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Files: 166-02-34325 to 34327

Citation: 2009 PSLRB 19



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

SANJEEV (SONNY) GILL

Grievor

and

**TREASURY BOARD
(Department of Human Resources and Skills Development)**

Employer

Indexed as

Gill v. Treasury Board (Department of Human Resources and Skills Development)

In the matter of grievances referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Dan R. Quigley, adjudicator

For the Grievor: Jacek Janczur, Public Service Alliance of Canada

For the Employer: Jennifer Lewis, counsel

Heard at Vancouver, British Columbia,
November 6 to 9, 2007, and October 27 to 30, 2008.

REASONS FOR DECISION

I. Grievances referred to adjudication

[1] These proceedings concern three grievances referred to adjudication by Sanjeev (Sonny) Gill (“the grievor”), a former term employee at what was then Human Resources Development Canada (HRDC or “the employer”). The grievor was an investigation and control officer (ICO), classified at the PM-02 group and level, and had been employed by the HRDC since October 15, 2001.

[2] The first grievance (PSLRB File No. 166-02-34326) relates to the grievor’s indefinite suspension without pay, effective April 24, 2003, pending the results of an administrative investigation further to criminal charges filed against him. The grievor requests the following corrective action:

That the suspension end immediately and I be allowed to return to work and that I be reimbursed for all lost wages, benefits, and pension credits, that any reference to this matter be removed from my personnel file, that I be made whole.

[3] The second grievance (PSLRB File No. 166-02-34325) concerns the employer’s decision to revoke the grievor’s Enhanced Reliability Status (ERS), effective August 26, 2003, after reviewing the report of the administrative investigation. The grievor requests the following corrective action: “That my ERS be reinstated [sic] that I be made whole.”

[4] The third grievance (PSLRB File No. 166-02-34327) was filed when the grievor’s employment was terminated on August 26, 2003, following the revocation of his ERS. The grievor requests the following corrective action:

That I be reinstated, that I be made whole. That the guidelines established in the Personal [sic] Security Standard section be followed and immediately instated in the case at hand. That all decisions regarding my termination of employment due to revocation be void ab initio. That I be made whole.

[5] The one-year delay between hearing sessions was because the grievor’s representative was not available due to illness. The next available hearing dates for all parties after November 6 to 9, 2007 session were October 27 to 30, 2008.

[6] Both parties made brief opening remarks. Counsel for the employer called four witnesses and filed 29 exhibits. The grievor’s representative called two witnesses,

including the grievor, and filed seven exhibits. The parties filed two exhibits on consent. The parties requested, and I agreed, that, due to the sensitivity of the evidence concerning the criminal proceedings and the administrative investigation, certain individuals be referred to as Messrs. X and Y and V-1 through V-22.

[7] On April 1, 2005, the *Public Service Labour Relations Act (PSLRA)*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, these references to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (“the former Act”).

II. Summary of the evidence

[8] André Lefebvre is Director General, Investigations and Inquiries Branch, Office of the Privacy Commissioner of Canada. From 2002 to 2007, he was the manager of the Special Investigations Unit, Security, Investigations and Emergency Response, HRDC. Before 2002, Mr. Lefebvre had been employed for 26 years with the Royal Canadian Mounted Police (RCMP).

[9] Mr. Lefebvre identified Exhibit E-1 as an email sent on April 22, 2003, by Jeanine Arsenault, Regional Manager, Human Resources Directorate, BC/Yukon Region, HRDC, to Cathy Lee, Manager, Emergency Preparedness, Security and Information Management, BC/Yukon Region, HRDC, and Daniel Richer, Manager, Labour Relations, HRDC, among others. Ms. Arsenault informed them that Sergeant Dan Russell, of the RCMP’s Indo-Canadian Gang Task Force, had advised Lydia Gledhill, Acting Director, HRDC, Abbotsford, and Claire Turgeon, Team Leader, Joint Compliance Team, that the grievor had been arrested and charged in relation to the February 13, 2003 kidnapping of a drug dealer and that he was awaiting a bail hearing. Mr. Lefebvre stated that Ms. Lee had provided him with a copy of the email.

[10] Mr. Lefebvre identified Exhibit E-2 as notes that he took during a meeting with Sergeant Russell on April 23, 2003. Sergeant Russell informed him that he was investigating a number of unsolved murders that implicated an East Indian organized crime gang. He confirmed that the grievor had been arrested and charged for the February 13, 2003 kidnapping of a drug dealer. The RCMP rescued the victim of the kidnapping, but he had suffered a severe beating. The rescue was deemed necessary since the police thought that the victim was going to be killed. The RCMP had wiretap

conversations and physical surveillance evidence showing that the grievor was associated with the organized crime gang and that he had used his vehicle for the kidnapping. Sergeant Russell also advised Mr. Lefebvre that four Indo-Canadian men involved in the kidnapping were suspects in six unsolved murders.

[11] Mr. Lefebvre testified that, while employed as an ICO, the grievor had access to confidential and privileged information on Canadian citizens. The grievor's association with the organized crime gang posed a threat to Canadian citizens and to the security of the HRDC. The RCMP requested that the HRDC check the grievor's computer to determine if he had run the names of Messrs. X and Y and 22 other persons of interest identified by the RCMP (V-1 through V-22) (Exhibit E-7). The HRDC decided to conduct an administrative investigation, which lasted approximately four months. According to Mr. Lefebvre, it focused on whether the grievor was associated with the organized crime gang and whether the organized crime gang had gained access to the HRDC's data. Mr. Lefebvre testified that the administrative investigation concluded that there was no evidence that the grievor had accessed the HRDC's data or that he had run the names of Messrs. X and Y or V-1 through V-22.

[12] On April 24, 2003, Mr. Lefebvre sent an email (Exhibit E-3) to Mr. Richer and to Gilles Lajoie, National Director of Security Investigations and Emergency Response, HRDC, recommending that the grievor be suspended immediately without pay. His recommendations for doing so were

- to determine whether the grievor was associated with the organized crime gang;
- to point out (for parallelism) the fact that the grievor had access to privileged and confidential information on Canadian citizens;
- to protect the HRDC's assets;
- to determine whether the grievor had leaked any information to Messrs. X and Y and V-1 through V-22; and
- to determine if other associates of the organized crime gang had infiltrated the HRDC's computers and data with the grievor's assistance.

[13] When asked by counsel for the employer if he had used the criteria found in *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*,

2002 PSSRB 9, when he recommended that the grievor be suspended immediately without pay, Mr. Lefebvre replied that he had not. When he was asked if the grievor had presented a “reasonable” risk by being at the workplace, Mr. Lefebvre responded as follows: “Yes, as he had access to large quantities of privileged information on Canadian citizens.” He testified that privileged information could be a person’s social insurance number (SIN), home address, surname and given names, birth date and employment and financial records and details of social benefits such as welfare claims, Employment Insurance (EI), etc.

[14] Mr. Lefebvre identified Exhibit E-7 as a letter dated June 17, 2003 that he received from Inspector D. Henderson, Officer in Charge (OIC) Lower Mainland, Homicide Section, E Division, Major Crime Section, RCMP. The letter contained, among other things, evidence that would be presented at the grievor’s trial. Mr. Lefebvre took some of this information into account when he recommended that the grievor’s ERS be revoked. The letter states, in part, the following:

...

INFORMATION KNOWN REGARDING Sanjeev Singh GILL

During the investigation Project E - DECREASE Mr. GILL was a close personal friend of the primary targets of the investigation being [V-15, V-19, V-9 and V-22]. These subjects are primary suspects in several Indo Canadian murders in the lower mainland of BC.

During the course of Project E INTEGRATE evidence will be presented during the trial that Mr. GILL was in communication with [Messrs. X and Y], more specifically planning the kidnapping and possible murder of [V-13]. Evidence also indicates Mr. GILL also conducted tasks for [Messrs. X and Y] one example being picking up weapons and portable radio’s prior to the kidnapping. Physical surveillance conducted of the primary targets [Messrs. X and Y] confirms the identity of Mr. GILL and his participation in the planning of the kidnapping. When the [Messrs. X and Y] were arrested with the victim numerous vehicles believed involved in the kidnapping were seized and subsequently searched. Located in the interior of Mr. GILL’s vehicle was a large blood stain consistent with the victim being transported in Mr. GILL’s vehicle. Forensic examination of the exhibits is continuing.

A search warrant was granted for Motor Vehicle Branch records (pictures) for Mr. GILL. A photo line up was shown the victim of the kidnapping and he identified Mr. GILL as

the driver of the vehicle used to initially transport the victim to the compound on Kent Street in Vancouver.

Investigators at this time are continuing their investigation into Mr. GILL and his association to the criminal element within the Indo Canadian Community. During the course of two major investigations Mr. GILL has surfaced as a close associate of known suspects in numerous murders and for lack of a better description Indo Canadian organized crime figure within the lower mainland.

It is requested the following names be checked on Mr. GILL's computer to determine if he has run these names in the past:

. . .

Sgt RUSSELL is continuing to liaise directly with Special Investigations Section to ensure they are provided sufficient information to determine if in fact information has been leaked and to assist in providing information to further HRDC process to remove Mr. GILL's enhanced security clearance. If further information is required please contact Sgt Dan RUSSELL, Lower Mainland Homicide Section

As previously discussed with Sgt RUSSELL this letter contains sensitive information related to Mr. GILL as well as ongoing police investigations and is not for dissemination. Please contact Sgt RUSSELL if it is required to share this information outside of your investigative team.

. . .

[Sic throughout]

[15] Mr. Lefebvre stated that he accepted the information from the RCMP that the grievor was associated with the organized crime gang and that he was involved in the kidnapping and attempted murder of the drug dealer. He also stated that he was concerned because the grievor may have accessed the HRDC's Special Witness Protection Program database. The grievor could have retrieved information and passed it on to the organized crime gang so that they could locate potential victims.

[16] Mr. Lefebvre stated that a security clearance is a prerequisite for employment in the federal public service and that it is position based; that is, the level of a security clearance associated with a position is that which an employee requires to perform the duties of that position. He further stated that at the HRDC, all positions require at a minimum the ERS level since employees need to access material with a Protected "B" security classification. This level is required because the HRDC's information on

Canadian citizens is sensitive, and if it were leaked to unauthorized sources, it could put a person in serious danger. If an employee is granted an ERS, it allows the employee access to classified information and signifies that the employer has confidence in the employee accessing its data. The HRDC describes Protected “B” material, and how it should be handled, as follows (Exhibit E-14):

Definition	<i>Particularly sensitive, serious injury to individuals.</i>
Examples	<i>Personal, medical, or financial matters.</i> e.g. Personnel Screening Consent and Authorization, pay, test results, character references, conflicts of interest, eligibility for social benefits, etc.
TRANSPORT* and TRANSMISSION* Minimum Requirements By Hand Mail/Courier Facsimile Electronic Mail Storage Minimum Security Zone	<i>Between authorized persons only, depending on need-to-know principle;</i> <i>Double enveloped, gum-sealed, with no security marking on the outer envelope;</i> <i>Secure Fax;</i> <i>Departmental approved system.</i> <i>Monitored open shelving and Central Registry, a locked cabinet and/or security container, approved by Regional Security Officer.</i> <i>Operation or Security Zone.</i>
Destruction Personnel Screening Level	<i>Paper strip-cut shredder approved by Regional Security Officer.</i> <i>Reliability Status</i>

[17] As an ICO, the grievor required an ERS. There are, however, two higher levels of security at the HRDC: Secret-Level II and Top Secret-Level III. An ERS can be granted, denied or revoked by the Departmental Security Officer (DSO), but a Secret-Level II or Top Secret-Level III clearance can be granted, denied or revoked only by the Deputy Head of a Department or by the Canadian Security Intelligence Service (CSIS).

[18] Mr. Lefebvre testified that, before recommending that the grievor be immediately suspended without pay, he had considered reassigning or appointing him to another position within the HRDC. He determined, however, that no other position was possible because even if the grievor were relocated to the mailroom or to a service desk, he would still have access to confidential information on Canadian citizens.

[19] Mr. Lefebvre testified that it was not the kidnapping charge and the grievor's arrest that were detrimental to the HRDC but rather the grievor's association with the organized crime gang since he had access to confidential information on Canadian citizens.

[20] Mr. Lefebvre stated that he conducted the administrative investigation, which began on April 23, 2003 to the best of his abilities. He clarified that he was not investigating the kidnapping charge and the grievor's arrest but whether the grievor had accessed confidential information on Canadian citizens and provided it to the organized crime gang. As well, he had to determine whether the organized crime gang had infiltrated the HRDC's computers with the grievor's assistance.

[21] Mr. Lefebvre admitted that, initially, during internal discussions held on April 22, 2003, there was some confusion as to whether or not the grievor was actually charged with kidnapping and attempted murder. On June 6, 2003, Joel Stelpstra, a staff relations consultant, sent Ms. Gobeil an email (Exhibit E-4) to clarify that the grievor had in fact been formally charged with attempted kidnapping.

[22] On June 24, 2003, the grievor was advised by Nancy Emery, Service Delivery Manager, Corporate Services, HRDC Abbotsford (Exhibit E-5), that he was required to attend a meeting with Messrs. Lefebvre and Lajoie on June 27, 2003 about the nature and impact of the criminal charges against him.

[23] Mr. Lefebvre identified Exhibit E-6 as the typewritten notes of meetings held on June 25, 2003 with Sergeants Russell and Kirby and on June 27, 2003 with Mr. Lajoie, the grievor and Paul Facey, the grievor's bargaining agent representative. Although other persons were interviewed on June 27, 2003 about other matters relating to the grievor (Exhibit E-6), I will only report on the events concerning the grievor's arrest since the other matters are irrelevant.

[24] Mr. Lefebvre testified that the grievor confirmed that the RCMP had arrested him at his residence on April 16, 2003 and that he was held in custody for two weeks. When questioned about Messrs. X and Y, the grievor stated that they were simply acquaintances and that they lived within two blocks of each other but that he had not been in recent contact with them since they were in jail. He also mentioned that he had known them only for one year. He then stated that he was going to follow his lawyer's advice to not discuss his arrest.

[25] Mr. Lefebvre explained to the grievor that he needed more information as to why the grievor had been arrested. He advised the grievor that if he chose not to cooperate, Mr. Lefebvre would have no choice but to determine whether or not the grievor posed a threat to the security of the HRDC. Since the grievor maintained that he was adhering to his lawyer's advice, the meeting ended.

[26] Mr. Lefebvre stated that, after the meeting, he met with Mr. Facey to advise him that he would be available if the grievor changed his mind and decided to explain the events that led to his arrest.

[27] Mr. Lefebvre testified that he relied on the information that the RCMP had provided because it was factual and very specific on dates and times and on how it had been obtained (i.e., wiretap conversations and physical surveillance). He also stated that the RCMP is a trustworthy and credible police organization and that there was no motive for the RCMP to provide the HRDC with false information. He mentioned that he had not seen the RCMP's evidence since its (the RCMP's) investigation was ongoing. Mr. Lefebvre also stated that after the June 27, 2003 meeting he was unable to determine the degree of threat the grievor posed to the HRDC's security since the grievor would not discuss the events leading to his arrest. He stated: "I tried to counterbalance the grievor's statements about [Messrs. X and Y] and the RCMP's information and decide what was credible."

[28] Mr. Lefebvre testified that he had expected that the grievor would cooperate at the June 27, 2003 meeting and provide information so that he could determine whether the grievor was associated with the organized crime gang and the level of threat, if any, that the grievor posed to the security of the HRDC. The grievor, however, only provided basic information about Messrs. X and Y, and it was inconsistent with the information that the RCMP had provided to the HDRC.

[29] Mr. Lefebvre stated that at the June 27, 2003 meeting Mr. Facey provided him with a copy of the grievor's *Recognizance of Bail*, letters of recommendation from the grievor's supervisor and several of his colleagues, and a best-wishes card signed by a number of employees from the Abbotsford office (Exhibit E-9).

[30] Mr. Lefebvre met with the Director General and the Director of the Branch on July 4, 2003. They confirmed that the grievor had not attempted to access information from the Special Witness Protection Program database. Mr. Lefebvre stated that he was later advised by the Director General that the grievor could not have accessed the Special Witness Protection Program database since its information is stored in a stand-alone computer with restricted access.

[31] Mr. Lefebvre informed Mr. Facey on August 7, 2003 that the grievor was going to be called to another meeting (Exhibit E-10). The meeting was scheduled for August 13, 2003 to provide the grievor with an opportunity to clarify or comment on new information that Mr. Lefebvre had obtained. Mr. Lefebvre stated that he obtained this new information from interviews he conducted from August 11 to 14, 2003 with several of the grievor's colleagues, his team leader and his sister. He stated that, at that point, he had not received any new information from the RCMP. The grievor, however, chose not to attend the meeting.

[32] Mr. Lefebvre identified Exhibit E-12 as his *Investigation Summary*. He recommended that as the DSO, Mr. Lajoie revoke the grievor's ERS because of the seriousness of the criminal allegations against the grievor and the implied breach of trust in his integrity and credibility as an ICO. Mr. Lefebvre confirmed that he wrote the following in the "Conclusion" section of the *Investigation Summary*: ". . . his confirmed association to organized crime gang members." He wrote it there as opposed to the "Recommendation" section. He suggested that Mr. Lajoie look at both sections before deciding whether to revoke the grievor's ERS.

[33] In cross-examination, Mr. Lefebvre agreed with the grievor's representative that the administrative investigation concluded that the grievor had not run the names of Messrs. X and Y or V-1 through V-22 through his computer.

[34] Mr. Lefebvre also agreed that persons charged with a crime are advised by their lawyers not to discuss their cases with anyone. However, he felt that there was nothing

preventing the grievor from explaining in more detail his association with Messrs. X and Y.

[35] Mr. Lefebvre stated that he did not question the validity of the RCMP's allegations because its officers had told him personally and through written communications that they had wiretap conversations and physical surveillance that clearly demonstrated the grievor's association with the organized crime gang. The RCMP had also advised the HRDC that the grievor had obtained weapons, rope, duct tape and portable radios for the organized crime gang and that he had used his vehicle for the kidnapping. Mr. Lefebvre maintained that the RCMP is a credible organization that had no motive for falsely accusing the grievor.

[36] Mr. Lefebvre agreed that Sergeant Russell had contacted Ms. Gledhill on April 22, 2003 to determine who had authority to revoke the grievor's ERS. He explained that the Treasury Board is responsible for protecting the HRDC's assets and information in its possession concerning Canadian citizens. It is the HRDC's responsibility to protect Canadian citizens from any perceived risk or threat. He reiterated that the DSO has the authority to grant, deny or revoke an employee's ERS.

[37] Mr. Lefebvre was adamant that there was no other position at the HRDC that the grievor could be appointed to where he would not have access to computers or paper files or where he would not overhear conversations about sensitive matters.

[38] When asked by the grievor's representative if he had spoken with the grievor's criminal lawyer, Mr. Lefebvre replied that he had not. He explained that, as the lead investigator of the administrative investigation, his mandate was to deal only with the grievor and HRDC employees. He had no authority to interview persons employed outside the HRDC.

[39] When Mr. Lefebvre was asked if he had consulted the October 2001 *Guidelines for Conducting Administrative Investigations* (Exhibit G-1), he replied that he had not because those guidelines were not in force at the time of the administrative investigation.

[40] Mr. Lefebvre explained in rebuttal that the July 2003 *Guidelines for Conducting Administrative Investigations* (Exhibit E-13) were the official guidelines. (They were approved in February 2002 by the Deputy Minister and promulgated in July 2003.)

Mr. Lefebvre stated that he was very familiar with those guidelines since he had played an integral role in drafting them.

[41] Mr. Lefebvre stated that the RCMP first contacted the HRDC and stated that it would try to revoke the grievor's ERS. He explained that the RCMP's mandate is to ensure that confidential information on Canadian citizens is protected by the department that has that information. Mr. Lefebvre noted that it was Mr. Lajoie, as the DSO, and not the RCMP who revoked the grievor's ERS following the completion of the administrative investigation.

[42] Mr. Lefebvre stated that he had to question the grievor about the events that led to his arrest and about his involvement with Messrs. X and Y so that he could determine whether the grievor was associated with the organized crime gang and whether he posed a threat to the security of the HRDC.

[43] Mr. Lefebvre clarified that when he referred to the ". . . review of evidence held by police" in the "Conclusion" section of his *Investigation Summary* (Exhibit E-12), he was referring to information obtained from the RCMP task force, which was investigating a number of unsolved murders that implicated an East Indian organized crime gang. The RCMP alleged that the grievor had been associated with Messrs. X and Y for approximately three years. The RCMP's evidence, which was obtained through wiretap conversations and physical surveillance, implicated the grievor in the kidnapping of the drug dealer.

[44] Mr. Lefebvre confirmed that Ms. Emery had sent a letter to the grievor on June 24, 2003 (Exhibit E-5) to advise him of the meeting scheduled for June 27, 2003. She also advised the grievor that he could bring a bargaining agent representative or any other person to provide him with advice and counsel. Mr. Lefebvre stated that the grievor's lawyer was not present at the meeting.

[45] The next witness called was Mr. Lajoie. Mr. Lajoie began his public service career as an ICO in January 1973, and in 1985, he became a supervisor of ICOs. In 1994, he was the president of security for the HRDC in Quebec. In April 2000, he became the DSO, and as of August 2003, National Director of Security Investigations and Emergency Response.

[46] Mr. Lajoie confirmed that Mr. Lefebvre advised him that the grievor had been arrested and charged with the kidnapping of a drug dealer.

[47] Mr. Lajoie stated that he was present at the meeting on June 27, 2003 and during the interviews that took place from August 11 to 14, 2003. He noted that he attends meetings only if there is a potential threat to the security of the HRDC. He confirmed that as the DSO he has the delegated authority to grant, deny or revoke an employee's ERS. When he decided to revoke the grievor's ERS, he was very familiar with the grievor's file.

[48] Mr. Lajoie confirmed that he developed the *Information Classification Guide* (Exhibit E-14), which is provided to all employees to advise them on how to identify the category, sensitivity and level of protection of HRDC data.

[49] Mr. Lajoie explained that it is his responsibility to respond to a threat that could affect a Canadian citizen's EI, old age pension, etc., as well as the security of the HRDC and its assets. He explained that as the DSO he must also implement the *Government Security Policy* (Exhibit E-15) and referred to the preamble, which reads as follows:

2. Preamble

The Government of Canada depends on its personnel and assets to deliver services that ensure the health, safety, security and economic well-being of Canadians. It must manage these resources with due diligence and take appropriate measures to safeguard them from injury.

Threats that can cause injury to government personnel and assets, in Canada and abroad, include violence toward employees, unauthorized access, theft, fraud, vandalism, fire, natural disasters, technical failures and accidental damage. The threat of cyber attack and malicious activity through the Internet is prevalent and can cause severe injury to electronic services and critical infrastructures. Threats to the national interest, such as transnational criminal activity, foreign intelligence activities and terrorism, continue to evolve as the result of changes in the international environment.

The Government Security Policy prescribes the application of safeguards to reduce the risk of injury. It is designed to protect employees, preserve the confidentiality, integrity, availability and value of assets, and assure the continued delivery of services. Since the Government of Canada relies

extensively on information technology (IT) to provide its services, this policy emphasises the need for departments to monitor their electronic operations.

...

[Emphasis in the original]

[50] Mr. Lajoie stated that as the DSO he also has to protect the resources of the Government of Canada. In the case of a major incident, he has to develop an emergency plan to ensure the safe and reliable delivery of government services to Canadian citizens. The definition of assets in the *Government Security Policy* (Exhibit E-15) is as follows:

Appendix "B" - Glossary

...

Assets (biens) - tangible or intangible things of the Government of Canada. Assets include but are not limited to information in all forms and media, networks, systems, materiel, real property, financial resources, employee trust, public confidence and international reputation. (The inclusion of information in this definition is for the purposes of this policy only and should not be interpreted as importing any legal consequences applicable for assets to information.)

[Emphasis in the original]

[51] Mr. Lajoie stated that he must also comply with the requirements of the *security* program found at section 10.1 of the *Government Security Policy*:

Departments must appoint a Departmental Security Officer (DSO) to establish and direct a security program that ensures co-ordination of all policy functions and implementation of policy requirements. These functions include general administration (departmental procedures, training and awareness, identification of assets, security risk management, sharing of information and assets), access limitations, security screening, physical security, protection of employees, information technology security, security in emergency and increased threat situations, business continuity planning, security in contracting and security incident investigations.

...

[52] Mr. Lajoie testified that the Government of Canada has to ensure that employees with access to confidential information are reliable and trustworthy. He referred to clause 10.9 of the *Government Security Policy*, which deals with security screening:

...

. . . Special care must be taken to ensure the continued reliability and loyalty of individuals, and prevent malicious activity and unauthorized disclosure of classified and protected information by a disaffected individual in a position of trust.

...

[53] Mr. Lajoie noted that clause 10.9(f) of the *Government Security Policy* states that the department must “[f]or cause, review, revoke, suspend or downgrade a reliability status or a security clearance.” If he is advised that an employee does not meet the security clearance required of his or her position, he meets with the employee to evaluate if there is a risk to the HRDC’s assets. If he determines that there is a risk to the assets and security of the HRDC, he may decide to conduct an investigation. As the DSO, he can grant, deny or revoke an employee’s ERS, but only the Deputy Head or the CSIS can grant, deny or revoke a Secret-Level II or Top Secret-Level III security clearance.

[54] Mr. Lajoie also referred to the Treasury Board’s *Personnel Security Standard* (Exhibit E-16), which states: “. . . Security assessments and reliability checks are conditions of employment under the *Public Service Employment Act (PSEA)*.” He testified that in the public service the minimum level is basic, but at the HRDC it is the ERS. Mr. Lajoie referred to section 2.2, which defines the difference between basic reliability status and the ERS. Section 2.2 reads as follows:

2.2 Screening requirements

...

Basic reliability status is the minimum type of screening required for individual’s [sic] appointed or assigned to a position for six months or more. This status is also required for individuals who are under contract for more than six months and who will have regular access to government premises. It is optional for periods of less than six months. An individual granted basic reliability status may access only

information and assets that are neither classified nor designated.

Enhanced reliability status is the type of screening required when the duties or tasks of a position or contract necessitate access to designated information and assets, regardless of the duration of an assignment, appointment or contract. An individual granted enhanced reliability status may access, on a need-to-know basis, designated information and assets.

...

[55] Mr. Lajoie testified that if an employee's ERS is revoked, he determines whether the employee can be appointed or reassigned to a position elsewhere at the same group and level. He confirmed that the grievor was considered for reappointment, but the minimum security level required of employees that deal with Protected "B" material is the ERS. He stated that "[i]t was considered but was not possible." He also stated that if an employee wishes to challenge a revocation of his or her security clearance, the employee can do so through the grievance procedure in accordance with the *PSLRA*.

[56] Mr. Lajoie testified that he agreed with the immediate suspension of the grievor without pay because, as an ICO, the grievor had access to the HRDC's assets and information on Canadian citizens. His major concern was the grievor's association with the organized crime gang. The fact that the grievor was charged with kidnapping a drug dealer led him to believe that the grievor had to be associated with the organized crime gang. The purpose of the administrative investigation was "[t]o have the truth at the end of the investigation. If not, we would have to make a decision based on the information that we had." The administrative investigation was to determine whether the organized crime gang had obtained, with the grievor's assistance, information on Canadian citizens.

[57] Mr. Lajoie stated that if the RCMP had provided new information or if the grievor had proven that he did not pose a threat to the security of the HRDC he would have had the grievor's suspension revoked and had him reinstated immediately. When asked by counsel for the employer if he had considered the *Larson* criteria, Mr. Lajoie responded that he had not. Counsel for the employer then reviewed the *Larson* criteria with Mr. Lajoie, and his testimony can be summarized as follows:

- 1) As an ICO, the grievor posed a threat to the security of the HRDC because of its confidential information on Canadian citizens.
- 2) The grievor's association with the organized crime gang would be of concern to Canadian citizens.
- 3) Although Mr. Lajoie was not involved with the RCMP's criminal investigation, he was aware that it was ongoing.
- 4) Mr. Lajoie stated that there were no other positions at the HRDC to which the grievor could have been appointed where he would not have had access to computers, paper files or sensitive information.
- 5) Mr. Lajoie stated that he had advised the grievor that, at any time, he could provide him with additional information. The grievor, however, chose not to do so.

[58] Mr. Lajoie testified that he revoked the grievor's ERS "[f]ollowing advice from our legal counsel on the information that I had in the grievor's file. He had an opportunity when we met to explain his relationship with the organized crime gang but he chose not to do so." He stated that the decision was easy since he had reasonable grounds to believe that the grievor could share information on Canadian citizens with the organized crime gang. Although the administrative investigation revealed that the grievor had not run the names of Messrs. X and Y or V-1 through V-22 through his computer, Mr. Lajoie believed that there might have been other persons that the grievor was associated with that were unknown to the RCMP or to the HRDC. In conclusion, Mr. Lajoie stated that the grievor presented a high level of risk to the security of the HRDC because of his association with the organized crime gang.

[59] In cross-examination, Mr. Lajoie stated that he was advised that it would be virtually impossible to find out whether the grievor had accessed any files other than the ones assigned to him. Millions of computer entries are made on a daily basis, and it would require all of the IT personnel to perform such a search.

[60] Mr. Lajoie repeated several times to the grievor's representative that his focus was on the grievor's association with the organized crime gang and not the criminal charges. He reiterated that when the grievor was asked at the June 27, 2003 meeting to

explain his involvement with Messrs. X and Y, the grievor provided only limited information even though he and Mr. Lefebvre explained the consequences if he refused to cooperate. Mr. Lajoie stated that he could only make a decision on the information available to him.

[61] Mr. Lajoie noted that after revoking the grievor's ERS he did not search for a position in another department since he felt that he could not recommend the grievor to any other department because of the grievor's association with the organized crime gang.

[62] Mr. Lajoie agreed with the grievor's representative that the grievor was acquitted of the kidnapping charge and that the administrative investigation concluded that he had not improperly accessed the HRDC's computers. However, he would not agree that the grievor was not associated with the organized crime gang because of the information that he had received from the RCMP. He agreed that the RCMP wanted to revoke the grievor's ERS as early as April 22, 2003, but stated:

We were not conducting our investigation for the RCMP. They asked us to look into the names of some individuals to see if they had compromised our computer system, and we did so. The RCMP has the responsibility to ensure that Canadian citizens are protected, and they were exercising their duty.

[63] Mr. Lajoie stated that although he never met with the RCMP surveillance team or listened to any of the wiretap conversations, the fact that the RCMP had evidence in its possession, along with the information provided by Inspector Henderson, was, in his view, sufficient.

[64] The grievor's representative repeatedly alleged that the RCMP "were out to get" the grievor and that it had falsely accused him as it had David Milgard and Donald Marshall. He continued to assert that the RCMP just wanted a conviction and that it could not be trusted. At that point, I advised the grievor's representative that unless he had evidence of a conspiracy against the grievor, he had to move on with his cross-examination of Mr. Lajoie.

[65] In redirect, Mr. Lajoie stated that, as an ICO, the grievor could visit other departments as well as provincial and municipal offices. He could, for example, visit a welfare office and claim that he was investigating a person. As well, at the HRDC he not only had access to computers but also to paper files, which contain personal

information such as a person's home address, SIN, EI benefits, old age pension, etc. He stated that this information is of interest to criminals.

[66] Mr. Lajoie stated that after he revoked the grievor's ERS, the grievor no longer met the security clearance required of his position as an ICO. Without a valid ERS, it was impossible to market the grievor to other departments.

[67] Mr. Lajoie confirmed that on August 26, 2003, he sent a letter (Exhibit E-19) to Bill Gardner, Assistant Deputy Minister, BC/Yukon Region, HRDC, informing him that he concurred with the recommendation in Mr. Lefebvre's *Investigation Summary* (Exhibit E-12) and that he was immediately revoking the grievor's ERS.

[68] The next witness called was Ms. Arsenault. Ms. Arsenault retired in February 2005 after working 32 years in the public service. In 2003, she was the Regional Manager, Human Resources Directorate, BC/Yukon Region, HRDC, and reported to the director, Bob McMorine. When dealing with the grievor's file, her contacts were Messrs. Richer and Stelpstra.

[69] Ms. Arsenault referred to an email dated April 24, 2003 from Mr. Lefebvre to Mr. Richer (Exhibit E-20) in which Mr. Lefebvre advised HRDC headquarters that it would be in their best interests to immediately suspend the grievor without pay because of his confirmed association (by the RCMP) with the organized crime gang. Mr. Richer replied to Mr. Lefebvre that, to consider a suspension pending an administrative investigation, the principles, questions and guidelines stated in *Larson* had to be followed.

[70] Ms. Arsenault stated that she advised Mr. Gardner on staff relations matters, and in that capacity she considered whether the *Larson* criteria applied to the grievor's case. She advised Mr. Gardner that it was in the best interests of the HRDC to immediately suspend the grievor without pay pending the outcome of the administrative investigation. She confirmed that, as an ICO, the grievor had access to confidential information on Canadian citizens and that his association with the organized crime gang posed a threat to the security of the HRDC.

[71] The nature of the criminal charges filed against the grievor and his association with the organized crime gang were adverse to the HRDC's mandate. Ms. Arsenault

confirmed that all data retained by the HRDC is considered classified at the Protected “B” level.

[72] Ms. Arsenault testified that, although she was aware that an administrative investigation was being conducted, she was not involved with it in any way.

[73] Ms. Arsenault also testified that the HRDC considered reassigning or appointing the grievor to another position before the administrative investigation began, but it was decided that his presence elsewhere in the workplace would compromise the security of the HRDC since there are computers and paper files in every section.

[74] Ms. Arsenault confirmed that on April 24, 2003, Mr. Gardner sent a letter (Exhibit E-21) to the grievor suspending him without pay, effective immediately, pending an investigation. She explained that “[t]he suspension was not disciplinary because there had been no determination of discipline. The investigation was a fact-finding tool to gather facts and arrive at a decision.”

[75] On May 29, 2003, Mr. Gardner sent another letter (Exhibit E-27) to the grievor informing him that an administrative investigation would commence and that, at an appropriate stage in the investigation, an investigator would contact the grievor for his input. In the interim, the grievor would remain suspended without pay. That same day, Ms. Arsenault informed Mr. Gardner that the HRDC’s corporate security officials were awaiting additional information from the RCMP before proceeding with the internal investigation. The release of that information was dependent on advice from the RCMP’s counsel (Exhibit E-28).

[76] On August 27, 2003, Mr. Gardner advised the grievor that Mr. Lajoie had revoked his ERS as a result of his association with the organized crime gang (Exhibit E-29). Mr. Gardner also advised him that, effective August 26, 2003, he was terminating the grievor’s employment by the authority delegated to him under subsection 11(2) of the *Financial Administration Act (FAA)*, since his employment with the HRDC required that he hold a valid ERS.

[77] In conclusion, Ms. Arsenault stated that an ICO without an ERS is incapacitated from performing his or her duties. It is her belief that in the federal public service a person must have a valid ERS to secure employment.

[78] During cross-examination, the grievor's representative noted that in Mr. Lefebvre's *Investigation Summary* (Exhibit E-12) he recommended that the ". . . DSO revokes the employee's enhanced reliability clearance" but that the *Personnel Security Standard* (Exhibit E-16), at clause 2.2, *Screening requirements*, refers to basic and enhanced reliability status and not to enhanced reliability clearance. This was simply a statement that the grievor's representative made to Ms. Arsenault. As such, I accept that there is a difference in wording between the exhibits, but what significance it has is unclear.

[79] Ms. Arsenault stated that since the grievor did not retain his ERS, which is a condition of employment at the HRDC, his employment was terminated. To be clear, she stated that "ERS was revoked, and not because it was reduced to a lower level."

[80] Ms. Arsenault agreed with the grievor's representative that the HRDC did not try to find a position for the grievor in another department. She stated, however, that even if the grievor's security clearance were reduced to basic reliability, there are no positions in other departments at that level. She reiterated that the grievor's security clearance was not reduced to basic reliability status — his ERS was revoked.

[81] Ms. Arsenault also agreed with the grievor's representative that she clarified to Mr. Richer on May 8, 2003 (Exhibit G-3) that an email on which she had copied him (on April 22, 2003, Exhibit E-1) referred only to the grievor being charged with kidnapping. It was Mr. Lefebvre who had stated that the grievor had been arrested and charged with kidnapping and attempted murder (Exhibit E-20).

[82] In redirect, when referred to her email of April 22, 2003 (Exhibit E-1), Ms. Arsenault stated that a person could conclude from the statement that "the victim was severely beaten" that it had been attempted murder. She explained that at that point the whole event was very unclear.

[83] Andy Netzel has worked in the public service for 29 years at the Canada Employment Insurance Centre and at the HRDC. For the past three years, he has occupied the position of Regional Executive Head, BC/Alberta/Territories, HRDC.

[84] Mr. Netzel testified that he has on two occasions revoked an employee's ERS, and as a result, the employees had their employment terminated.

[85] During cross-examination, Mr. Netzel stated that he was not sure whether there are positions in other departments where an employee can work with only a basic reliability status.

[86] The next witness, Ms. Turgeon, was called by the grievor's representative. Ms. Turgeon retired from the public service in June 2006. She was the grievor's team leader during his employment at the HRDC.

[87] Ms. Turgeon testified that the grievor was an excellent employee who demonstrated integrity and reliability. He was dedicated and sensitive to clients' issues. He was well-liked by his colleagues, and she never had to address any negative workplace issues with him.

[88] Ms. Turgeon stated that on the day of the grievor's arrest, Sergeant Russell told her that the grievor would never again work in a federal government department since he had been charged with kidnapping and attempted murder. It was her impression that Sergeant Russell was out to get the grievor.

[89] Ms. Turgeon could not recall whether, when interviewed by Messrs. Lajoie and Lefebvre, they had asked her about the type of persons with whom the grievor associated. However, she did recall Messrs. Lajoie and Lefebvre specifically ordering her not to communicate with the grievor.

[90] Ms. Turgeon was not cross-examined.

[91] The grievor testified next. He stated that on October 15, 2001, he was hired as a term ICO with the Joint Compliance Team located in Abbotsford, B.C. On March 27, 2003, his term was extended to March 26, 2004.

[92] The grievor testified that his duties included investigating farm workers to ensure that they were not working at other jobs while collecting EI, determining if employers had issued false records of employment, ensuring that recipients of EI were actively seeking employment and reminding them of their obligations while collecting EI. The grievor stated that he spoke about those subjects as part of his job duties on his own initiative at the local Punjabi radio station, Sikh temples, community centres, the Canada Revenue Agency and the HRDC.

[93] The grievor noted that he enjoyed his employment with the HRDC since he felt that it was “[v]ery similar to police work; much like a cat-and-mouse scenario.”

[94] The grievor stated that he was familiar with only a few of the HRDC’s computer programs, such as the *Online Insurance System* and the *Support System for Agent*, which he used to obtain the SIN and home address of a person collecting EI. Since he preferred to work with paper files, he acknowledged that he did not use a computer as much as he should have. He stated: “In fact, I never inputted anything into a computer. For me, it was more of a visual tool.”

[95] When asked by his representative if he had used any of the HRDC’s computers for anything other than work-related purposes, the grievor replied that he had not.

[96] When asked if he had ever been approached by anyone other than an HRDC employee to retrieve information from the HRDC’s computers, again he replied that he had not.

[97] The grievor stated that he had used his remote access privileges on only five or six occasions during the three years that he was employed at the HRDC.

[98] The grievor then related the events surrounding his arrest and charges.

[99] On or about February 14, 2003, the RCMP confiscated his vehicle from his residence while he was away. The RCMP left a business card and asked him to contact them. He proceeded to contact a lawyer, and they then met with the RCMP. Before the meeting, his lawyer advised him only to listen and not to ask any questions.

[100] In early March 2003, the RCMP returned his car. On April 16, 2003, he was arrested and charged with kidnapping and confinement. Sergeants Kirby and Russell escorted him to the RCMP’s Surrey Detachment and placed him in a holding cell. They told him that his world was going to crumble and that his “[c]ushy job with the Government of Canada was gone.”

[101] At approximately 21:00 that evening, Sergeants Russell and Kirby conducted a one-hour audio-video interview with him. During the interview, on numerous occasions, Sergeants Kirby and Russell stated that his ERS would be revoked and that his job “would no longer be there” when he was released.

[102] The grievor clarified that, during the interview, Sergeant Kirby advised him that the reason he had not been arrested in February 2003 was that he was not on the RCMP's radar screen. In other words, he was not a known person of interest.

[103] The grievor testified that he was never charged with attempted murder. He conceded that there might have been an assault charge along with the kidnapping and confinement charges. Before his arrest he had no idea who the victim of the kidnapping was or who else had been charged. He also stated that before his car was seized he had never been contacted or charged by the RCMP in relation to any investigation or incident. He posted bail three weeks after he was arrested, and he then retained a new lawyer.

[104] The grievor's recollection of the meeting on June 27, 2003 with Messrs. Lefebvre and Lajoie was that he conveyed to them that he had not participated in the kidnapping and noted that if he had pled guilty that he would be in jail. The only persons Messrs. Lajoie and Lefebvre asked him if he was associated with were Messrs. X and Y, and he replied that he had known them for approximately one year. They never asked him about the 22 other persons of interest to the RCMP (V-1 through V-22) or if he had a criminal record. The grievor told Messrs. Lefebvre and Lajoie at the June 27, 2003 meeting that his lawyer had advised him not to discuss his case with anyone, including his family, as that could subject them to a subpoena once the criminal proceedings began.

[105] The grievor testified that he did not conspire with Messrs. X and Y or with anyone else in the kidnapping of the drug dealer. He stated that he is not associated with anyone involved in organized crime. He also stated that of all the individuals identified as V-1 through V-22, he has only known V-19 (a co-accused in the kidnapping) since he was five years old. They were in grades 8 to 10 together, and after graduating from high school, they played pickup basketball, football and soccer with other East Indians. He further stated that he never picked up weapons or portable radios for anyone. The large bloodstain found on the backseat of his vehicle was, in fact, only half the size of a baby's fingernail. The DNA testing of the bloodstain never linked it to the victim of the kidnapping or to any other person of interest to the RCMP. Messrs. Lefebvre and Lajoie never questioned him on the allegations made by the RCMP, nor did they share the information that the RCMP had provided.

[106] The grievor testified that during his trial, no evidence was adduced of wiretap conversations, physical surveillance or the DNA testing of the bloodstain.

[107] The trial lasted 2 days, and the 12-member jury found him not guilty. He was acquitted on July 2, 2006. It was a case of mistaken identity.

[108] Before his termination, the grievor was not provided with a copy of Mr. Lefebvre's *Investigation Summary* (Exhibit E-12), so he had no opportunity to respond or rebut the allegations it contained. When referred by his representative to the July 2003 *Guidelines for Conducting an Administrative Investigation* (Exhibit E-13) and in particular to "Appendix G (Sample Letter Presenting the Administrative Investigation Report and Employee's Right to Respond)", the grievor stated that he had never received that appendix. The grievor also stated that neither he nor Mr. Facey cancelled the scheduled meeting of August 13, 2003 with Messrs. Lefebvre and Lajoie and that it was they who cancelled the meeting.

[109] When asked by his representative to describe the impact that his termination has had on him, the grievor replied that although he has applied for a number of positions in the federal public service and has successfully passed the oral interviews and written exams he "can't get a job" because of the lack of a security clearance. He stated that he was prejudged. He was not provided with the information that the HRDC had and therefore was deprived of an opportunity to respond. The termination was insulting and very disturbing. He concluded by stating that he could still be a good ICO.

[110] In cross-examination, the grievor stated that he did not discuss the events surrounding his arrest during the June 27, 2003 meeting with Messrs. Lefebvre and Lajoie because he was following his lawyer's advice. He explained that he did, however, give them his lawyer's business card after the meeting. The reason he did not bring his lawyer to the meeting was that his fee was approximately \$500 an hour, and the grievor was afforded bargaining agent representation by Mr. Facey.

[111] In redirect, the grievor stated that another reason he did not bring his lawyer to the meeting with Messrs. Lefebvre and Lajoie was that he did not believe that the meeting was to discuss the criminal charges.

III. Summary of the arguments

A. For the employer

[112] Counsel for the employer argued that the grievor's indefinite suspension without pay and the revocation of his ERS were administrative actions and not disciplinary in nature. Therefore, pursuant to subsection 92(1) of the former *Act*, I lack jurisdiction to decide these grievances.

[113] The grievor's termination of employment was a result of the revocation of his ERS, a condition of employment at the HRDC, which prevented the grievor from performing his duties. It was for non-disciplinary reasons and was not related to the criminal charges. The question to be answered, counsel for the employer stated, is whether the termination was disguised discipline or the result of an administrative action. There is no evidence that the grievor's termination was based on a decision or a motive by the employer to discipline him. In other words, there was no disciplinary intent on the employer's part.

[114] Before the grievor was suspended without pay, Ms. Arsenault testified that she considered the criteria stated in *Larson* and applied it to the grievor's case.

[115] Counsel for the employer argued that, in the alternative, if I were to decide that the employer's treatment of the grievor was a breach of his right to procedural fairness, it is important to remember that the grievor was an employee whose term was due to expire on March 26, 2004. Therefore, if a remedy is to be considered, the grievor should be compensated only to the end of his term, since I cannot reinstate either his position as an ICO or his ERS.

[116] Counsel for the employer concluded by stating that I should dismiss the grievances.

[117] In support of her arguments, counsel for the employer submitted the following case law: *Hillis v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 151; *Glowinski v. Canada (Treasury Board)*, 2006 FC 78; *Endicott v. Canada (Treasury Board)*, 2005 FC 253; *Myers v. Canada (Attorney General)*, 2007 FC 947; *R. v. Aulakh*, 2006 BCSC 1257; *Attorney General of Canada v. Basra*, 2008 FC 606; and *Larson*.

B. For the grievor

[118] The grievor's representative argued that the HRDC failed in its interpretation of the five tests set out in *Larson*, which it alleges that it considered.

[119] Tests 1 and 2 in *Larson* need to be read together. There was no evidence that the criminal charges laid against the grievor posed a threat to the security of the HRDC or that they were potentially harmful, detrimental or adverse to its reputation. The administrative investigation determined that the grievor had not accessed the HRDC's computers to run the names of Messrs. X and Y or known criminal gang members and murder victims (V-1 through V-22). As well, the employer presented no evidence whatsoever of any illegal access by the grievor to the HRDC's computers.

[120] With respect to test 3, the employer did not hire or retain independent investigators to investigate the criminal charges or the grievor's alleged association with the organized crime gang. The employer took the RCMP's words verbatim. Other than asking the grievor if he knew Messrs. X and Y, no attempt was made to investigate whether he was associated with the organized crime gang.

[121] As for test 4, no reasonable steps were taken to consider any position, including one requiring a lower level of security clearance, lesser duties or closer supervision. The employer never considered those options.

[122] Concerning test 5, the employer did not fulfill its onus to objectively consider the possibility of reinstating the grievor, even though in August 2003 it had determined following the administrative investigation that the grievor had not illegally accessed the HRDC's computers. The employer did not take that into account when it decided to revoke the grievor's ERS and terminate his employment. There was no evidence that the employer canvassed other locations in the lower mainland of British Columbia or any other department to determine if there was a possibility of employment.

[123] The grievor admitted to Messrs. Lajoie and Lefebvre that he knew Messrs. X and Y for a period of one year. However, for the grievor to prove that he was not associated with an organized crime gang, he would have had to lie and state that he did not know them. In other words, he was in a Catch-22 situation.

[124] The grievor's representative argued that the *FAA* states that a termination must be for cause, which is not the case here.

[125] There was no evidence that positions requiring basic reliability status do not exist in the public service. Although an ERS may be the minimum level required to work at the HRDC, it may not necessarily be so in other departments.

[126] The grievor gave Messrs. Lajoie and Lefebvre his lawyer's business card, but they never contacted his lawyer.

[127] The grievor's representative stated that I should make a determination that the HRDC acted in bad faith and used the pretext of revoking the grievor's ERS to terminate his employment.

[128] The HRDC assumed that, because the grievor was arrested and charged for kidnapping a drug dealer, he was associated with an organized crime gang. Although the grievor told Messrs. Lajoie and Lefebvre that he pled not guilty and that otherwise, he would be in jail, he was presumed guilty anyway. He was not afforded procedural fairness since the employer did not provide him with a copy of Mr. Lefebvre's *Investigation Summary* (Exhibit E-12). The employer concluded that the grievor had not accessed its computers for any unlawful activity. In addition, the grievor was not given a copy of the "Sample Letter Presenting the Administrative Investigation Report and Employee's Right to Respond," which is found in the July 2003 *Guidelines for conducting Administrative Investigations* (Exhibit E-13). The grievor therefore had no opportunity to rebut or comment on Mr. Lefebvre's *Investigation Summary*. The grievor testified that the meeting of August 13, 2003 was cancelled by the employer, but Mr. Lefebvre testified that the grievor did not attend.

[129] In conclusion, the grievor's representative stated that I should order the employer to reinstate the grievor's ERS (and referred to *Copp v. Canada Customs and Revenue Agency*, 2003 PSSRB 8), or in the alternative, instruct the employer to find a position at the basic reliability level in another federal government department or award the grievor compensation from August 26, 2003 to March 26, 2004, the date when his term employment was scheduled to end.

[130] The grievor's representative referred me to *Sullivan v. Canadian Security Intelligence Service*, 2003 PSSRB 26; *Deering v. Treasury Board (National Defence)*,

PSSRB File No. 166-02-26518 (19960208); *Kampman v. Treasury Board (Solicitor General - Correctional Service Canada)*, PSSRB File Nos. 166-02-21656 and 21771 (19920110); *Zhang v. Treasury Board (Privy Council Office)*, 2005 PSLRB 173; *Basra v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 70; and *Copp*.

C. Reply

[131] Counsel for the employer argued that the *Hillis* decision concludes that there are no longer any positions in the federal public service that require only basic reliability status.

IV. Reasons

[132] On October 15, 2001, the grievor commenced his employment with the HRDC as an ICO. On April 16, 2003, he was arrested and charged with kidnapping and confinement. On April 22, 2003, Sergeant Russell of the Indo-Canadian Gang Task Force advised Ms. Gledhill that the grievor was arrested and charged for the February 13, 2003, kidnapping of a drug dealer. He also advised her that the RCMP would attempt to revoke the grievor's ERS.

[133] On April 23, 2003, Sergeant Russell met with Mr. Lefebvre to inform him that the RCMP had evidence that the grievor was associated with an organized crime gang. On June 17, 2003, Inspector Henderson confirmed in writing to Mr. Lefebvre (Exhibit E-7) that evidence would be presented during the grievor's trial that he was in direct communication with Messrs. X and Y to specifically plan the kidnapping and possible murder of the drug dealer. There was also evidence that the grievor picked up weapons and portable radios before the kidnapping at the bequest of Messrs. X and Y. Physical surveillance of Messrs. X and Y confirmed the identity of the grievor and his participation in planning the kidnapping. As well, located in the interior of the grievor's vehicle was a large bloodstain consistent with the victim being transported in the grievor's vehicle.

[134] The RCMP asked the HRDC to check the grievor's computer to determine whether he had run the names of Messrs. X and Y and V-1 through V-22 and to determine whether he had leaked information to the organized crime gang while he was employed as an ICO.

A. Was the employer justified in immediately and indefinitely suspending the grievor without pay (PSLRB File No. 166-02-34326)?

[135] On April 24, 2003, Mr. Lefebvre recommended to Messrs. Richer and Lajoie that the grievor be suspended immediately without pay. His reasons for this recommendation were to determine the grievor's association with the organized crime gang, to point out the grievor's access to privileged and confidential information on Canadian citizens, to protect the HRDC's assets, to determine if the grievor had used the HRDC's computers to run the names of Messrs. X and Y and V-1 through V-22 and to determine whether the organized crime gang had infiltrated the HRDC's computers with the grievor's assistance.

[136] Ms. Arsenault testified that she considered the *Larson* test before she recommended to Mr. Gardner that it was in the best interests of the HRDC to immediately suspend the grievor without pay. The five criteria read as follows:

1. *The issue in a grievance of this nature is not whether the Grievor is guilty or innocent, but rather whether the presence of the Grievor as an employee of the company can be considered to present a reasonably serious and immediate risk to the legitimate concerns of the employer.*
2. *The onus is on the company to satisfy the board of the existence of such a risk and the simple fact that a criminal charge has been laid is not sufficient to comply with that onus. The company must also establish that the nature of the charge is such as to be potentially harmful or detrimental or adverse in effect to the company's reputation or product or that it will render the employee unable properly to perform his duties or that it will have a harmful effect on other employees of the company or its customers or will harm the general reputation of the company.*
3. *The company must show that it did, in fact, investigate the criminal charge to the best of its abilities in a genuine attempt to assess the risk of continued employment. The burden, in this area, on the company is significantly less in the case where the police have investigated the matter and have acquired the evidence to lay the charge than in the situation where the company has initiated proceedings.*

4. *There is further onus on the company to show that it has taken reasonable steps to ascertain whether the risk of continued employment might be mitigated through such techniques as closer supervision or transfer to another position.*
5. *There is a continued onus on the part of the company during the period of suspension to consider objectively the possibility of reinstatement within a reasonable period of time following suspension in light of new facts or circumstances which may come to the attention of the company during the course of the suspension. These matters, again, must be evaluated in the light of the existence of a reasonable risk to the legitimate interest of the company.*

[137] On April 24, 2003, Mr. Gardner informed the grievor that, in accordance with paragraph 11(2)(f) of the *FAA*, he was indefinitely suspended without pay effective immediately (Exhibit E-21). Paragraph 11(2)(f) reads as follows:

Power and functions of Treasury Board in relation to personnel management

- (2) *Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,*

...

(f) establish standards of discipline in the public service and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct, and the circumstances and manner in which and the authority by which or whom those penalties may be applied or may be varied or rescinded in whole or in part;

...

[138] The employer invoked paragraph 11(2)(f) when it immediately and indefinitely suspended the grievor without pay. To be clear, the employer argued that the grievor's suspension was an administrative action, and I have agreed with this argument. As

such, the suspension should have been invoked under paragraph 11(2)(g) for reasons other than breaches of discipline or misconduct. Paragraph 11(2)(g) reads as follows:

...

(g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;

...

[139] Counsel for the employer argued that I lack jurisdiction in this case pursuant to subsection 92(1) of the former Act. The employer's position is that the grievor's suspension without pay and the revocation of his ERS were administrative actions. Subsection 92(1) reads as follows:

Adjudication of Grievances

Reference to Adjudication

92. (1) *Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,

(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),

(i) disciplinary action resulting in suspension or a financial penalty, or

(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or

(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

[140] It is abundantly clear that both the HRDC and the RCMP are mandated to protect the confidential and personal information of Canadian citizens and to ensure the integrity of employees who have access to that information.

[141] After a thorough review of the evidence and arguments, I conclude that, based on the information provided by the RCMP to the HRDC at the time, the HRDC was justified in immediately suspending the grievor without pay pending the results of the administrative investigation. I believe that the HRDC properly analyzed and applied the five tests found in *Larson*. There is no evidence of bad faith or disciplinary action resulting in a suspension or financial penalty taken by the employer.

[142] This grievance (PSLRB File No. 166-02-34326) is therefore dismissed for lack of jurisdiction.

B. Did the HRDC meet the burden of proof in adducing sufficient evidence to revoke the grievor's ERS and terminate his employment (PSLRB File Nos. 166-02-34325 and 34327)?

[143] Mr. Gardner's letter of August 27, 2003 (Exhibit E-29) informed the grievor that Mr. Lajoie had revoked his ERS after reviewing the *Investigation Summary* prepared by Mr. Lefebvre (Exhibit E-12) following the administrative investigation, which had determined that the grievor was associated with the organized crime gang.

[144] Mr. Gardner also informed the grievor that, since he no longer possessed a valid ERS, which is a requirement for employment at the HRDC, his employment was terminated effective August 26, 2003, pursuant to subsection 11(2) of the *FAA*.

[145] The HRDC's decision to revoke the grievor's ERS was taken following meetings between the RCMP and Messrs. Lajoie and Lefebvre, written correspondence from Inspector Henderson, and the June 27, 2003 meeting with Messrs. Lajoie and Lefebvre and the grievor.

[146] Mr. Lajoie testified that he explained to the grievor that he needed to provide more information surrounding his arrest and the criminal charges so that Mr. Lajoie could determine whether the grievor posed a threat to the security of the HRDC. He also advised the grievor, that if he did not cooperate and provide more details,

Mr. Lajoie would have to base his decision on the information that the RCMP had provided.

[147] The grievor, however, following his lawyer's advice, chose not to discuss or provide any additional information about his arrest and criminal charges.

[148] In *B.C. Ferry and Marine Worker's Union v. British Columbia Ferry Services Inc.*, 2008 BCSC 1464, the Supreme Court of British Columbia confirmed that although the arbitral jurisprudence establishes that silence *per se* is not misconduct giving rise to just cause for discipline, the 'right to silence' is not absolute. In the 'extraordinary' circumstances of that case (the disappearance of two passengers aboard the MV Queen of the North which ran around and sank on March 22, 2006), the employer's interests in ascertaining and publicly disclosing the cause of the incident far outweighed the employee's interest in refusing to talk.

[149] In this case, I heard no compelling argument from counsel for the employer that would lead me to believe that this case is "extraordinary." As such, I see no misconduct on the grievor's part to maintain his "right to silence" with respect to the events leading to his arrest and the criminal charges.

[150] I have concluded that Mr. Lajoie was justified in revoking the grievor's ERS based on the information provided by the RCMP at the time, the grievor's decision not to explain the events surrounding his arrest and the criminal charges, and the need to protect the security of the HRDC, its assets and its confidential information concerning Canadian citizens.

[151] Following the revocation of the grievor's ERS, which was required to perform his duties as an ICO, the termination of his employment was the unfortunate consequence. The revocation of the grievor's ERS was just that. It was not a suspension of his ERS or a demotion to a lower level. The decision to revoke an employee's ERS is, in and of itself, a removal of the trust and reliability of the person who holds the clearance. I see no reason why the HRDC would have marketed the grievor to another department at any level of security clearance if his ERS was revoked because of their lack of trust in him and in his reliability.

[152] I conclude that terminating the grievor's employment was an administrative action and that it was done for non-disciplinary reasons. To retain jurisdiction, I would

have to be convinced that the employer acted in bad faith or breached the grievor's right to procedural fairness.

C. Did the HRDC breach the rules of procedural fairness in revoking the grievor's ERS and as a result terminating his employment?

[153] The grievor requests that his ERS be reinstated because he was not provided with an opportunity to respond to or to rebut Mr. Lefebvre's *Investigation Summary* (Exhibit E-12) and because he was not provided with the information and allegations that the HRDC had in its possession and on which it based its decision to revoke his ERS, which resulted in the termination of his employment. Therefore, the HRDC's decision violates the rules of procedural fairness accorded to the grievor under administrative law.

[154] I have concluded that the HRDC's decision to immediately suspend the grievor without pay and to revoke his ERS, which resulted in the subsequent termination of his employment, were not a disciplinary action but rather were administrative in nature, as provided under the *FAA*. Although I have found that it was an administrative action, it is a decision, however, that affects the grievor's rights, privileges and interests, which is sufficient to give rise to the duty of procedural fairness.

[155] In *Glowinski v. Canada (Treasury Board)*, 2006 FC 78, at paragraph 43, the Federal Court states the following:

...

A court of law should not give policies the force of law unless Parliament clearly intended such policies to be given the force of law and such policies are clear, and not inconsistent with other policies.

[156] The *Government Security Policy* (Exhibit E-15) and the *Personnel Security Standard* (Exhibit E-16) are consistent with paragraph 7(1)(e) of the *FAA*, which gives the Treasury Board authority concerning issues of "human resources management in the federal public service, including terms and conditions of employment, which would include establishing various screening levels essential of employees to ensure they are reliable and trustworthy."

[157] Clause 10.9 of the *Government Security Policy* (Exhibit E -15) states that government departments must "[t]reat individuals in a fair and unbiased manner, and

give them an opportunity to explain adverse information before a decision is reached” and “[a]dvice individuals of their rights of review or redress in case of denial, suspension or revocation.”

[158] As the Supreme Court states at paragraph 25 of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817:

...

The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated

...

[159] One cannot minimize the important role of the Government of Canada to ensure that employees who have access to confidential information and a department’s assets are reliable and trustworthy. However, when an employee’s security clearance is revoked, the employee’s employment is, effectively, terminated. The impact on the employee is not only fatal to his or her current employment, but also to future employment in the federal public service. As such, the degree of procedural fairness raises the bar from a minimal standard.

[160] The grievor was entitled to know the information that the HRDC had in its possession, and he should have been given an opportunity to explain and clarify before the decision was reached to revoke his ERS and terminate his employment. He should have been provided with a copy of Mr. Lefebvre’s *Investigation Summary* (Exhibit E-12) and been given an opportunity to rebut it. The grievor testified that when he met with Messrs. Lefebvre and Lajoie on June 27, 2003, they only questioned him about Messrs. X and Y. He replied that he had known them for approximately one year and that they lived within two blocks of each other. In a review of Mr. Lefebvre’s *Investigation Report* (Exhibit E-6), I note that this was the only question they asked him that would create a nexus between the grievor and his alleged association with the organized crime gang. No questions were asked concerning the 22 persons of interest to the RCMP (V-1 through V-22), the known criminals and murder victims, whose names the RCMP provided to Messrs. Lefebvre and Lajoie. The grievor was told by Messrs. Lajoie and Lefebvre that, unless he provided more details about Messrs. X

and Y and the events leading to his arrest and the criminal charges, Mr. Lajoie would have to base his decision on the information provided to him by the RCMP.

[161] On July 4, 2003, Mr. Lefebvre was informed that it was impossible for the grievor to have accessed the Special Witness Protection Program database. He also testified that there was no evidence that the grievor had illegally accessed the HRDC's computers and run the names of Messrs. X and Y or V-1 through V-22. It is fair comment that as far as the HRDC knew, their data and computer systems had not been illegally accessed by the grievor.

[162] On August 7, 2003, Mr. Lefebvre informed Mr. Facey, the grievor's bargaining agent representative, that the grievor would be invited to a meeting on August 13, 2003 and that the grievor would have an opportunity to clarify or comment on new information obtained following the June 27, 2003 meeting. Although Mr. Lefebvre testified that the grievor chose not to attend, I prefer the grievor's unchallenged testimony that the HRDC cancelled the meeting, and I must say that I find this disquieting.

[163] On August 21, 2003, Mr. Lefebvre completed his administrative investigation, and on August 27, 2003, Mr. Gardner terminated the grievor's employment. Regardless of Mr. Lefebvre's explanation that he had not received any new information; the grievor should have been provided with a copy of his *Investigation Summary* and should have been given an opportunity to comment before Mr. Lajoie made his decision to revoke his ERS, which effectively terminated his employment.

[164] The HRDC did not share with the grievor this information or the allegations provided by the RCMP on which they based their decision with the grievor, albeit I note that Inspector Henderson's letter (Exhibit E-7) states that his letter contains sensitive information not for dissemination as the RCMP's investigation was ongoing. However, his letter states that he should be contacted if it is required to share this information outside the HRDC's investigation team (Exhibit E-7). I saw no evidence that the HRDC was explicitly told not to share this information. All that to say that this information and the allegations were not disclosed to the grievor. Although the RCMP wanted to revoke the grievor's ERS as early as April 22, 2003, it was not their decision to make. It was Mr. Lajoie's decision as the DSO. Either Mr. Lefebvre or Mr. Lajoie should have advised the RCMP that the grievor had to be provided full disclosure of the information and allegations before they could revoke his ERS, which would effectively

terminate his employment. Perhaps if they had done so, the grievor may have chosen to clarify the information or allegations in consultation with his lawyer or to have his lawyer present to ensure that his ERS was not revoked and that his employment was not terminated.

[165] Mr. Lajoie's decision to revoke the grievor's ERS and Mr. Gardner's decision to terminate his employment not only affected the grievor's employment with the HRDC, but also now compromise any chance of the grievor obtaining further employment in the federal public service. The grievor testified that, although he has been successful during oral interviews and written exams, he is eventually screened out as he no longer has a valid security clearance.

[166] The grievor did not adduce any evidence that the HRDC's decision to revoke his ERS, which terminated his employment, was made in bad faith or for reasons relating to discipline or that it was unreasonable given the allegations and information the RCMP provided to the HRDC. Having said that, it is quite possible that if the grievor had full disclosure of those allegations and information and a copy of Mr. Lefebvre's *Investigation Summary* and an opportunity to rebut or respond, his ERS may not have been revoked.

[167] It is difficult to comprehend why the HRDC did not adduce the RCMP's evidence and allegations through Sergeant Russell, who was present during a portion of the hearing. After all, the HRDC based its decision to revoke the grievor's ERS on that evidence and those allegations, which terminated his employment.

[168] The jurisprudence makes it abundantly clear that the failure to bring before an adjudicator some witness who could testify to the facts at issue is not without significance. Where the failure to produce such a witness is not explained, an inference may be drawn that the unproduced testimony would have been contrary to the case of the party affected by the inference or that it at least would not have supported the party.

[169] One of the underlining premises in determining procedural fairness is whether an employee is presumed innocent until proven guilty. In this case, the grievor was presumed guilty at the outset. For these reasons I have concluded that the duty of procedural fairness owed to the grievor has been breached. Although I cannot reinstate the grievor to his position as an ICO, I order the HRDC to compensate him from the

date of his termination (August 26, 2003) to what would have been the end of his term (March 26, 2004).

[170] After examining the evidence and the parties' arguments, I conclude that the HRDC breached the grievor's procedural rights, and in doing so, it removed his ERS, which effectively terminated his employment. As a former term employee, this gives rise to a consideration of an appropriate remedy. I cannot reinstate the grievor's ERS. However, I order the HRDC, within 60 days of the receipt of this decision, to assign an independent HRDC screening officer not related to this case to re-evaluate the grievor's ERS, as per the HRDC's *Security Policy and Procedures Manual* (Exhibit E-17). The HRDC within 14 days of the re-evaluation of the grievor's ERS, will inform the grievor in writing of its decision and the reasons on which the decision was based.

[171] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[172] The grievance in PSLRB File No. 166-02-34326 is dismissed for lack of jurisdiction.

[173] The grievances in PSLRB File Nos. 166-02-34325 and 166-02-34327 are allowed in part.

[174] The HRDC shall compensate the grievor from the date of his termination (August 26, 2003) to what would have been the end of his term (March 26, 2004).

[175] The HRDC, within 60 days of the receipt of this decision, shall assign an independent HRDC screening officer not related to this case to re-evaluate the grievor's ERS, as per the HRDC's *Security Policy and Procedures Manual*.

February 11, 2009.

**D.R. Quigley,
adjudicator**