethics and Professional Conduct*.

[110] Those rules of conduct were well-established and were brought to the grievor's attention mainly through his offer-of-employment letters, which referred to the obligation to observe the *Conflict of Interest and Post-employment Code for the Public Service* and the *Values and Ethics Code for the Public Service*.

[111] Even in the absence of a specific code of conduct, there exists a code of common sense that imposes rules of ethics on public service employees, which prohibit contracting with family members. In that regard, counsel for the respondent referred to the testimonies of Mr. Taylor and Mr. Marshall and to *Gannon v. Treasury Board (National Defence)*, 2003 PSSRB 32.

[112] The evidence clearly established that the grievor was extensively involved in numerous contracting files (at least 12 projects) involving Abotech and Mr. Smith. The grievor's conduct was not an isolated incident but rather a series of incidents that occurred many times over a significant period and involved huge amounts of money.

[113] The respondent submitted that there was nothing that the grievor could have said to the ARC that would have mitigated the type of conflict on interest situation he was in, and that such behaviour is cause for termination.

[114] Moreover, the grievor's lack of forthrightness during the investigation and his misleading of the ARC are determining aggravating factors. Any chance to restore trust or to mitigate the seriousness of the grievor's wrongdoing evaporated with his response to the question Mr. Quevillon asked him about the extent of his relationship with Mr. Smith. When that question arose, the grievor chose to lie. The grievor lied a second time during the investigation, when he stated that he had divulged his relationship with Mr. Smith to his superior, Mr. Taylor. As the grievor admitted during the hearing, those statements were knowingly inaccurate.

[115] For the respondent, the only logical inferences that can be made from the grievor's statements are that he knew his involvement with Abotech was inappropriate and that he intended to mislead the ARC in an attempt to cover up the seriousness of his behaviour.

[116] During his testimony, the grievor "tried to come clean". He admitted that he should not have been involved in contracting activities with Abotech, that he should have disclosed his family relationship with Mr. Smith to his superiors and that the answers that he gave in the course of the investigation were not truthful. Counsel for the respondent submitted that those admissions were made for the first time at the hearing and that they constituted an act of contrition of convenience that came too late in the process. In that regard, counsel for the respondent referred to *Francis v.*

Treasury Board (Solicitor General - Correctional Service Canada), PSSRB File No. 166-02-24111 (19931007).

[117] Counsel for the respondent referred to several cases about the seriousness of conflict of interest and on the appropriateness of severe penalties usually imposed: *Atkins v. Treasury Board (Ministry of Transport)*, PSSRB File No. 166-02-889 (19740321); *Threader v. Canada (Treasury Board)*, [1987] 1 F.C. 41; *Lalla v. Treasury Board (Industry, Science and Technology)*, PSSRB File No. 166-02-23969 (19940113); *McIntyre v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File No. 166-02-25417 (19940718) (application for judicial review dismissed in [1996] F.C.J. No. 900 (QL)); *Blair-Markland v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-28988 (19991103); *Armstrong v. Treasury Board (Public Works and Government Services Canada)*, 2000 PSSRB 29; *Oliver v. Canada Customs and Revenue Agency*, 2003 PSSRB 43 (application for judicial review dismissed in 2004 F.C. 1462); and *Assh v. Canada (Attorney General)*, 2006 FCA 358.

[118] With respect to the second ground for termination, counsel for the respondent submitted that he had established that the grievor manipulated the procurement process to facilitate the awarding of contracts to specific contractors.

[119] Counsel for the respondent submitted that the grievor's conduct constituted a violation of the Treasury Board's *Contracting Policy* and the code of common sense and argued that directing contracts to a specific firm was clearly in violation of the fundamental principle of fairness and equity required in government contracting activities.

[120] Counsel for the respondent submitted that in light of the evidence and the applicable principles, the grievor's termination should be upheld. The wrongdoings are serious and were not isolated and the grievor showed no understanding or real remorse for his actions despite his convenient act of contrition before the adjudicator. Based on all the circumstances and on the grievor's lack of forthrightness during the investigation, counsel for the respondent submitted that the grievor had irrevocably severed the bond of trust required to maintain his employment.

3. Objection with respect to the remedial jurisdiction

[121] In the alternative that I conclude that the termination was too harsh a penalty, counsel for the respondent submitted that I have no jurisdiction to reinstate the

grievor, given that his reliability status was revoked and that his later employment at NR Can was terminated as a consequence of that revocation. Since the reliability status was the lowest level required to hold any position in the public service, the reinstatement of the grievor was legally impossible. Counsel for the respondent argued that and referred me to *Zhang v. Treasury Board (Privy Council Office)*, 2005 PSLRB 173, and to *Hillis v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 151.

[122] Counsel for the respondent further suggested that I remain seized of the issue of remedy so that the parties can address the issue of mitigation.

B. For the grievor

1. The suspension

[123] The grievor recognized that the initial suspension with pay imposed on him on September 24, 2004, was an administrative measure. The grievor submitted that when the respondent changed the status of the suspension to a suspension without pay on October 17, 2005, based on KPMG's findings, the suspension became disciplinary. The suspension was based on KPMG's first two reports, which presented findings related to breaches of contracting rules and manipulation of the procurement process to facilitate directing contracts to specific firms.

[124] The grievor's representative referred to the letter of suspension and to Mr. Marshall's testimony, in which he indicated that based on the evidence, he could no longer tolerate keeping the grievor on the payroll until the investigation into potential misconduct was completed. The grievor submitted that the intention in changing the status of the suspension was punitive and disciplinary as it was a reaction to the seriousness of the allegations. The grievor's representative concluded on that issue that at the time the suspension was imposed there was insufficient evidence to justify it.

2. Termination of employment

[125] The grievor's representative submitted that this case was one of fairness. She insisted that the grievor is not arguing that there were no conflicts of interest or appearances of conflicts of interest "every time he touched those files involving Abotech from the beginning." The grievor's representative argued that the grievor's conduct has to be analyzed within the particular context of the CAC's activities and its

fundamentally flawed approach to contracting, as it was recognized by KPMG and the ARC. The grievor should not be held responsible for that systemically flawed approach.

[126] The grievor had no experience or training in contracting laws, regulations, standards or directives. His area of expertise and strength was marketing, and he was very good at it. The grievor learned the contracting process and rules on the job from the CPU manager, from Mr. Burwash and from other colleagues on an as-needed basis.

[127] Both the CPU and the PM team were overworked and understaffed for the growing volume of work at the CAC. The grievor and the other project managers believed that when the CPU gave them the green light on a project, it meant that everything complied with the contracting rules and regulations.

[128] There was constant pressure on the consultants to generate revenue and to satisfy clients. Speed and efficiency were the common denominators at the CAC. Speed in carrying out the procurement process and awarding contracts was the principal characteristic that distinguished the CAC from the procurement and contracting services provided by PWGSC.

[129] The grievor was a very efficient project manager and a hard worker who carried a third of the total contracts generated by the CAC — $45 million worth of complex contracting projects. He contributed significantly to the financial stability of the CAC.

[130] On the question of whether the respondent proved that the grievor manipulated the procurement process in directing the three contracts at issue to specific firms, the grievor's representative submitted that the respondent did not meet its onus of proof. She submitted that the evidence is inconclusive with respect to the grievor's level of involvement in each contracting project, especially concerning the elaboration of the statements of work, the evaluation criteria and the actual evaluation of bids that the grievor performed.

[131] The grievor's representative also submitted that there is contradictory and inconclusive evidence on whether bid evaluations were reasonable regarding the contracts awarded to Abotech and Valsar. Concerning the contract awarded to Intoinfo, she submitted that the evidence was inconclusive. She relied on Mr. Burwash's statements and further submitted that if there was doubt, it should benefit the grievor.

[132] Regarding the allegation of conflict of interest, the grievor admitted during the hearing that he made a very big mistake in assuming that he could treat his professional relationship with Mr. Smith like any other relationship he had with other contractors. The grievor believed that his relationship with Mr. Smith was not a close family relationship that had to be disclosed. Moreover, the grievor thought that if he treated Abotech the same way that he treated other contractors, there would be no problems. The grievor continued to maintain that mistaken belief throughout his employment at the CAC.

[133] Regardless of his good intentions, the grievor recognizes that he should have disclosed his blood relationship with Mr. Smith to Mr. Taylor or to Mr. McCann.

[134] Concerning the grievor's behaviour during the investigation, his representative submitted that following the leaked information to the press, the grievor's frustration and perception that he would not receive fair treatment led him to not tell the complete truth to the ARC about his relationship with Mr. Smith. The grievor's representative submitted that the grievor demonstrated poor judgement in his reaction to what he perceived as the respondent's bad faith.

[135] The grievor's representative submitted that there are important mitigating factors to consider in this case.

[136] I was referred to the CAC's fundamentally flawed approach to contracting and to the inherent potential conflict of interest that exists between the revenue generation and client satisfaction cultures and the need for control policies. The grievor generally complied with the culture, the practices and the rules that were in place at the CAC and should not be held responsible for the CAC's systemically flawed approach.

[137] Despite the RCMP's investigation and the massive forensic investigation, no fraud or personal benefit of any kind was discovered. The grievor's representative further submitted that the grievor has 15 years of service with the public service with an exemplary performance record. She also submitted that I should take into account as a mitigating factor the grievor's admission and recognition that he should not have been involved with the Abotech files and that he should have disclosed his relationship with Mr. Smith to his superiors.

[138] The grievor's representative emphasized Mr. Taylor's statements, in which he confirmed that, despite the importance of the rules about conflict of interest, he believed that the grievor was capable of learning from his mistakes and that he would still be willing to work with him in the future.

[139] The concept of discipline should be corrective and progressive as opposed to punitive. From the grievor's perspective, the letter of termination clearly established the respondent's intent to punish him without considering the mitigating factors.

[140] The grievor's representative submitted that there is a long line of cases similar to this one where a lesser penalty was found to be appropriate. I was referred to *Easton v. Canada Customs and Revenue Agency*, 2001 PSSRB 95; *Demers v. Treasury Board (Revenue Canada, Taxation)*, PSSRB File Nos. 166-02-13980 and 13990 (19830912); and *Bastie v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-22285 (19930909).

[141] The grievor's representative submitted that the cases referred to by the respondent are distinguishable from this case. In *Oliver*, the grievor continued to prepare tax returns for personal benefit after having been advised by the respondent to stop his activities. In that case, there were no mitigating factors. The grievor's representative argued that the *McIntyre* decision, which upheld the termination, is out of step with other cases from that period. In *Blair-Markland*, the employee went beyond the assigned duties of her employment to do a favour for a relative and, nevertheless, the penalty at issue was a 20-day suspension.

3. Objection with respect to the remedial jurisdiction

[142] On the issue of my jurisdiction to order reinstatement, the grievor's representative argued that the revocation of the grievor's reliability status did not imply a revocation of his security clearance. Since it was not established that he has lost his security clearance, which is deemed valid until September 20, 2010, I therefore have jurisdiction to order the grievor's reinstatement.

[143] The grievor's representative, like counsel for the respondent, suggested that I retain jurisdiction on remedy should I allow the grievance.

C. Reply of the respondent

[144] Counsel for the respondent commented on the cases referred to by the grievor's representative. He submitted that in *Easton* and *Bastie*, the circumstances were different and the misconduct was an isolated incident. In *Demers*, there was a clear admission of wrongdoing and responsibility and no attempt was made to mislead the employer during the investigation.

V. Reasons

[145] There are two grievances to be decided. With respect to the grievance contesting the suspension without pay, I must first determine if it is adjudicable. If I conclude that it is adjudicable, I must determine if it is moot, given that the termination was retroactive to the initial date of the suspension. If necessary, I will determine if the suspension was reasonable in all circumstances.

[146] With respect to the termination, I must determine if the grievor's alleged misconduct was established and, if so, determine whether termination was the appropriate penalty.

A. The suspension

[147] I will first deal with the issue of my jurisdiction over the grievance relating to the suspension without pay imposed on the grievor on October 17, 2005. That suspension was subsequent to the original suspension with pay imposed on September 24, 2004.

[148] Paragraph 209(1)*b*) of the *PSLRA* provides that an employee may refer to adjudication a grievance related to "a disciplinary action resulting in termination, demotion, suspension or financial penalty."

[149] In *Basra*, the Federal Court quashed a decision in which the adjudicator concluded that an indefinite suspension without pay pending a disciplinary investigation was adjudicable under paragraph 209(1)(*b*) of the *PSLRA*. In its decision, the Court concluded, at page 10, the following:

. . .

> *In this case, the Adjudicator considered that the existence of a disciplinary investigation, and the fact that the applicant had been suspended without pay, was sufficient to give him jurisdiction over*

> *the matter under paragraph 209 (1)b) of the PSLRA. However, the Adjudicator did not consider, as he is directed to by the jurisprudence, whether the employer's intention, in suspending the applicant, was to punish him. Rather, it appears that the Adjudicator merely considered that, due to the length of time the investigation was taking, the suspension became disciplinary by default. Therefore, I conclude that this is a serious error, as the Adjudicator applied the incorrect test, which is sufficient in itself to warrant the intervention of this Court. . . .*

. . .

[150] From my understanding of the *Basra* decision, the administrative or disciplinary nature of a suspension is to be assessed based on the employer's intention when it imposed the suspension.

[151] In this case, the suspension with pay imposed on September 24, 2004, was clearly administrative in nature. The nature of the second suspension imposed on October 17, 2005, appears to me as mixed. The change in the grievor's status from being suspended with pay to being suspended without pay arose after KPMG's findings. As Mr. Marshall wrote in the suspension letter, "On the basis of the evidence available to date, I have determined that this Department can no longer tolerate keeping you on the payroll until such time as our investigation into potential misconduct is finalized."

[152] While it is clear from the evidence that at that point the investigation had not been completed, the change in the status of the suspension raises a question as to the real intent behind it. Since the grievor had already been removed from the workplace for almost a year pending the completion of the investigation, why did it become necessary to change the monetary element of the suspension? I infer from the letter of suspension and from Mr. Marshall's testimony that the seriousness of KPMG's findings was a determinative factor for the change of status. Given so, I conclude that the suspension, while it was an interim measure, had a punitive element to it.

[153] I therefore conclude that, in this particular context, the respondent's intention contained a disciplinary component and that the suspension grievance is therefore adjudicable under paragraph 209(1)(*b*) of the *PSLRA*.

[154] Despite that conclusion, I agree with the respondent's submission that the grievance regarding the suspension is moot since the termination was imposed retroactively to the original date of the suspension without pay.

B. The merits of the termination

[155] I must now determine whether the grievor committed the alleged misconduct and, if so, assess the appropriateness of the penalty.

1. First ground for termination – conflict of interest

[156] The *Conflict of Interest and Post-Employment Code for the Public Service*, adopted by the Treasury Board, and the *Values and Ethics Code for the Public Service*, which replaced the *Conflict of Interest and Post-employment Code for the Public Service* in June 2003, were clearly applicable to the grievor and were brought to his attention in his offer-of-employment letters for different assignments.

[157] The *Conflict of Interest and Post-employment Code for the Public Service* contains clear provisions on the responsibility of public service employees regarding conflict of interest:

> . . .
>
> ***Application***
>
> *5. In keeping with the principles described below, each employee is responsible for taking such action as is necessary to prevent real, potential or apparent conflicts of interest. The employee is also required to observe any specific conduct requirements contained in the statutes governing his or her particular department and the relevant provisions of legislation of more general application such as the Criminal Code, the Canadian Human Rights Act, the Privacy Act, the Financial Administration Act and the Public Service Employment Act.*
>
> ***Principles***
>
> *6. Every employee shall conform to the following principles:*
>
> > *a) employees shall perform their official duties and arrange their private affairs in such a manner that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced;*
> >
> > *b) employees have an obligation to act in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law;*
> >
> > . . .
> >
> > *d) on appointment to office, and thereafter, employees shall arrange their private affairs in a manner that will prevent real, potential or apparent conflicts of interest from arising, but if such a conflict does arise between the private interests of an employee and the official duties and responsibilities of that*

> *employee, the conflict shall be resolved in favour of the public interest;*
>
> . . .
>
> ***Methods of compliance***
>
> *16. An employee complies with the Code in the following ways:*
>
> *(a) avoidance: by avoiding or withdrawing from activities or situations that would place the employee in a real, potential or apparent conflict of interest relative to his or her official duties and responsibilities;*
>
> . . .
>
> ***Avoidance of preferential treatment***
>
> *30. Employees must not accord preferential treatment in relation to any official matter to family members or friends, or to organizations in which the employee, family members or friends have an interest. Care must be taken to avoid being placed, or appearing to be placed, under obligation to any person or organization that might profit from special consideration by the employee.*
>
> . . .
>
> ***Failure to comply***
>
> *33. An employee who does not comply with the measures described in Parts I and II is subject to appropriate disciplinary action up to and including discharge.*
>
> . . .

[158] The *Values and Ethics Code for the Public Service*, which replaced the *Conflict of Interest and Post-Employment Code for the Public Service*, contains similar provisions:

> . . .
>
> ***Objectives of this Code***
>
> *The Values and Ethics Code for the Public Service sets forth the values and ethics of public service to guide and support public servants in all their professional activities. It will serve to maintain and enhance public confidence in the integrity of the Public Service. The Code will also serve to strengthen respect for, and appreciation of, the role played by the Public Service within Canadian democracy.*
>
> . . .
>
> ***Public Service Values***
>
> *Public servants shall be guided in their work and their professional conduct by a balanced framework of public services values: democratic, professional, ethical and people values.*
>
> . . .

Ethical Values*: Acting at all times in such a way as to uphold the public trust.*

- *Public servants shall perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.*

. . .

Public Servants

This Code forms part of the conditions of employment in the Public Service of Canada. At the time of signing their letter of offer, public servants acknowledge that the Values and Ethics Code for the Public Service *is a condition of employment. All pubic servants are responsible for ensuring that they comply with this Code and that they exemplify, in all their actions and behaviours the values of public service. . . .*

. . .

Measures to Prevent Conflict of Interest

Avoiding and preventing situations that could give rise to a conflict of interest, or the appearance of a conflict of interest, is one of the primary means by which a public servant maintains public confidence in the impartiality and objectivity of the Public Service.

These Conflict of Interest Measures are adopted both to protect public servants from conflict of interest allegations and to help them avoid situations of risk. Conflict of interest does not relate exclusively to matters concerning financial transactions and the transfer of economic benefit. While financial activity is important, it is not the sole source of potential conflict of interest situations.

It is impossible to prescribe a remedy for every situation that could give rise to a real, apparent or potential conflict. When in doubt, public servants should seek guidance from their manager, from the senior official designated by the Deputy Head, or from the Deputy Head, and refer to the Public Service Values stated in Chapter 1 as well as the following measures as benchmarks against which to gauge appropriate action.

Public servants have the following overall responsibilities:

a. In carrying out their official duties, public servants should arrange their private affairs in a manner that will prevent real, apparent or potential conflicts of interest from arising.

. . .

Methods of Compliance

. . .

There will be instances, however, where other measures will be necessary. These include the following:

> *a. avoiding or withdraw from activities or situations that would place the public servant in real, potential or apparent conflict of interest with his or her official duties. . . .*
>
> . . .
>
> ***Avoidance of Preferential Treatment***
>
> . . .
>
> *When making decisions that will result in a financial award to an external party, public servants shall not grant preferential treatment or assistance to family or friends.*
>
> . . .

[159] In March 2003, the CAC adopted a new *Code of Ethics and Professional Conduct.* The following provisions are relevant:

> . . .
>
> ***Purpose***
>
> *The CAC Code of Ethics and Professional Conduct is intended to promote ethical and professional behaviour by CAC members (staff and management). It acts as a guide to conduct in workplace and professional relationships and indicates to clients, government and the public, the high standards that CAC expects its members to meet in discharging their responsibilities. Its ultimate objective is to foster a positive workplace environment within CAC and to inspire the trust and confidence of clients, the government and the public in CAC as an organization and in its individual members.*
>
> ***Scope***
>
> *The Code reflects the fact that since CAC is part of the Public Service, all its members bear the responsibilities of public servants and that, in addition, many are also professional auditors and consultants with specific responsibilities to clients. The Code is not a set of detailed rules but, rather, a set of high-level principles of broad and continuing application that may require interpretation in specific situations. As such, it represents the voluntary assumption of self-discipline by CAC members that goes above and beyond the requirements of the law and governmental and departmental policies. . . .*
>
> . . .
>
> *1. Individual Responsibility:*
>
> *We will act with integrity, honour our commitments and accept accountability for our actions.*
>
> . . .
>
> *12. Conflict of interest:*
>
> *We will exercise due diligence before undertaking an assignment to identify possible conflicts of interest that might*

> *impair our professional judgement or could reasonably be thought to do so. If we become aware of such a conflict of interest we will immediately inform the client and will then decide either not to proceed or to proceed only with the client's consent (see references).*

. . .

[160] In *Atkins*, the adjudicator referred, at page 29, to the definition of conflict of interest given by American professor Dean Manning:

. . .

> *Any interest of an individual may conflict at times with any other of his interest. This book however, is concerned with only two interests: one is the interest of the government official (and of the public) in the proper administration of his office; the other is the official's interest in his private economic affairs. A conflict of interest exists whenever these two interests clash, <u>or appear to clash</u>.*
>
> *A conflict of interest does not necessarily presuppose that action by the official favoring one of these interests will be prejudicial to the other, nor that the official will in fact resolve the conflict to his own personal advantage rather than the government's. If a man is in a position of conflicting interests, he is subject to temptation however he resolves the issue. Regulation seeks to prevent situations of temptation from arising. . . .*
>
> *I have underlined the words "<u>or appear to clash</u>" because they go to the root of the problem. It is not sufficient for the public servant or his associates to be convinced of their own innocence and integrity. Nor is it necessary to prove that they have been disloyal to the employer. Even in the absence of evidence of wilful wrongdoing, a conflict of interest or the appearance thereof can be easily recognized by an intelligent citizen as contrary to public policy.*

. . .

> [Emphasis in the original]

[161] In *Lalla*, at page 10, in referring to the standard of conduct of public service employees the adjudicator referred to another relevant case:

. . .

> *I believe the standard expected of a public servant was very well expressed by Chief Adjudicator (as he was then known) Edward B. Jolliffe, Q.C., in his decision issued May 31, 1973, in <u>McKendry</u> (supra) where he wrote as follows:*

> *The essential requirements are that the public servant should serve only one master and should never place himself in a position where he could be even tempted to prefer his own interests or the interests of another over the interests of the public he is employed to serve. Those requirements constitute the rationale of the doctrine that he should avoid a position of apparent bias as well as actual bias, and that he should never place himself in a position where … as Dean Manning puts it … "two interests clash, or appear to clash".*

His words are no less relevant twenty years later.

. . .

[Emphasis in the original]

[162] In *Threader*, the Federal Court of Appeal confirmed that the appearance of a conflict of interest is a basis for disciplinary action in the public service. In response to the parallel argument that was made about the private sector, where an actual conflict of interest has to be proven before discipline can be imposed, the Court wrote the following, at page 10:

. . .

> *I see no real merit in this argument. The Crown is quite entitled to demand different standards of its employees than those prevailing in the private sector. It is not only entitled in law to enjoin its servants from putting themselves in a position of an apparent conflict of interest; the rational for its doing so is patently obvious.*
>
> . . .
>
> *Manifestly, the public service will not be perceived as impartial and effective in fulfilling its duties if apparent conflicts between the private interests and the public duties of public are tolerated.*

. . .

[163] As for the applicable test, the Court also wrote the following, at page 12:

. . .

> *The term "appearance of conflict of interest" is not defined in the Guidelines and the absence of judicial commentary is understandable in view of the position at common law already indicated. The notion of the appearance of a conflict of interest giving rise to legal consequences is entirely modern. Legal consequences normally only flow from reality. However there is a well-established analogue in which mere perception does entail legal consequences. That has to do with the apprehension of judicial bias. In such a case, the question to be asked is:*

> > *Would an informed person, viewing the matter realistically and practically and having thought the matter through, think it more likely than not that the judge, whether consciously or unconsciously, would not decide fairly?*
>
> *While simply stated, its application is by no means easy as evidenced by the decisions in the Canadian Arctic Gas Pipeline Ltd. (In re) and in re National Energy Board Act, [1976] 2 F.C. 20 (CA); reversed [1978] 1 S.C.R. 369. The parallel question . . . to be answered in a case such as this, might be phrased:*
>
> > *Would an informed person, viewing the matter realistically and practically and having thought the matter through, think it more likely than not that the public servant, whether consciously or unconsciously, will be influenced in the performance of his official duties by considerations having to do with his private interests?*
>
> *Such an approach may be equally difficult in its application but it is essential if I am correct in my appreciation that the existence or not of an appearance of a conflict of interest is properly to be determined on an objective, rational and informed basis.*
>
> . . .
>
> [Emphasis in the original]

[164] In *Assh*, the Federal Court of Appeal reaffirmed the test for determining whether a public servant's conduct gives rise to an apparent conflict of interest as set out in *Threader* and discussed the interpretation to be given to the codes relating to conflict of interest:

> *[80] The application of the law to particular facts inevitably requires consideration of its purposes. Accordingly, the application of section 27 must take account of the Code's object of enhancing the public's confidence in the integrity of the public service (section 4) and should be relatively risk-averse in this respect. . . .*
>
> . . .
>
> *[81] . . . By providing that employees must "act in a manner that will bear the closest public scrutiny" (paragraph 6(*b*)), the Code also makes it clear that being subject to a rigorous conflict of interest standard is a condition of public service.*
>
> . . .
>
> *[84] The absence from the Code and from the Veteran Affair's directive of a blanket rule comprehensively and specially dealing with the acceptance of legacies is not, in my view determinative. Codes of conduct are inevitably non-exhaustive works in progress, emphasizing broad principles (including in this case, a prohibition of the transfer of economic benefits of more than nominal value), and responding primarily to problems already encountered. They should be interpreted and applied accordingly.*

. . .

[165] In *McIntyre,* the adjudicator discussed the employee's responsibility to ensure that a conflict of interest does not exist and insisted that "the onus of compliance was squarely on the employee."

[166] In this case, I conclude that, by engaging in contracting activities involving Abotech, given his family relationship with Mr. Smith, the grievor placed himself in a position of at least an apparent conflict of interest, in violation of the *Conflict of Interest and Post-employment Code for the Public Service*, the *Values and Ethics Code for the Public Service*, and the CAC's *Code of Ethics and Professional Conduct*. I conclude that in this case, the grievor's conduct meets the parameters of the objective test set out in *Threader*.

[167] The grievor was subject to a very high standard of conduct. That standard derived from his status as a public service employee, but it also derived from the particular activities of the CAC and from the position he held within the CAC. The CAC was providing contracting services to federal government department and agencies. Contracting in the public service is a sensitive matter and the government's credibility relies on the perception of neutrality, independence and fairness. Consequently, employees who act on behalf of the federal government in contracting bear the responsibility of acting in a manner compatible with those essential principles.

[168] As a principal consultant, the grievor had to comply with that high standard of conduct and scrutiny. I find that as an acting portfolio manager with an important leadership position within the PM team, his responsibility was even more serious and onerous.

[169] The grievor handled several contracts involving Abotech. His family relationship with Mr. Smith may not have been close, but it was still a family relationship that he should have divulged.

[170] The grievor testified that he did not think at that time that his grandmother being the sister of Mr. Smith's mother was a close family relationship that he had to disclose. I am of the opinion that the grievor should have known that his relationship with Mr. Smith was likely to raise at least an appearance of conflict of interest. In the context of his responsibilities, he should have been sufficiently prudent to

acknowledge that his relationship with contractors had to be perceived as being neutral and independent; otherwise, it could raise suspicions.

2. Second ground for termination – manipulation of the procurement process

[171] The Treasury Board's *Contracting Policy* contains the following provisions:

> . . .
>
> ***1. Policy objective***
>
> *The objective of government procurement contracting is to acquire goods and services and to carry out construction in a manner that enhances access, competition and fairness and results in best value or, if appropriate, the optimal balance of overall benefits to the Crown and the Canadian People.*
>
> ***2. Policy statement***
>
> *Government contracting shall be conducted in a manner that will:*
> *(a) stand for the test of public scrutiny in matters of prudence and probity, facilitate access, encourage competition, and reflects fairness in the spending of public funds;*
>
> . . .
>
> ***4. Policy requirements***
>
> . . .
>
> *4.1.3 Whenever practical, an equal opportunity must be provided for all firms and individuals to compete, provided that they have, in the judgement of the contracting authority, the technical, financial and managerial competence to discharge the contract and meet, where appropriate, the objectives established by overall national policies or as required under the* North American Free Trade Agreement, *the* World Trade Organization - Agreement on Government Procurement, *and the* Agreement on Internal Trade*.*
>
> . . .
>
> *4.1.8 Public servants who have been delegated authority to negotiate and conclude contractual arrangements on behalf of the Crown must exercise this authority with prudence and probity so that the contracting authority (the minister) is acting and is seen to be acting within the letter and the spirit of the Government Contracts Regulations, the Treasury Board Contracts Directives and the government's procurement policies, the* North American Free Trade Agreement, *the* World Trade Organization - Agreement on Government Procurement, *and the* Agreement on Internal Trade*.*
>
> . . .

[172] I conclude that the respondent has established on the balance of probabilities that the grievor manipulated the procurement process with respect to the contract

awarded to Abotech and the contract awarded to Valsar in order to direct contracts to those specific firms.

[173] With respect to the NCPC contract awarded to Abotech, I conclude that Abotech was the only contractor proposed to Mr. Onischuk by the grievor. On that matter, I prefer the testimonies of Mr. Koziol and Mr. Onischuk over the grievor's testimony. The testimonies of Mr. Koziol and Mr. Onischuk converged, were neutral and agreed with the personal notes they took during or shortly after the meeting that they had with the grievor. The grievor's testimony was more self-serving and vague since he admitted during cross-examination that he did not recall the specifics of that meeting.

[174] I also infer from all the evidence on that issue that from the beginning, the grievor intended to direct the contract to the client's preferred resource and that he manipulated the process accordingly. I finally conclude that in directing the contract to Abotech, the grievor gave preferential treatment to Abotech, given his family relationship with Mr. Smith.

[175] With respect to the contract awarded to Valsar, I conclude, from the evidence, that the grievor did manipulate the scoring to allow that contractor to be the winning bidder. I find that the numerous unexplained changes on the scoring grid relating to the first three very close bids raise serious questions as to the real basis of the evaluation. In that respect, I prefer Mr. Reed's opinion along with his statement that such changes should have been explained over Mr. Burwash's statement that he simply could not reach any conclusion from the evaluation grid.

[176] With respect to the Intoinfo's contract, I find the evidence to be inconclusive, and therefore I conclude that the respondent did not prove manipulation of the evaluation process. Although both requirements R-2 and R-3 refer to experience with the Web, they are different: R-2 refers to experience developing websites and R-3 refers to experience developing and documenting approaches for Website content mapping. The grievor's note about the scoring of the second bidder refers to the web experience but more precisely to having experience in content mapping. No additional evidence was provided during the hearing about the real meaning of that note, and I find that I cannot infer manipulation of the scoring simply from that note.

[177] I therefore conclude that the grievor manipulated the procurement process to direct two contracts to specific contractors, likely to satisfy the clients' needs and

expectations. The grievor's conduct constituted a violation of the contracting policies and the principle of fairness underlying those policies. I also conclude that because of the grievor's conduct, the other contractors involved in the bidding processes did not get a fair chance to contract with the federal government.

C. Appropriateness of discipline

[178] I must now determine the appropriateness of the penalty.

[179] Brown and Beatty, *Canadian Labour Arbitration, 4th ed.*, discusses the arbitrator's role in assessing the fairness of a particular penalty imposed as follows:

> . . .
>
> *The purpose of their review is to determine for themselves that a sanction is just and reasonable in all the circumstances – that the penalty "fits the crime"(page 7-129)*
>
> . . .
>
> *It is now understood that testing the reasonableness of a disciplinary sanction involves a wide-ranging review of a broad set of circumstances concerning the employee, the employer and the incident itself. (page 7-144)*
>
> . . .
>
> *Consideration is invariably given to the nature of the misconduct, the personnel circumstances of the employee, the way in which the employer has managed the situation or a combination of all three. The employment context and the employee's occupational and professional status often play important roles as well.*
>
> *In an effort to give employers and employees a better sense of the analytic framework they employ, arbitrators have provided checklists of the most important factors that typically organize their deliberations. In an early and often-quoted award, one arbitrator summarized in the following terms those factors that, other things being equal, can offset the gravity of the misconduct:*
>
> > *Is has been held, however, that where an arbitration board has the power to mitigate the penalty imposed on the grievor, the board should take into considerations in arriving at its decision the following factors:*
> >
> > *1. The previous record of the grievor*
> >
> > *2. The long service of the grievor*
> >
> > *3. Whether or not the offence was an isolated incident in the employment history of the grievor*
> >
> > *4. Provocation*

> *5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated*
>
> *6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances*
>
> *7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination*
>
> *8. Circumstances negativing intent, e.g., likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it*
>
> *9. The seriousness of the offence in terms of company policy and company obligations*
>
> *10. Any other circumstances which the board should properly take into consideration (page 7-153)*
>
> . . .

[180] Discussing rehabilitative potential and the corrective approach, Brown and Beatty write as follows:

> *The critical question for arbitrators using a corrective approach is the grievor's capacity to conform to acceptable standards of behaviour in the future. To answer this question requires an assessment of the grievor's ability and willingness to reform and rehabilitate himself or herself so that a satisfactory employment relationship can be re-established. In a word, an arbitrator must decide whether the person is "redeemable". On this view, as one arbitrator pointed out, the checklist of mitigating factors are but general circumstances of general considerations which bear upon the employee's future prospects for acceptable behaviour, which is the essence of the whole corrective approach to discipline.*
>
> *In assessing whether a viable employment relationship can be re-established, arbitrators put great weight on whether the employee has tendered a sincere apology and/or expressed real remorse. The assumption is that employees who do so recognized the impropriety of their behaviour and are likely to be able to meet the employer's legitimate expectations.*

[181] The issue of conflict of interest in the public service has been recognized as a serious offence by the jurisprudence, more particularly in *Oliver* and *McIntyre* where termination was upheld and in *Demers* where a one-year suspense was substituted to the termination. In each of the cases, adjudicators applied the mitigating and aggravating factors on a case-by-case basis.

[182] I will now assess the aggravating and mitigating factors that I find are relevant in the present case.

[183] There are two mitigating factors that I find relevant. Firstly, there was neither proof nor any allegation made that the grievor received any monetary compensation or that he otherwise benefited personally from his conduct. Secondly, the grievor has 15 years of service in the public service with an untarnished record.

[184] With respect to the grievor's admission of responsibility regarding the conflict of interest issue, I find that it came too late in the process to be considered as a mitigating factor. With respect to the grievor's understanding that his family relationship with Mr. Smith's was not a close family relationship that he had to disclose, I find it cannot mitigate the seriousness of his misconduct. The grievor should have known the extent of his obligations under the codes of conduct. In case of uncertainty, he should have sought advice from his superior. Finally, if the grievor thought that his relationship with Mr Smith was not problematic, why was he so reluctant to disclose it when questioned by the ARC?

[185] There are also important aggravating factors that have to be considered.

[186] I find that the grievor's misconduct with respect to the appearance of the conflict of interest, the manipulation of the procurement process and the preferential treatment given to Abotech in the NCPC's file, was serious, particularly in the context of the CAC's mandate to engage in contracting activities on behalf of the federal government. I also consider the leadership position that the grievor held within the CAC.

[187] In my opinion, avoidance of conflict of interest or appearance of conflict of interest goes to the root of the integrity required from public service employees who carry out contracting activities on behalf of the government. Integrity and the perception of integrity are essential to maintaining the government's credibility when engaging in contracting activities with private contractors. Furthermore, compliance with the principles of fairness enunciated in the contracting policies is essential to ensuring the legality and credibility of competitive procurement processes.

[188] The grievor's misconduct relates to the core business of the CAC and to the essence of his duties as a consultant. In my opinion, the grievor cannot rely on the

CAC's flawed practices or on the heavy workload to excuse his conduct. He should have known that placing himself in an apparent conflict of interest and manipulating the procurement process was beyond any acceptable practices. His misconduct undermines the public's confidence in the integrity of the public service in general and in the public service's contracting in particular.

[189] As for the recurrence of the offences, the grievor's conduct was not an isolated incident. His involvement with Abotech lasted over a two-year period and involved 12 high-value contracts. I find that to be an aggravating factor. As for the manipulation of the procurement process, it involved two different projects.

[190] The grievor's lack of forthrightness during the respondent's investigation constitutes, from my perspective, a determinant factor with regard to the rehabilitation of the grievor and the necessary bond of trust. On two occasions, the grievor made inaccurate and misleading statements with respect to his family relationship with Mr. Smith. He made those statements knowing that they were inaccurate. Despite the fact that I can understand the grievor's frustration and exasperation over the length of the investigation and the presumed leak to the press, I find it insufficient to justify his lack of forthrightness with the ARC. He held a position of trust, and he had the responsibility to cooperate in a forthright manner with the ARC.

[191] I find the principles outlined in the following passage in *Oliver* to be relevant and applicable to this case:

> . . .
>
> *The recognition of culpability or some responsibility for his or her actions is a critical factor in assessing the appropriateness of the discipline. This is because the rehabilitative potential of the grievor is built on a foundation of trust, and trust starts with the truth. If a grievor has misled his employer, failed to cooperate with the legitimate investigation of allegations on conflict of interest, and refuses to admit any responsibility in the face of evidence showing wrongdoing, then re-establishing the trust necessary for an employment relationship is impossible.*
>
> . . .

[192] Considering all the circumstances, I believe that the grievor has irrevocably severed the bond of trust and integrity required of him to be reinstated.

[193] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

Order

[194] The grievances are dismissed.

August 5, 2008.

Marie-Josée Bédard,
adjudicator