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Date: 20100716

File: 566-02-837

Citation: 2010 PSLRB 83

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

DOUGLAS TIPPLE

Grievor

and

DEPUTY HEAD
(Department of Public Works and Government Services)

Respondent

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: D.R. Quigley, adjudicator

For the Grievor: Dave Cutler, Stephen Victor and Christopher Rootham, counsel

For the Respondent: Jeff Laviolette, Treasury Board Secretariat, and Harvey A. Newman, Michael Ciavaglia and Claudine Patry, counsel

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Heard at Ottawa, Ontario,
September 24 to 28, 2007, January 28 and 29, May 12 to 16, and
December 9 to 12, 2008, and June 22 to 26, 29 and 30, July 6, and October 6, 2009.

I. Individual grievance referred to adjudication

[1] On October 11, 2005, Douglas Tipple accepted a letter of offer for a specified-term appointment from October 11, 2005 to October 6, 2008, as Special Advisor to the Deputy Minister, Real Property Business Transformation, Public Works and Government Services Canada (PWGSC). Ten months later, by letter dated August 31, 2006, the Deputy Minister of PWGSC ("the DM") advised Mr. Tipple that his services would no longer be required as of the close of business on September 29, 2006.

[2] On September 5, 2006, Mr. Tipple filed a grievance contesting the DM's decision to terminate his employment.

[3] Mr. Tipple is seeking the following corrective action:

> a. *an order reinstating him to his position as Special Advisor to the Deputy Minister, Real Property Business Transformation at Public Works and Government Services Canada (at the EX-05 level), with reimbursement of the salary and other benefits he would have received prior to the date of reinstatement.*
>
> b. *in the alternative, in lieu of an order reinstating him to his former position:*
>
> I. [*sic*] *damages for loss of past and future salary in the amount of $726,923.08;*
>
> ii. *damages for loss of past and future bonus, in the amount of $109,038.46 (being approximately 15% of his salary);*
>
> iii. *damages for loss of employee benefits (including health, dental, life insurance, etc.), in the amount of $109,038.46 (being approximately 15% of his salary);*
>
> c. *relocation and moving expenses in the amount of $10,000.00;*
>
> d. *damages for PWGSC's breach of its duty of good faith owed to Mr. Tipple and PWGSC's obligation to protect and to not damage Mr. Tipple's reputation, in the amount of $250,000.00;*
>
> e. *punitive damages arising from PWGSC's unfair, disingenuous, reckless, capricious, arbitrary, and high-handed conduct, which has caused Mr. Tipple stress,*

> *anxiety, damage to his reputation, and disruption to his personal life, in the amount of $250,000.00;*
>
> *f. interest on the foregoing amounts;*
>
> *g. full indemnification for his legal costs in pursuing his Grievance and the within Adjudication.*

[4] On February 14, 2007, since no decision had been rendered at the final level of the grievance process within the regulatory timeframe, Mr. Tipple referred his grievance to adjudication.

[5] The parties were unavailable for a hearing before September 24, 2007.

II. Procedural matters

A. Objection to jurisdiction

[6] On June 22, 2007, the respondent raised an objection to the jurisdiction of an adjudicator to hear Mr. Tipple's grievance.

[7] Both parties made brief opening remarks at the hearing. Counsel for the respondent objected that Mr. Tipple had been laid off under subsection 64(1) of the *Public Service Employment Act* (*PSEA*) and that paragraph 211(*a*) of the *Public Service Labour Relations Act* (*PSLRA*) prohibits a referral to adjudication for a termination of employment under the *PSEA*. Therefore, according, to the respondent, I should dismiss the grievance for lack of jurisdiction.

[8] Counsel for Mr. Tipple argued that the DM's decision to end Mr. Tipple's specified period of appointment was not a *bona fide* layoff. The layoff was done in bad faith, and subparagraph 209(1)(*c*)(i) of the *PSLRA* gives an adjudicator jurisdiction.

[9] I decided to hear the merits of the case and to reserve my decision on an adjudicator's jurisdiction to hear the grievance.

B. Disclosure orders

[10] On May 16, 2007, Mr. Tipple's counsel, by letter to the respondent's counsel, requested the production of all PWGSC's documentation relevant to Mr. Tipple's case before the hearing scheduled for September 24, 2007. The letter specified 19 categories of documents that he required to prepare for the hearing. The letter also advised counsel for the respondent that, in the event that the respondent failed to

produce the requested documentation in a timely matter, Mr. Tipple's counsel would request a pre-hearing conference with the adjudicator.

[11] On June 5, 2007, Mr. Tipple's counsel requested a pre-hearing conference to address the respondent's failure to produce relevant documentation and also requested a list of the respondent's witnesses, including a summary of their expected evidence in the form of a "will-say" statement.

[12] On June 21, 2007, Adjudicator Mackenzie convened a pre-hearing conference and addressed the parties' submissions on the production of the respondent's documentation, the list of the respondent's witnesses and a summary of the expected evidence in the form of a will-say statement.

[13] On June 25, 2007, Adjudicator Mackenzie made the following first disclosure order:

. . .

> *The* Public Service Labour Relations Act *(PSLRA) gives an adjudicator the authority to compel the disclosure of documents. The power to order disclosure is not subject to the* Access to Information *or* Privacy Acts. *The adjudicator has concluded that he does have the authority to order disclosure of documents.*
>
> *The employer has until July 3, 2007 to raise any objections to disclosure of the documents listed in the letter of May 16, 2007 on the basis of privilege.*
>
> *The requested documents at point 12 of the May 16, 2007 letter are not ordered to be disclosed since these are publicly available documents.*
>
> *As regards the second issue, this will confirm that the request for an order requiring both parties to provide a list of witnesses and will-say statements was denied at the pre-hearing conference. The parties are nonetheless encouraged to discuss the grievance and their conduct of the case.*

. . .

[14] On July 4, 2007, the respondent objected that an adjudicator can exercise his or her power to order the disclosure of documents only in matters over which he or she has jurisdiction. Accordingly, the respondent proposed that a hearing be scheduled to hear submissions on whether an adjudicator holds jurisdiction to hear Mr. Tipple's

grievance. The respondent also requested, considering the volume of documents requested by Mr. Tipple's counsel in the May 16, 2007 letter, a minimum of eight weeks to collect and review the documentation.

[15] On July 5, 2007, counsel for Mr. Tipple objected to the respondent's eight-week delay and requested the following:

> . . .
>
> *Further, I note in support of its wrongful and improper request that a jurisdictional hearing be convened, the Employer alleges "... that it is bound to follow the provisions of the two statutes that govern how departments use and disclose information under their control". This is, in our view, dishonest and disingenuous. The fact is, the Employer is right now in breach of the provisions of the* Privacy Act *as a result of its failure to disclose information and documentation to our client, notwithstanding our client's entitlement to that information and documentation. In this regard, I enclose a copy of the letter from the Office of the Privacy Commissioner of Canada to the undersigned, dated June 29, 2007, which reads in part, as follows:*
>
>> *"This letter is to report the results of our investigation of the* Privacy Act *complaint you submitted on behalf of Mr. Douglas Tipple against Public Works and Government Services Canada (PWGSC). You stated in a letter received in our Office on May 1, 2007 that PWGSC failed to respond to the request within the time limit set out in the* Privacy Act.*"*
>>
>> ***
>>
>> *As PWGSC did not respond to the request within the time limit of 60 days, however, it is deemed to have refused to give you access to your client's personal information, according to the provisions of section 16(3) of the* Act. *Your complaint is therefore well-founded.*
>>
>> ***
>>
>> *Since PWGSC is deemed to have refused to give you access to your personal information and you have now received this report, you have the right to apply to the Federal Court under section 41 for the review of the decision of PWGSC."*

> *What the foregoing passage and the letter from the Office of the Privacy Commissioner of Canada make abundantly clear is that the Employer has no intention of following the provisions of the* Privacy Act, *just as the Employer had not followed the orders of the Public Service Labour Relations Board in the within matter.*
>
> *Also with respect to the disclosure issue, the Employer alleges in the letter from Treasury Board, that "we must emphasize that the employer has not yet had an opportunity to obtain and examine all the documents that are potentially relevant to Mr. Cutler's list of May 16, 2007."*
>
> *To the contrary, the Employer has had ample opportunity to disclose and produce those documents, in view of the fact that the documents were requested of them directly on May16th, 2007, almost two months ago. Further, most if not all such documents were previously requested of PWGSC by way of our client's* Privacy Act *request, received by PWGSC on February 13, 2007. Quite simply, PWGSC has been aware for over four an a half months that our client has been seeking the documents requested in my letter dated May 16, 2007, and has done nothing to disclose or produce them.*
>
> *Accordingly, we respectfully submit that, in keeping with its order of June 25, 2007, the Public Service Labour Relations Board should order the Employer to disclose and produce to our client all of the documents referred to in my letter to the Employer dated May 16, 2007, but for the documents requested at point 12 of that letter, and that such disclosure and production must take place prior to 5:00 p.m. on Thursday, July 12th, 2007.*

. . .

[16] On July 13, 2007, counsel for Mr. Tipple raised the following matters:

. . .

> *As you are aware, that hearing will commence on September 24th, 2007. Mr. Tipple has been seeking production of documents from the Employer for several months. Pursuant to the order of the adjudicator, dated June 25, 2007, that request for production was granted, subject only to the Employer having until July 3rd, 2007 to raise any objections to the disclosure of the requested documents on the basis of privilege. No specific objections as to privilege have been raised by the Employer.*

> *In breach of the adjudicator's order dated June 25th, 2007, no documents have been produced by the Employer. The hearing date of September 24th, 2007 is rapidly approaching.*
>
> . . .
>
> *Accordingly, we respectfully request that the Public Service Labour Relations Board impose a deadline upon the Employer to comply with the order of June 25th, 2007 and that the Employer be ordered to produce all of the documents requested in my letter to the Employer, dated May 16, 2007, except for the documents at point 12 of that letter, and that such production must be effected on or before Friday, July 20th,2007.*

. . .

[17] On August 2, 2007, Adjudicator Mackenzie made a second disclosure order, ordering the respondent to provide disclosure in accordance with the disclosure order of June 25, 2007, no later than August 17, 2007. In addition, the respondent was ordered to provide Mr. Tipple's counsel with a list of documents that it alleged were subject to solicitor-client privilege and/or cabinet confidence. Any remaining issues relating to privilege were to be dealt with by the adjudicator at the beginning of the hearing.

[18] On August 15, 2007, the respondent requested an extension of time to August 24, 2007 to provide Mr. Tipple's counsel with the documents covered by the disclosure order of August 2, 2007. Adjudicator Mackenzie granted the request and ordered the respondent to provide Mr. Tipple's counsel with documents that had already been compiled by the original deadline of August 17, 2007.

[19] On August 17, 2007, the respondent provided Mr. Tipple's counsel with a box of documents that had not been redacted and advised him that further documents would be delivered by August 24, 2007. The respondent also provided a list of documents that it would withhold as it considered them protected by the litigation, solicitor-client privilege or the "cabinet confidence" privilege.

[20] On August 23, 2007, Adjudicator Mackenzie held another pre-hearing conference and issued the following order:

. . .

> *The purpose of disclosure prior to a hearing is to ensure a fair hearing of the grievance before an adjudicator. The power of an adjudicator to order disclosure is for the sole purpose of the grievance hearing.*
>
> *Mr. Mackenzie has concluded that since the order of disclosure is for the sole purpose of the grievance hearing before an adjudicator, it is implied that the information in disclosed documents relating to third parties will not be disclosed to others outside of the hearing preparation process. This means that although the documents can be shared with the grievor and witnesses, the information is not to be disclosed to any other parties or individuals.*
>
> *Any issues about privacy or confidentiality of documents that are introduced at the hearing as exhibits are to be determined by the adjudicator at the hearing. Similarly, any submissions of the employer about subsequent treatment of disclosed documents that are not admitted into evidence are to be addressed by the adjudicator at the hearing.*

. . .

[21] On January 28, 2008, after hearing submissions by the parties at the hearing, I made a third disclosure order, ordering the respondent to provide Mr. Tipple's counsel with the full disclosure of documentation relating to communications between Isaac David Marshall, the DM at the time, Yvette D. Aloïsi, Acting Associate DM, and a number of other individuals.

[22] On March 31, 2008, the respondent advised that it had performed the search in accordance with the disclosure order dated January 28, 2008. The respondent maintained that the quantity of documents resulting from the search was not overly substantial, and the documentation was provided to Mr. Tipple's counsel.

[23] On April 10, 2008, counsel for Mr. Tipple advised that the documents provided by the respondent were incomplete and identified numerous outstanding disclosure issues.

[24] On April 25, 2008, the respondent advised counsel for Mr. Tipple that it had inadvertently failed to send documents retrieved from Mr. Marshall's email account and has since sent them.

[25] On April 25, 2008, counsel for Mr. Tipple advised me that the respondent had not fully complied with the January 28, 2008 disclosure order and that, to proceed at

the resumption of the hearing scheduled for May 12, 2008, he needed the full disclosure of the relevant documentation still in the respondent's possession.

[26] On April 25, 2008, counsel for Mr. Tipple provided me with all previous correspondence in his possession dealing with disclosure issues with the respondent. Counsel for Mr. Tipple sought my intervention to enforce the January 28, 2008 order.

[27] On May 7, 2008, I held a case management conference to identify and narrow the specific issues with respect to the respondent's documentary disclosure and directed the parties to be prepared to make submissions at the resumption of the hearing on May 12, 2008.

[28] On May 12, 2008, at the resumption of the hearing, both parties made submissions on the issue of the respondent's documentary disclosure.

[29] On May 13, 2008, I issued a fourth disclosure order ordering the respondent to conduct an electronic search of government records for a number of employees involved with Mr. Tipple's case. The respondent suggested that it would complete the search by August 31, 2008.

[30] On August 5, 2008, the respondent advised me and counsel for Mr. Tipple that, due to delays in acquiring the needed computer forensic facilities and e-discovery software, it could not meet the August 31, 2008 deadline.

[31] On August 29, 2008, the respondent requested a case management conference to amend and narrow the May 13, 2008 disclosure order.

[32] On September 8, 2008, a case management conference was convened, and I issued a fifth disclosure order, limiting to a minor extent the scope of the electronic search ordered on May 13, 2008 and ordering the disclosure of additional documents. The respondent was required to provide Mr. Tipple's counsel with all relevant documentation as soon as it became available and on an ongoing basis. The May 13, 2008 disclosure order remained in effect, and both the May 13 and September 8, 2008, disclosure orders were to be completed by November 21, 2008.

[33] On November 6, 2008, the respondent requested a disclosure order compelling Mr. Tipple to provide the full disclosure of expenses incurred by him as a result of his termination of employment up to that date, the details of his efforts in seeking

employment and copies of his tax returns for 2006 and 2007. The respondent requested that Mr. Tipple disclose the documents by November 17, 2008, one week before the resumption of the hearing scheduled for November 24, 2008.

[34] On November 7, 2008, further to its November 6, 2008 request for a disclosure order, the respondent then requested the following, by November 17, 2008:

. . .

> *If the grievor established or re-established himself as a sole proprietorship at any time subsequent to August 31, 2006, all financial records of that sole proprietorship including income tax returns filed for the 2006 and 2007 taxation years.*

. . .

[35] On November 11, 2008, counsel for Mr. Tipple agreed to the respondent's requests of November 6 and 7, 2008. Thus, I did not need to issue a disclosure order for the requested documentation.

[36] On November 14, 2008, a case management conference was held with the parties to address the inability of the respondent's counsel to continue with the hearing scheduled to resume on November 24, 2008. It was agreed that the hearing would resume on December 9, 2008, and that new counsel would have carriage of the respondent's case.

[37] At the resumption of the hearing on December 9, 2008, counsel for Mr. Tipple advised me that he had not received documents until November 2008 even though the September 8, 2008 disclosure order directed the respondent to provide documents on an ongoing basis. As well, at the resumption of the hearing, the respondent produced additional documentation, and counsel for Mr. Tipple requested the production of non-redacted copies of documents produced by the respondent. This again caused considerable delay to the proceedings as counsel for Mr. Tipple needed time to review the documentation. At that point in the hearing, I advised counsel for Mr. Tipple that he might have to file the disclosure orders in Federal Court and have it enforce them. Counsel for Mr. Tipple stated that the hearing had been delayed on many occasions while he waited for documentation and that, in the best interests of Mr. Tipple, he stated that seeking an enforcement order from the Federal Court would only delay the proceedings and cause additional costs on top of the already additional costs caused

by the respondent not providing the relevant documentation. Counsel for Mr. Tipple then asked me to draw a negative inference from the respondent's continuing failure to comply with the disclosure orders made in this case.

[38] In March 2009, counsel for Mr. Tipple received further documentation from PWGSC. However, it was not from the disclosure orders made in this case but through his original access to information request.

III. Summary of the evidence

[39] Counsel for the respondent filed 26 exhibits and stated that he would call the following three witnesses: Mr. Marshall, Ms. Aloïsi and Diane Lorenzato, Acting Assistant DM, Human Resources Branch (HR), PWGSC. However, Ms. Aloïsi did not testify.

[40] Mr. Tipple testified, and his counsel filed 26 exhibits.

[41] During the witnesses' testimonies and in a number of exhibits, reference was made to David Rotor and to the special advisors (Messrs. Rotor and Tipple). That occurred because Mr. Rotor was Special Advisor to the DM, Acquisitions Business Transformation, until August 31, 2006. Mr. Rotor has also referred a grievance to adjudication of which I am not seized.

A. For the respondent

[42] On August 13, 2007, Mr. Marshall was appointed High Commissioner of Canada to Barbados and the Eastern Caribbean. From June 2003 to June 2007, Mr. Marshall was the DM.

[43] Mr. Marshall testified that his mandate was to provide leadership to PWGSC following the negative publicity from the "sponsorship scandal." He was to stabilize PWGSC, help it regain its credibility, raise employee morale, and ensure professionalism from executives and employees. When Mr. Marshall arrived at PWGSC, approximately 14 000 employees were working in one branch. He created three separate branches — Procurement/Acquisitions, Real Property and Information Technology — and appointed an Assistant DM to each.

[44] From June to December 2003, Mr. Marshall undertook a review or, as he stated, "a vertical probing or diagnostic" of the services provided by PWGSC in such areas as

workload, best practices and expectations. The result of his review was a 10-page report entitled "The Transformation of the Public Works and Government Services Canada," which intrigued the Prime Minister as well as Cabinet.

[45] On March 24, 2004, the Government of Canada created the Expenditure Review Committee (ERC) to review government spending and to find ways to achieve savings. The ERC was chaired by the President of the Treasury Board and had seven Cabinet ministers as vice-chairpersons. Mr. Marshall initiated a review of the three newly created PWGSC branches and developed a number of strategic initiatives to achieve savings. He stated that this strategic submission was called "The Way Forward" or the "Transformation."

[46] On February 23, 2005, the Minister of Finance delivered the 2005 Budget Speech, which forecasted $11 billion in savings over the next 5 years. A document prepared by the Department of Finance entitled "Expenditure Review for Sound Financial Management," an overview document of the 2005 Budget (Exhibit E-2), detailed PWGSC's commitment and action plan to save $925 million over a 5-year period, from 2005 to 2010. The document reads in part as follows:

. . .

> *The Government of Canada is the largest single user of office space in Canada. It accommodates some 284,000 public servants in 5.7 million square metres of space. About half of this space is in the National Capital Region.*
>
> *Analyses undertaken by PWGSC and the Auditor General show that the cost of managing federal property can be reduced through more efficient use of space and by relying on more efficient management. And the potential for savings is large—especially in light of the fact that PWGSC manages over 420 buildings and 2,000 leases on an ongoing basis, and has 1,200 employees engaged in providing architectural, engineering, and property management services to other departments.*
>
> ***Action Plan***
>
> *The expenditure review action plan for savings on property management includes the following:*
>
> - ***Accommodation standards.** The Government will reduce the current average level of space utilization over 21 square metres per employee — to 18 square metres per employee, a level more consistent with*

private sector benchmarks. Fit-up standards, for construction, cabling, etc., will also be adjusted from the current average cost of $400 per square metre to a PWGSC standard of $313 per square metre.

- ***Inventory management.*** *The Government will improve its leasing strategies to ensure a more strategic use of lower-cost accommodation outside municipal "cores"—downtown areas—and the more timely negotiation of leases to ensure the best possible rate from landlords. This will also include improved management of repairs and maintenance contracts.*

- ***Outsourcing.*** *The Government will hire private sector experts in cases where significantly lower fees for project costs and management can be achieved.*

Savings from improved property management—after investments of $100 million—will total $925 million over five years (Table 4). Investments will be required to develop new information management systems to optimize space use and minimize cost, to provide skills development, and training to perform new tasks.

Table 4

Savings—Property Management

	2005-06	2006-07	2007-08	2008-09	2009-10	Total
			(millions of dollars)			
Enforcing accommodation standards	50	85	95	120	150	500
Improved inventory management	40	50	60	70	80	300
Outsourcing and overhead reductions	10	15	15	65	70	175
Non-essential capital deferral	50					50
Total saving	150	150	170	255	300	1,025
Investments at PWGSC	(20)	(20)	(20)	(20)	(20)	(100)
Net savings	130	130	150	235	280	925

. . .

[47] Mr. Marshall testified that Tim McGrath was Acting Assistant DM, Real Property Branch, at that time. He noted that Mr. McGrath was "a bright light and one of the few director generals within PWGSC with good ideas." He had decided to appoint him to the position of Acting Assistant DM to "test him out." Even though he appointed Mr. McGrath to that position, Mr. Marshall believed that Mr. McGrath could have benefited from having someone coach, guide or mentor him for approximately three years so that Mr. McGrath could eventually lead The Way Forward. Mr. Marshall submitted a proposal to the Treasury Board Secretariat to justify hiring two senior executives from the private sector (one for the Real Property Branch and one for the Procurement/Acquisitions Branch) to assist with The Way Forward. Those senior executives would share their knowledge and expertise and would help guide PWGSC through what was viewed as an unprecedented change in the delivery of government services. Mr. Marshall remarked that a fundamental rule of management is that the person giving the advice is also responsible for implementing it.

[48] In January 2005, an "Executive Group Position Description" (Exhibit G-1, tab 3) was developed. In March 2005, a national search for potential candidates was initiated, and Mr. Tipple was selected as the best candidate for the position of Special Advisor to the DM, Real Property Business Transformation. Since Mr. Tipple was not bilingual, on May 5, 2006, Mr. Marshall wrote to the Secretary of the Treasury Board, requesting that Mr. Tipple be exempted from the Treasury Board's policy on official languages. He explained that Mr. Tipple would not be involved with the ongoing provision of services to internal government clients or to the public and that he did not have to supervise staff (with the exception of those in his office). As well, when events or activities took place involving interaction in both official languages, an assistant DM or another senior official would accompany Mr. Tipple. The Secretary of the Treasury Board approved Mr. Marshall's request.

[49] On October 11, 2005, Mr. Tipple accepted the letter of offer for a specified-term appointment to a position classified at the EX-05 group and level with an annual salary of $360 000.00 (Exhibit G-1, tab 6). The letter of offer indicated that Mr. Tipple was entitled to the following:

- a performance-based bonus of up to 15 percent of his annual salary for performance during a fiscal year;

- annual vacation leave earned at the rate of one and two-thirds (1 2/3) days per month;
- cumulative sick leave;
- superannuation;
- disability, medical and dental insurance;
- relocation expenses consistent with the *Integrated Relocation Directive*;
- payment of his annual memberships fee at the National Club in Toronto;
- payment for completion of each study module from the Directors' Education Program at the Rotman School of Business in Toronto; and
- French language training.

The letter of offer also indicated the following:

. . .

> *Other*
>
> *Your services may be required for a shorter period depending upon the availability of work and continuance of the duties to be performed. Nothing in this letter should be construed as an offer of indeterminate appointment, nor should you in any way plan on or anticipate continuing employment in the Public Service as a result of this offer.*
>
> *You will be subject to a probationary period of 12 months excluding periods of leave without pay, and periods of leave with pay in excess of 30 consecutive days.*

[50] Mr. Marshall stated that, from October 11, 2005 to March 31, 2006, Mr. Tipple performed diagnostic work on leasing, repairing and maintaining government buildings; developing workplace methodologies; defining PWGSC's goals; benchmarking costs with the private sector; and providing strategic advice. Mr. Marshall stated that, although Mr. Tipple was doing a good job, he was concerned that there was not enough integration in the implementation of his work.

[51] In April and May 2006, Mr. Tipple was advocating a Crown corporation, where accountability and staff salaries were the major focus, along with outsourcing jobs to reduce overhead. Mr. Marshall noted that, during discussions with the Minister of Public Works and Government Services ("the Minister"), he was advised that the Government of Canada did not envision a Crown corporation or a major outsourcing of jobs. As well, PWGSC employees were very concerned about the number of changes taking place, and their bargaining agents were preparing a campaign to challenge any major outsourcing.

[52] From April to June 2006, Mr. Marshall had several discussions with Ms. Aloïsi. He stated that she agreed that it would be problematic for PWGSC to absorb more changes and that she felt that Mr. Tipple's role as Special Advisor was not "working out."

[53] On June 27, 2006, Mr. Marshall completed Mr. Tipple's "Executive Group Performance Agreement" ("the Performance Agreement") for October 11, 2005 to March 31, 2006, and gave him a "surpassed" rating for the delivery of his key commitments (Exhibit G-1, tab 15). He stated that Mr. Tipple was a valued employee who performed excellent work. The accomplishments attached to the Performance Agreement read as follows:

. . .

1. *Established and Provided Strategic Direction to the Business Transformation Agenda for Real Property Branch*
   - *Introduced rigorous, industry standard Business Transformation methodology to guide Real Property Renewal*
   - *Created Business Transformation Project Office*
   - *Defined Business Transformation strategy and related projects (i.e. Outsourcing, Systems Renewal, Pathfinder Projects, Asset Profile)*
   - *Engaged industry experts on key projects*

2. *Provided leadership and Real Property expertise on key Renewal Projects and Initiatives:*
   - *Benchmarking of Real Property Branch to other Real Estate organizations (e.g., GSA, ORC)*
   - *Proposed a Corporate Real Estate Organization Model*
   - *Consolidation of Service Integration Branch into Real Property Branch*
   - *ERC Savings Methodology*

- *Exploration of a Crown Corporation*
- *Development of Asset Profiles for RPB portfolio*

3. *Provided strategic advice to Deputy Minister, Central Agencies and the Minister related to Real Property Renewal such as:*
   - *Real Estate Study*
   - *Corporate Real Estate Model*
   - *ERC Commitments*
   - *RP System Integration*
   - *Outsourcing*
   - *Major Crown Projects*

4. *Enhanced the Working Relationship with Key Stakeholders and Partners*
   - *TBS*
   - *Collective Bargaining Agents*
   - *Other PWGSC Branches*
   - *GSA*

. . .

In the "Narrative Assessment" portion of the Performance Agreement, Mr. Marshall wrote the following:

. . .

> *Douglas Tipple has been appointed to the position of Special Advisor to the Deputy Minister, Real Property Business Transformation, effective October 11, 2005*
>
> *He has been accountable for leading an unprecedented transformation of the Department's Real Property Business Line, and for providing authoritative advice and recommendations to the Minister and Deputy Minister, in order to create the optimum value-for-money approach to meet the real property management needs of Public Works and Government Services Canada, the Government of Canada and Canadians, and for achieving savings in the order of $1 Billion over five years.*
>
> *The attached accomplishments will clearly demonstrate how Douglas Tipple provided the necessary leadership and strategic direction to advance the Real Property Transformation Agenda.*
>
> *Doug has been a valuable member of the Executive Management Team. In the short time he has been with us, he amply demonstrated the value that PWGSC and the Government is gaining from his Leadership, experience and insight.*

> *I want to express how much I appreciate the effort you have contributed to this transformation.*
>
> . . .

[54] As a result of surpassing expectations for the delivery of his key commitments, Mr. Tipple was advised that he would receive a lump-sum payment of $25 655.00, which was equal to 15 percent of his pro-rated salary.

[55] Mr. Marshall testified that, although he was pleased with Mr. Tipple's work and considered him "one of his boys," in May 2006 he was considering whether to continue to retain Mr. Tipple's services because of Mr. McGrath's progress on some of The Way Forward strategies.

[56] On May 4, 2006, Mr. Tipple requested Mr. Marshall's approval to travel to the United Kingdom (UK) from June 25 to 30, 2006, to meet with UK officials to discuss best practices since they had undertaken a similar transformation. Mr. Marshall testified that he approved Mr. Tipple's request but noted that he was not involved with any of the travel or meeting arrangements. The High Commission of Canada to the UK ("the High Commission") and PWGSC officials coordinated the scheduling of meetings.

[57] On July 5, 2006, Mr. Marshall received an email from Alain Trépanier, Acting Assistant DM, Corporate Services, Policy and Communications Branch, advising him that the Department of Foreign Affairs and International Trade (DFAIT) had expressed concerns because the High Commission was embarrassed that the special advisors had missed a number of scheduled meetings (Exhibit G-1, tab 20). Mr. Marshall testified that he met with Mr. Tipple on July 12, 2006 and that Mr. Tipple advised him that he did not miss any meetings, although there had been a number of miscommunications between PWGSC and the High Commission in organizing and scheduling meetings. He instructed Mr. Tipple to prepare a trip report detailing the benefits of the trip, the meetings he attended and the use of his time. Mr. Marshall stated the following: "I had not concluded any wrongdoing, except for some administrative snafus. The purpose of the trip report was that it would form the record if Canadian taxpayers were to ask if the trip was productive or added any value."

[58] On July 12, 2006, Mr. Marshall received a memo from Mr. Trépanier indicating that the meetings that the special advisors had missed had been with the UK Ministry of Defence (MOD), the UK National Audit Office (NAO) and the UK National Health

Services Purchasing and Supply Agency (NHS-PASA) (Exhibit G-1, tab 21). Mr. Trépanier noted that, for one of the meetings, the High Commission did not provide the necessary support to the special advisors. Mr. Trépanier also mentioned that Guy Saint-Jacques, Acting High Commissioner of Canada to the UK, had sent letters of apology to each of the agencies involved. Mr. Trépanier had prepared letters of apology on Mr. Marshall's behalf, which he had attached to his memo, and he recommended that Mr. Marshall send them. The letters were addressed to Mr. Saint-Jacques and to the UK agencies involved. Mr. Marshall agreed with Mr. Trépanier's recommendation, and he approved the letters.

[59] On July 17, 2006, on Mr. Marshall's behalf, Ms. Aloïsi signed and sent the letters of apology (Exhibit G-1, tabs 22 to 25). The letter to Mr. Saint-Jacques acknowledged that Mr. Marshall had been informed that the special advisors had missed a number of scheduled meetings and that he was undertaking measures to determine what had gone wrong. Mr. Saint-Jacques was also advised that Mr. Marshall had sent letters of apology to the UK agencies involved and that he had assured them that the miscommunications that occurred would be rectified before any other mission was contemplated (Exhibit G-1, tab 22). Mr. Marshall stated the following: "I was not saying we did anything wrong. I was acknowledging his concerns." The letters sent to the UK agencies indicated that the missed meetings resulted from unfortunate miscommunications (Exhibit G-1, tabs 23 to 25).

[60] Mr. Marshall testified that, while he was on vacation from July 21 to August 21, 2006, Ms. Aloïsi contacted him on a number of occasions. On August 15, 2006, she advised him that *The Globe and Mail* newspaper had published an article about the special advisors' trip to the UK (Exhibit G-1, tab 42) that was "not kind." He stated that, while he did not shrug off the article, he did not take any action since Ms. Aloïsi and the Treasury Board Secretariat were sorting out the matter. Mr. Marshall noted that the newspaper had obtained a copy of Mr. Tipple's trip report before he had seen it.

[61] On his return to the office on August 22, 2006, Mr. Marshall asked Shahid Minto, Chief Risk Officer, PWGSC, to investigate the particulars of the special advisors' trip to the UK On August 25, 2006, Mr. Marshall met with Mr. Minto to review his findings. Mr. Minto's final report ("the Minto Report") was completed on August 31, 2006. The summary of the Minto Report reads as follows (Exhibit G-2, tab 74):

. . .

> *Attached is my report on the United Kingdom (UK) trip of D. Rotor and D. Tipple. In my opinion, due diligence and appropriate oversight was observed in approving the objectives and the make up of the team to visit the UK Scheduling/communication problems occurred which resulted in D. Rotor being unable to attend at least three meetings as originally scheduled. He substituted these with other meetings. D. Tipple arranged some meetings with private sector companies without informing the DM, but the meetings were related to the objectives of the trip. Notwithstanding the above, both advisors appear to have used their time in a responsible and productive manner. Some administrative lapses occurred. Both advisors combined personal vacation with the business trip without written pre-approval by the DM. Both made their own air and travel arrangements using personal credit cards and neither has completed their travel claim as of yet. I am confident that all expenses claimed and approved will be reasonable and approved in accordance with prescribed rules.*

. . .

[62] Mr. Marshall stated that, on the morning of August 25, 2006, he met with the Minister and the Secretary of the Treasury Board to discuss issues involving The Way Forward, as well as the Minto Report.

[63] Mr. Marshall stated that, in the afternoon of August 25, 2006, he met with the Minister privately. They also discussed the press coverage of the special advisors' trip to the UK. Mr. Marshall advised the Minister and the Secretary of the Treasury Board that "although there were lapses in the special advisors' judgement that invited awkward questions, their actions were not a firing offence." The Minister asked Mr. Marshall if such an expensive "experiment" — hiring private-sector executives — was justifiable and on the right track, but at no time did he pressure Mr. Marshall to end their specified-term appointments. Mr. Marshall advised the Minister that over the next few days he would reflect on whether the experiment was still justifiable.

[64] On August 28, 2006, the next business day, Mr. Marshall informed the Minister that he had decided to end the experiment. He testified that he made that decision because Mr. Tipple had delivered his key commitments, The Way Forward was ahead of schedule, PWGSC could not absorb further changes and no major initiatives were left for Mr. Tipple. As well, both Mr. Marshall and the Minister were confident that

Mr. McGrath could assume the further work required for The Way Forward and that Diane Orange, Director General, Real Property Transformation Branch, PWGSC, would be available to assist Mr. McGrath with the extra duties. Mr. Marshall stated that he could not justify having taxpayers pay Mr. Tipple's salary for another two years.

[65] Mr. Marshall stated that he instructed Mses. Aloïsi and Lorenzato to obtain advice from senior officials at the Public Service Commission (PSC), the Public Service Human Resources Management Agency of Canada (PSHRMAC) and the Treasury Board Secretariat on how to end Mr. Tipple's term employment.

[66] On August 31, 2006, Mr. Marshall met with Mr. Tipple and gave him a letter advising him that his services would no longer be required as of the close of business on September 29, 2006. The letter reads in part as follows (Exhibit G-2, tab 82):

. . .

> *As the Transformation moves into its next phase, I have decided that it would be more appropriate that the functions you are performing be integrated into the Assistant Deputy Minister, Real Property's role.*
>
> *As you are aware, your letter of offer dated October 7, 2005 contained a clause which indicated that your services may be required for a shorter period depending upon the availability of work and the continuance of the duties to be performed. I regret to advise you that your specified period appointment to the position of Special Advisor to the Deputy Minister, Real Property Business Transformation, at the EX-05 level, will end earlier than previously indicated in your letter of offer. In accordance with the Treasury Board Term Employment Policy, you are entitled to one month notice. Your services will no longer be required as of the close of business on September 29.*

. . .

[67] Mr. Marshall noted that his decision was not a disciplinary action and remarked as follows:

> *The Transformation was my baby. I put myself on the line and as events were unfolding my decision to end Mr. Tipple's term was not a matter for discussion or debate. It was a good decision.*

[68] On September 1, 2006, Ms. Lorenzato prepared a "Memorandum to the Deputy Minister" to realign the business transformation functions within PWGSC. She

recommended that Mr. Marshall end the special advisors' term employment and that their responsibilities be transferred to the respective assistant DMs. Mr. Marshall testified that he agreed with her recommendations, which read as follows (Exhibit G-2, tab 92):

> . . .
>
> Recommendations
>
> *Both special advisors were hired for a 3-year term with a clause indicating that their services may be required for a shorter period. That clause states, in part, "Your services may be required for a shorter period depending upon the availability of work and continuance of the duties to be performed". Given the stage at which we are, the consensus is that the value for taxpayers is no longer obtained from these advisors to support continuation of their terms. I would recommend that we end the term employment of both special advisors and transfer their responsibilities to the respective ADMs*

Mr. Marshall stated that he then made a recommendation to the Treasury Board Secretariat to have the two special advisor positions abolished.

[69] Mr. Marshall was then referred to the following portion of the House of Commons debates of November 9, 2006 (Exhibit G-2, tab 100):

> . . .
>
> *Ms. Peggy Nash (Parkdale—High Park, NDP) :*
> *Mr. Speaker, in August the* Globe and Mail *reported on a junket to the U.K. taken by two ministerial advisers who ended up cancelling their meetings with British officials. Again, we learn today that no reports have been produced.*
>
> *How is it possible, at a time when over a billion dollars has been cut for programs to help our most vulnerable citizens, that government, like the Liberals before them, wastes so much of our hard-earned dollars for reports that do not even exist?*
>
> *[Table of Contents]*
>
> *Mr. James Moore (Parliamentary Secretary to the Minister of Public Works and Government Services and Minister for the Pacific Gateway and the Vancouver-Whistler Olympics, CPC) :*
> *Mr. Speaker, the two people in question, whom the member had referenced and whom the minister talked about*

> *today at committee, were in fact held accountable. They no longer work for the federal government.*

Mr. Marshall stated that he did not instruct the Parliamentary Secretary to the Minister on what to say. He noted that politicians are not held accountable for what they say in the House of Commons. He testified that PWGSC prepares background notes and suggested responses for the Minister's consideration in anticipation of any questions that might arise. The suggested response given to the Minister's office on September 18, 2006, reads as follows (Exhibit E-18):

> . . .
>
> *SUGGESTED RESPONSE*
>
> - *There is an important transformation taking place in the areas of acquisition and real property. This transformation will deliver significant savings for Canadian taxpayers.*
> - *The work of the two special advisors has been completed.*
> - *We are now at a stage where the work led by these two special advisors needs to be fully integrated within the department's Acquisition and Real Property branches.*
>
> . . .

[70] In cross-examination, Mr. Marshall agreed that the "Executive Group Position Description" (Exhibit G-1, tab3) accurately reflected Mr. Tipple's duties and responsibilities. He also agreed that Mr. Tipple was responsible for developing and monitoring all aspects of the implementation strategies of The Way Forward. He agreed as well that Mr. Tipple met with him almost daily to provide updates on The Way Forward.

[71] When questioned about the letter of offer, Mr. Marshall stated that, even tough it indicated that the specified-term appointment was for three years, "it was not etched in stone" and was subject to the availability of work and the continuance of the duties to be performed. He stated that he never promised Mr. Tipple that his term appointment would last three years. When Mr. Marshall was asked if he had discussed

it with Mr. Tipple, he replied, "Not specifically. But I never guaranteed him three years of employment."

[72] Mr. Marshall acknowledged that, on June 27, 2006, he gave Mr. Tipple a "surpassed" rating on his Performance Agreement (Exhibit G-1, tab 15), even though in May 2006 he had been considering whether to continue to retain Mr. Tipple's services. He agreed with Mr. Tipple's counsel that, at that time, the following aspects of The Way Forward were still ongoing: the Real Estate Study, the Corporate Real Estate Model, the ERC commitments, the Real Property System Integration, the outsourcing of jobs, and a Crown corporation project.

[73] Mr. Marshall was asked if he had approved the payment of Mr. Tipple's membership fee in the amount of $2407.50 for the National Club in Toronto in June 2006, which was made in late July 2006. He responded in the affirmative.

[74] Mr. Marshall confirmed that Mr. Tipple was the chairperson of a committee composed of senior officials responsible for evaluating and determining cost effective and efficient ways to accommodate federal government departments and, at the same time, to generate savings. The committee had selected the Bank of Montreal (BMO) to lead the Real Estate Study. The BMO was to act as a consultant to recommend a financial advisor to assist PWGSC in selling a number of government buildings and in moving to a sale and lease-back approach with the private sector. When Mr. Marshall was asked why the Royal Bank of Canada (RBC) became involved if the committee had selected the BMO, he explained that the Minister had intervened and had wanted the RBC to also be involved. Mr. Marshall confirmed that the Minister's intervention created a conflict with Mr. Tipple as he did not agree with the Minister's decision since the RBC charged significantly higher fees than the BMO.

[75] Although Mr. Marshall agreed that Mr. Tipple initiated the sale and lease back of federal government buildings announced by the Minister on August 20, 2007 (Exhibit G-2, tab 119), he noted that he and Mr. McGrath concluded the agreement. He also agreed that Mr. Tipple was involved with the Royal Canadian Mounted Police (RCMP) to relocate a number of its employees to the JDS Uniphase Building in suburban Ottawa and that that work continued after August 31, 2006.

[76] Mr. Marshall was referred to a "Memorandum to the Deputy Minister" dated May 4, 2006, in which Mr. Tipple requested Mr. Marshall's approval for the special

advisors to travel to the UK to meet with officials and their real-property service providers (Exhibit G-1, tab 9). Mr. Marshall testified that he approved Mr. Tipple's request on May 12, 2006, but that he indicated that Mr. Rotor would have to submit a separate trip rationale. When Mr. Marshall was asked if he agreed that Messrs. Tipple and Rotor would have had different sets of meetings because of their different portfolios, he replied in the affirmative.

[77] Mr. Marshall conceded that the sentence in the summary section of the Minto Report (Exhibit G-2, tab 74) that states that Mr. Tipple combined personal vacation with the business trip without written pre-approval was inaccurate.

[78] Mr. Marshall confirmed that he was aware that there had been scheduling problems with the UK trip but stated that he was not aware of the June 22, 2006, email (Exhibit G-1, tab 13) that Gregory Evanik, Director, Corporate Planning and Intergovernmental Cooperation, PWGSC, sent to Catherine M. Dickson, Counsellor, Trade, Investment, Science and Technology, Commercial and Economics Division, High Commission, in which he stated the following: "As I understand, you will be accompanying David Rotor and Doug Tipple to most of the meetings. Particularly for the OGC and MOD, would it be possible for you to make [*sic*] summary of the meetings?" Nor was Mr. Marshall aware of Ms. Dickson's reply (Exhibit G-1, tab 13):

> *. . . I would like to help you out in the reports but am afraid I will not be able to do that. I will meet the group with the Acting High Commissioner and hope to attend the MOD and OGC portions . . . There is a lot to do and I can't commit to full participation . . . I do not have the MOD details yet . . . I will try to get* [sic] *before the group leaves . . . .*

. . .

[79] Mr. Marshall stated that he was unaware that Mr. Evanik had prepared the "Internal Status Report" dated July 6, 2006 (Exhibit G-1, tab 14). The report reads in part as follows:

. . .

> *2 - Missed Meetings - While the no shows remain the core issues, is should be noted that the HC only partially fulfilled its commitment to us (particularly re the coordination and support for the MOD meetings) ... causing significant problems. In addition, PWGSC was not as diligent as it should have been in insisting that the HC provide us with the details*

> *which would have put into the materials and schedules ahead of time! Having said that, the delegation no shows for the Wed. June 28th afternoon MOD meeting, the June 29th NAO meeting, and the June 30th PASA meetings, are the core issues with which the HC is responding. We do not know why these occurred.*
>
> *ACTION: The HC has already sent letters of apology to the three UK organizations and we have asked to get these. If the DM also sends letters, the level of effort will be sufficient…as much as can be done at this time.*

. . .

[80] When Mr. Marshall was asked if he was aware that Mr. Tipple did not attend some of the meetings scheduled from June 28 to 30, 2006, because they dealt with procurement/acquisitions issues, he replied in the negative. He also stated that he was unaware that the special advisors had had different agendas (although in his previous testimony he had agreed that the special advisors would have had different sets of meetings).

[81] With respect to the letters of apology, when Mr. Tipple's counsel stated to Mr. Marshall that it was inappropriate not to have mentioned that Mr. Tipple did not miss any scheduled meetings that related to his portfolio, Mr. Marshall replied, "That's your opinion."

[82] Mr. Marshall confirmed that he had several debriefing meetings with Mr. Tipple from July 12 to 17, 2006. When asked why he never mentioned to Mr. Tipple during those meetings that he would be sending letters of apology, Mr. Marshall responded, "I knew there was a problem and it was appropriate to apologize." He subsequently conceded that it would have been appropriate to discuss the letters with Mr. Tipple.

[83] Mr. Tipple's counsel then referred Mr. Marshall to a weekly DM update, also referred to as a "Flash Report," dated July 28, 2006 (Exhibit G-1, tab 28). The Flash Report provided an update on the progress of the Business Transformation initiatives on which Mr. Tipple was working. In other words, it was a progress update of Mr. Tipple's key deliverables in his work plan. Mr. Marshall stated that 90 percent of the following work, on which Mr. Tipple was working, was not pursued by PWGSC:

- Business Transformation Request for Proposal;
- Financial Advisory Services Request for Proposal;

- Outstanding Strategy and Business Case;
- Change Meeting;
- Risk Meeting;
- ERC/Budget Commitment, Leader Project Office;
- ERC/Budget Commitment Accommodation/Inventory Management Saving Streams; and
- Corporate Real Estate Organization Model.

[84] At that point in the hearing, for clarification purposes, I asked Mr. Marshall if his testimony was that the Business Transformation initiatives that Mr. Tipple was working on before August 31, 2006, were discontinued and not pursued by PWGSC. Mr. Marshall replied in the affirmative. Mr. Tipple's counsel then referred Mr. Marshall to several sections of the "PWGSC 2006-2007 Departmental Performance Report" published by the Treasury Board Secretariat (Exhibit G-6). After thorough questioning, Mr. Marshall agreed that the following initiatives continued after August 31, 2006: the Corporate Real Estate Organizational Model, the Business and Systems Transformation Project, the Commercial Off-The-Shelf Software Solution for the Real Property Business and Systems Transformation Project, and the sale of nine federal office properties to a Canadian private-sector company.

[85] Mr. Marshall was questioned about an email that Mr. Evanik sent to Mr. Trépanier on July 31, 2006 (Exhibit G-1, tab 30), in which he stated: "We got via the backdoor a copy of the UK trip report . . . no action at this time . . . different???" Mr. Marshall replied that he had not seen the email and that he had no idea how Mr. Evanik had obtained the trip report.

[86] With respect to an email that Mario Baril, Manager, Media Relations, PWGSC, sent on August 9, 2006, to Mr. Marshall's chief of staff and to the Minister's chief of staff, Frédéric Loiselle (Exhibit G-1, tab 31), Mr. Marshall replied that he did not see the email on that day since he was on vacation. In his email, Mr. Baril states that he received an email from Daniel Leblanc, a reporter with *The Globe and Mail*, and that Mr. Leblanc had a copy of Mr. Tipple's trip report. Mr. Leblanc made a number of allegations and requested answers. Mr. Leblanc's email reads in part as follows:

[Translation]

. . .

> - *For whom was the document intended within the Ministry of Public* [sic] *of Public Works? Mr. Marshall?*
> - *A large portion of the report can be found on the Internet at the following locations: www. amaresearch.co.UK/PF106 (click on section: summary of contents) and www.adamsmith.org/ 80ideas/idea/5.htm. Why did the authors not quote these two reports as references?*
> - *Why did the authors change the text in order to drop expressions such as "Whilst..." and "What is more ..."?*
> - *Why did the authors modify certain figures in the text (see example below)?*
> - *Was Mr. Marshall aware that certain sections of the report were obtained from external sources?*
> - *What are the two advisors' annual salaries?*
> - *Did the advisors take their wives along for the trip and by how many days did they extend the trip to Europe for personal reasons? Did the government also pay for that portion of the trip?*
> - *Approximately how much did the trip cost the government?*
> - *To whom did Mr. Marshall need to send letters of apologies in England for the meetings missed by its two advisors?*
>
> . . .

[87] Mr. Marshall was then referred to an investigation report entitled "Leak of Information to the Globe and Mail" prepared by Daniel Desmarais, Investigation Manager, Special Investigations Directorate, PWGSC (Exhibit G-2, tab 117). Following a request from Mr. Trépanier, Mr. Desmarais conducted an investigation from August 10, 2006 to August 1, 2007. Mr. Marshall noted that the report was completed after he left PWGSC and that he was on vacation when Mr. Leblanc obtained a copy of Mr. Tipple's trip report. Since Mr. Marshall was having difficulty remembering names and dates, he was referred to certain paragraphs in the investigation report. He then replied, "After returning from vacation, I may have been told we were investigating this leak." He agreed that the leak of information could have damaged Mr. Tipple's reputation. When asked further questions about the investigation report, he reiterated that the investigation was completed after he left PWGSC. The summary of the investigation report reads in part as follows:

> . . .
>
> 4. *The scope of the SID investigation was to track the life cycle of the trip report to determine where, how and at what*

> *point it could have been delivered into the hands of the journalist. The comprehensive investigation included interviewing and obtaining written statements of fact from numerous employees, obtaining assistance of IT security to review and synthesize thousands of e-mail and telephone communications, the review of documentary evidence as well as request* [*sic*] *assistance from another government department.*
>
> *5. The evidence gathered confirms that on August 2, 2006, seven days prior to the journalist contacting the department, Ms. Janet Thorsteinson, Executive Director, Military Procurement, Acquisitions Branch of PWGSC exchanged e-mail with Ms. Catherine Dickson, Commercial Counselor at the Canadian High Commission in the United Kingdom. The investigation revealed that Ms. Dickson, who had acted as the contact person in the UK for the two PWGSC advisors was, as expressed in her e-mail communications, perturbed by the contents of the trip report, a copy of which she received from Ms. Thorsteinson on August 2, 2006 as an e-mail attachment.*
>
> . . .
>
> *10. In summary, Ms Thorsteinson was the only PWGSC employee identified during the investigation to have provided a copy of the trip report to Catherine Dickson a person outside the department. Catherine Dickson . . . admit*[ted] *to having had any communication with the journalist, Daniel Leblanc. Evidence was not uncovered which would link Ms. Thorsteinson directly to the delivery of the trip report to the journalist, however she did provide a copy of the document to Ms. Dickson . . . .*
>
> . . .

[88] Mr. Marshall stated that he was not aware that, on July 31, 2006, Mr. Evanik emailed a copy of Mr. Tipple's trip report to his immediate supervisor, Jonathan Higdon, Acting Director General, Strategic Policy and Planning, and to John Read, Senior Director, Military Procurement, PWGSC. He was also not aware that Mr. Read had forwarded the trip report to his immediate supervisor, Janet Thorsteinson, Executive Director, Military Procurement, PWGSC, and that she told Mr. Read to see that it got wide distribution. When Mr. Marshall was asked if Ms. Thorsteinson has been on special leave since August 6, 2006, he replied that he could not remember. In addition, he could not recall whether he had been advised that, on March 23, 2007, Ms. Dickson was given a letter of reprimand for her involvement.

[89] When Mr. Tipple's counsel stated to Mr. Marshall that Mr. Marshall knew that Mr. Tipple had not cancelled any scheduled meetings, he replied, "I did not know that to be a fact. Mr. Tipple may not have cancelled meetings. He developed another meeting schedule but he did not go where he was supposed to." Mr. Marshall agreed that Mr. Tipple informed him on July 12, 2006 that he had not cancelled any meetings that he had been scheduled to attend.

[90] When Mr. Tipple's counsel reminded Mr. Marshall that the Minto Report does not state that Mr. Tipple cancelled any scheduled meetings, Mr. Marshall remarked, "There was a mix-up. Persons expected them at meetings and they were not there. I sent letters of apology based on what I knew."

[91] Mr. Marshall confirmed that while he was on vacation Ms. Aloïsi called him on a number of occasions and that he received emails on his Blackberry. He agreed that Ms. Aloïsi had informed him that Mr. Loiselle had contacted her on August 15, 2006, after an article appeared in *The Globe and Mail* concerning the special advisors' trip to the UK and that the Minister wanted to know what was going on. Mr. Marshall stated that Ms. Aloïsi advised him that she was handling the situation and that she was preparing media lines to respond to the article, but he never saw the media lines.

[92] Mr. Marshall also confirmed that Ms. Aloïsi had informed him that Mr. Tipple had advised her that other articles had been published in *The Globe and Mail*, that his reputation was being tarnished and that he wanted PWGSC to "come out fighting." When Mr. Tipple's counsel asked Mr. Marshall if he agreed that a person's reputation is sacred and that a person would want it protected, Mr. Marshall stated that he did. However, he commented that "[t]he PWGSC refrains from that sort of reaction, as it is counter productive, and it must examine the best route. Telling the truth to the best of our ability is the best way. Mr. Tipple felt we were not doing enough, but that is a matter of judgement."

[93] When Mr. Marshall was asked if he recalled receiving an email from Mr. Baril on August 9, 2006, informing him that at the Minister's request Mr. Baril was to meet with Mr. Leblanc on that day (Exhibit G-1, tab 36), Mr. Marshall replied that he did not remember. However, he did agree that the Minister's office was involved at that time.

[94] Mr. Marshall stated that he was not aware that Mr. Baril had emailed Mr. Tipple on August 9, 2009, the same day, to request his comments on a number of key

messages prepared for his interview with Mr. Leblanc (Exhibit G-1, tab 32). Mr. Marshall was then directed to the paragraph entitled "Letters of Apology," which states in part as follows:

. . .

> *. . . In the course of such visits it does happen that scheduling conflicts occur. In the case of this trip, three such conflicts occurred, where meetings scheduled with government officials were replaced with other meetings. It is a matter of protocol and courtesy that when such cancellations occur the department will send formal letters of apology. . .*

. . .

Mr. Marshall replied that Ms. Aloïsi did not advise him that the issue concerning the cancelled meetings was included in the key messages. He stated that he was unaware of Mr. Leblanc's allegation that Mr. Tipple had plagiarized his trip report by not including attributions for some of the materials that he quoted. Mr. Marshall stated that, when he returned from vacation, he learned that the attributions were not included in the draft trip report but that they were in the final report.

[95] Mr. Marshall was then referred to an email that Mr. Baril sent him on August 10, 2006 (Exhibit G-1, tab 37) to advise him that Mr. Leblanc wanted copies of the letters of apology. When asked if he replied to the request, he stated that he did not since he was on vacation and Ms. Aloïsi was handling the matter. He remarked that, had he not been on vacation, he would have provided the letters since there was nothing to hide.

[96] Mr. Marshall could not recall the email of August 10, 2006 that Mr. Tipple sent to him, to Ms. Aloïsi, and to Messrs. Loiselle and Baril (Exhibit G-1, tab 39). In his email, Mr. Tipple states that he has just learned that apology letters were sent and that he never saw them and therefore could not comment, and he reiterates that he attended all the meetings that were scheduled relating to real estate matters. With respect to Ms. Aloïsi's reply to Mr. Tipple that it was normal practice to apologize, Mr. Marshall replied that he did not advise Ms. Aloïsi on what to say. When Mr. Tipple's counsel stated that, had PWGSC advised Mr. Leblanc on August 10, 2006 that Mr. Tipple had attended all the scheduled meetings about real estate matters, it might have assisted in protecting Mr. Tipple's reputation, Mr. Marshall conceded that it was quite possible.

[97] Mr. Tipple's counsel then questioned Mr. Marshall about an email sent on August 10, 2006, by Bill Merklinger, Director General, Service Transformation, Real Property Branch, PWGSC, to Marc-André Anderson, Acting Director, Strategic and Business Communications, PWGSC (Exhibit G-1, tab 41). In his email, Mr. Merklinger indicates that Mr. Tipple's executive assistant had inadvertently excluded the accreditation references in the trip report. He notes that the trip report was leaked and confirms that there was no intended plagiarism on Mr. Tipple's part. Mr. Marshall replied that he became aware of the mix-up only when he met with Mr. Minto on August 22, 2006.

[98] Mr. Marshall confirmed that, although he had not seen the August 15, 2006 article in *The Globe and Mail* entitled "Six letters of apology sent to British officials" (Exhibit G-1, tab 42), Ms. Aloïsi had advised him of its contents. He noted that, when reporters attempt to contact or request interviews from employees, as was the case with Mr. Tipple, employees are required to advise the reporters to contact PWGSC's Media Relations Branch. In other words, Mr. Tipple would have had to rely on the Media Relations Branch to get the information out.

[99] Mr. Marshall was asked if there had ever been other occasions on which he had sent letters of apology to foreign governments during his public service career. He confirmed that there had been no other occasions.

[100] Counsel for Mr. Tipple then referred Mr. Marshall to the August 16, 2006 article in *The Globe and Mail* entitled, "MPs to question aides on British trip" (Exhibit G-1, tab 50). Mr. Marshall remarked that a Member of Parliament (MP) has the right to question an employee but that normally the DM meets with the MP and not the employee.

[101] With respect to Mr. Tipple's August 16, 2006 email advising Mr. Marshall that he had received an access to information request about his trip to the UK, that he had not received the media plan and that his reputation was being tarnished (Exhibit G-1, tab 52), Mr. Marshall replied that, as far as he knew, the media plan had been shared with Mr. Tipple.

[102] When Mr. Marshall was questioned about the Minister's request of August 16, 2006 that Mr. Tipple prepare a briefing note concerning his trip to the UK (Exhibit G-1, tab 57), he stated that he did not remember if he had seen the final briefing note or whether the Minister had received it. When he was referred to the

briefing note that Mr. Tipple had prepared for the Minister (Exhibit G-1, tab 69), Mr. Marshall agreed that he had seen a draft on August 22, 2006 that included Mr. Tipple's itinerary of the meetings that he had attended.

[103] Mr. Marshall confirmed that he was aware of Mr. Tipple's email of August 17, 2006, to Messrs. Trépanier and Loiselle and Ms. Aloïsi (Exhibit G-1, tab 61). Mr. Tipple had requested a meeting with the Communications Branch, but his request was denied, and he was told to speak to Ms. Aloïsi about it. Mr. Tipple again requested a meeting with the Communications Branch to express his concerns and disappointment with the media plan as it did not reflect the issues that he had raised with Mr. Trépanier several days earlier. Mr. Tipple was seeking to set the record straight by requesting a more proactive approach, as opposed to a reactive approach, in an attempt to salvage his reputation. In the email, he suggested a number of messages that could have been conveyed to Mr. Leblanc to set the record straight. The messages were that he had not missed any real-estate-related meetings; that he had been invited by Mr. Rotor to attend procurement-related meetings, but his schedule had been full with real estate meetings; that he had not been informed that PWGSC had sent apology letters; and that the trip notes in Mr. Leblanc's possession had been marked "draft" and had been leaked by someone in PWGSC. Mr. Marshall stated that, although he could agree that Mr. Tipple may have felt that his reputation was being tarnished, he was away on vacation when Mr. Tipple made his request. He also stated that there was evidence that at one point Mr. Tipple agreed with the original media lines and that the approach taken by PWGSC not to enter into a running battle of words with the press was appropriate. Mr. Marshall agreed that the Minister is accountable for PWGSC and that, thus, the Minister's office has sole control over the media strategy when it involves PWGSC. When asked if he was aware of any written media strategy prepared by the Minister's office, Mr. Marshall replied in the negative.

[104] Mr. Marshall was referred to an email to him from Ms. Aloïsi, dated August 21, 2006 (Exhibit G-5, tab 7). When asked by counsel for Mr. Tipple to explain the context of the briefing note referred to in the email, Mr. Marshall replied that he could not remember. When asked if he had a copy of the briefing note, Mr. Marshall replied that he did. Mr. Marshall was then asked to produce the briefing note, which he agreed to do. I also requested that a copy of the briefing note be given to Mr. Tipple's counsel. It was never produced.

[105] Mr. Marshall was asked if he had met with Mr. Minto on August 25, 2006, before his meeting with the Secretary of the Treasury Board and the Minister to discuss his report. He responded in the affirmative.

[106] Mr. Marshall confirmed that he met with the Minister privately on August 25, 2006 to discuss the events of the UK trip. He testified that, although he advised the Minister that the events surrounding the UK trip were not a firing offence, it crystallized his thinking of May 2006. He continued by stating that he was aware that there was work in progress and work to be implemented and that it was his decision to slow down The Way Forward, to move forward on an evolutionary basis and to align the special advisors' roles with the respective assistant DM's in a line-management role. He commented as follows: "I knew there was work to be continued, but it could be handled by staff and Ms. Orange would be seconded to Mr. McGrath to assist him."

[107] Mr. Marshall was asked if he contacted Ms. Aloïsi after his private meeting with the Minister on August 25, 2006. Mr. Marshall confirmed that he did and stated, "She was to provide me with options on how to proceed with the termination of Mr. Tipple's employment."

[108] Mr. Marshall was asked if it was his practice to take notes of meetings he had with the Minister. He responded in the affirmative. When asked if he took notes on August 25, 2006, when he met privately with the Minister, he responded, "I don't recall and if I did they are no longer in my possession."

[109] Mr. Marshall agreed that, although he had been thinking about realigning Mr. Tipple's duties with Mr. McGrath's, no integration or organizational structure analysis was done. Mr. Marshall was then referred to the "Memorandum to the Deputy Minister" prepared by Ms. Lorenzato on September 1, 2006 (Exhibit G-2, tab 92) and particularly to the following excerpt: "As part of the review of the organizational structure of the department . . . ." When asked if he had decided to change the organizational structure in one day, he replied that he had, as he had the authority.

[110] Mr. Marshall testified that, once he abolished Mr. Tipple's position, it was not recreated in any shape or form.

[111] Mr. Marshall agreed that, after he transferred the Business Transformation functions to Mr. McGrath, on October 3, 2006 Terry Homma was appointed Project

Director for the Real Estate Study Project Office, PWGSC, and he assembled a Real Estate Study Team to complete the Real Estate Study (Exhibit G-2, tab 99).

[112] In reply, Mr. Marshall confirmed that he had the delegated authority to terminate the employment of an employee but that the Minister did not. When asked if PWGSC had been unfair, disingenuous or high-handed in how it had treated Mr. Tipple, he replied, "No, not at all. Public life is unfair and you have to bite your tongue. It is part of the environment."

[113] When counsel for the respondent asked Mr. Marshall to explain why the word "layoff" was not mentioned during any discussions with Mses. Aloïsi and Lorenzato or in the letter advising Mr. Tipple that his services would no longer be required, Mr. Marshall replied that he had asked for options to end Mr. Tipple's term employment since there was no further need for a special advisor. He replied that he had wanted an HR advisor's point of view on the options available. He remarked, "I did not use the term layoff, as I did not consider him to be an auto worker."

[114] Since May 2, 2006, Diane Lorenzato has been Acting Assistant DM, HR. Her substantive position is Director General, Communications, PWGSC. As Acting Assistant DM, she is responsible for the management policy framework, HR planning, compensation, classifying and abolishing positions, and administrating the *Conflict of Interest Policy*. She also provides advice to the DM on HR-related matters. As Director General, Communications, she is responsible for internal and external communications and for dealing with the media.

[115] Ms. Lorenzato confirmed that, after Mr. Tipple's departure, Mr. Marshall abolished his position.

[116] Ms. Lorenzato testified that, on August 24, 2006, following a request from Mr. Marshall, Ms. Aloïsi invited her to a meeting to discuss options to end the terms of the special advisors. She was asked to explore several scenarios, such as a discontinuance of work, a rejection on probation, or an interchange with another department or central agency. Ms. Lorenzato confirmed that tab 70 of Exhibit G-1 contains notes that she took at several meetings with Ms. Aloïsi, Mr. Marshall and other officials in central agencies to discuss ending the special advisors' terms.

[117] On August 25, 2006, Ms. Lorenzato received a telephone call from Ms. Aloïsi. They discussed options for ending Mr. Tipple's term employment. Ms. Lorenzato testified that she knew that Mr. Marshall wanted to end the term employment of the special advisors but that she did not know why. The first option discussed was rejection on probation, and the second was a discontinuance of work.

[118] On August 28, 2006, Ms. Lorenzato met with Mr. Marshall and Ms. Aloïsi. She stated that Mr. Marshall advised her that he no longer required Mr. Tipple's services since The Way Forward was well ahead of schedule. She noted that the discussion to end Mr. Tipple's term was not related to the events in the UK.

[119] On August 30, 2006, following discussions with Lynne Lemire-Lauzon, Director General, Executive Resourcing Policy, PSHRMAC, Ms. Lorenzato advised Mr. Marshall that he could abolish Mr. Tipple's position and merge his functions with those of Mr. McGrath. Later that day, Ms. Lorenzato prepared the "Memorandum to the Deputy Minister" and sent it to Ms. Aloïsi for approval. Ms. Aloïsi made some minor changes, and Mr. Marshall then approved Ms. Lorenzato's recommendations (Exhibit G-2, tab 92).

[120] On August 31, 2006, Mr. Marshall met with Mr. Tipple and gave him the letter advising him that his services would no longer be required as of the close of business on September 29, 2006 (Exhibit G-2, tab 82). Ms. Lorenzato noted that, according to the Treasury Board *Term Employment Policy*, Mr. Tipple was entitled to one month's notice. However, Mr. Tipple was paid one month of salary in lieu of working until the close of business on September 29, 2006. She stated that, when an employee's services are no longer required, the employee's email account is immediately deactivated, and the employee is escorted off the premises. She confirmed that that protocol was followed in Mr. Tipple's case.

[121] In cross-examination, Ms. Lorenzato confirmed that she approved the suggested response and background provided to the Minister's office following the articles that appeared in *The Globe and Mail* (Exhibit E-18). She also agreed that, on August 21, 2006, she prepared a media line that stated in part as follows: ". . . Treasury Board approved the request to create two new 3-year term positions at the EX-05 level to manage the business transformation, with the possibility of extension for an additional 2 years . . ." (Exhibit G-1, tab 63).

[122] When Ms. Lorenzato was asked what options had been discussed on August 25, 2006, she replied: "rejection on probation, discontinuance of work, transfer to the Department of National Defence or to the Treasury Board." When asked if Ms. Aloïsi had requested that she provide Mr. Marshall with options to terminate Mr. Tipple's employment, she confirmed that they had discussed terminating his employment and not a layoff.

[123] Ms. Lorenzato was referred to a copy of her handwritten notes of several meetings that she attended to discuss options to end Mr. Tipple's term employment (Exhibit E-25). It was pointed out to her that the typed notes (Exhibit G-1, tab 70) differed from her handwritten notes, and she was then asked to explain the following comment in her handwritten notes: ". . . do not talk about abolishing the position, people would have the perception that they will be . . . ." She explained that Ms. Lemire-Lauzon did not recommend abolishing the position and transferring Mr. Tipple's duties to another senior position within PWGSC without performing an analysis because it would recreate the position and could be grounds for constructive dismissal. When asked if she supported the transfer of Mr. Tipple's functions to the respective assistant DM, she replied that "I did not support that option since I did not know the scenario of the DM."

[124] Ms. Lorenzato agreed that no analysis or discussions took place to identify what work remained to be completed and who would assume responsibility for the work after August 31, 2006.

[125] In reply, Ms. Lorenzato stated that Mr. Tipple was not constructively dismissed and that his position was not recreated.

B. For the grievor

[126] Mr. Tipple's counsel began by reviewing Mr. Tipple's résumé (Exhibit G-1, tab 1), which details an extensive career as a senior executive with a number of companies, such as Bell Canada, BCE and CN Rail.

[127] Mr. Tipple testified that in early 2005 an executive recruiter for a Toronto firm approached him after PWGSC placed an ad in *The Globe and Mail* seeking candidates for the positions of special advisors to the DM, Procurement/Acquisition, and to the DM, Real Property Business Transformation, portfolios.

[128] Mr. Tipple stated that, before he accepted the offer of employment, he met with Mr. Marshall on a number of occasions. During their discussions, he was advised that his role would be to develop and implement the following initiatives:

- achieve savings of $1 billion over 5 years through the transformation of the Real Property Business;

- provide strategic leadership and advice to introduce and implement an unprecedented change in how PWGSC managed its real-property program;

- develop short-, medium- and long-term strategies to support the transformation and implementation of the Real Property Business.

[129] Mr. Tipple testified that Mr. Marshall told him that, for The Way Forward to be successful, the person who developed the initiatives had also to implement them. Mr. Marshall advised him that, although the specified period of appointment mentioned in the letter of offer was three years, The Way Forward could take from three to five years.

[130] When referred by his counsel to the "Executive Group Position Description" (Exhibit G-1, tab 3), Mr. Tipple explained that, not only was he to analyze and develop strategies, he also had to implement them and monitor the implementation process to ensure that the objectives of the Government of Canada and PWGSC were met. He referred to the following section, entitled "Nature and Scope":

. . .

> *The Special Advisor will lead the analysis of the findings of multifaceted reviews that have been conducted into current programs, practices, processes and systems which were aimed at determining inefficiencies, identifying areas for improvement and innovation, and new ways of doing business. The Special Advisor will be responsible for leading risk analyses, development of business cases, determining the most appropriate approaches to achieve the intended results, providing recommendations, developing the documentation to obtain the approvals for changes, developing the implementation strategies, plans, critical path and monitoring the implementation process to ensure achievement of the government's and department's objectives and priorities. While the incumbent is responsible for leading the transformation of the Real Property Business*

> *Line so that it is more effective and efficient, it is at the same time addressing the major objective of ensuring that the Department contributes to the efficiency of government to achieve cost reductions in the order of billon dollars in the next five years so that the savings will be redirected to the government's social priorities and health care.*
>
> . . .

[131] Mr. Tipple noted that the purpose of the UK trip was to benchmark government and private-sector organizations, assess management frameworks, and explore best practices. Following Mr. Marshall's request, he prepared a trip rationale, which Mr. Marshall approved on May 12, 2006 (Exhibit G-1, tab 9). The cost of the trip was estimated at $4900.00.

[132] Mr. Tipple testified that his wife accompanied him to the UK, as he was to be on vacation from July 4 to 7, 2006. He was not aware of any government policy that prevented his wife from accompanying him as long as her expenses were not claimed. He confirmed that none of his wife's expenses were submitted to PWGSC. He also confirmed that Mr. Marshall had approved his leave request (Exhibit G-1, tab 11).

[133] Mr. Tipple stated that, although Mr. Evanik informed him on June 22, 2006 that Ms. Dickson would attend and take notes at the meetings with the MOD and the UK Office of Government Commerce, which were scheduled for June 27 and 28, 2006 (Exhibit G-1, tab 12), she did not attend.

[134] Mr. Tipple testified that he attended all the meetings that he had scheduled with the different UK officials and agencies that related to real-property issues. He noted that he also scheduled meetings with private-sector companies that were involved with real-property issues.

[135] Mr. Tipple stated that, on June 12, 2006, his executive assistant advised Mr. Evanik (who was the liaison with Ms. Dickson) that he would not attend the meeting with the NAO and that she would provide Mr. Evanik with the list of meetings that Mr. Tipple was scheduled to attend (Exhibit G-8, tab 4). Mr. Tipple stated that he had arranged a number of meetings with UK private-sector firms that related to real-property issues. His executive assistant had access to his personal calendar, and she was to ensure that Mr. Evanik received a copy of his agenda (Exhibit G-8, tab 6).

[136] Mr. Tipple noted that, on the day he left for the UK, Ms. Dickson had advised Mr. Evanik and Richard Westler, Corporate Policy and Planning Sector, PWGSC, that she could not provide details concerning the meetings scheduled for Mr. Tipple but that she would provide the details on his arrival in London on June 26, 2006 (Exhibit G-2, tab 117). When Mr. Tipple arrived in London, he informed Ms. Dickson and Mr. Saint-Jacques that he would not attend the MOD meeting that dealt with procurement issues since it was not his responsibility but that he would attend the MOD meeting about real estate issues.

[137] Mr. Tipple was then referred to the briefing note that he prepared for the Minister entitled "Fact Finding Trip to the United Kingdom June 26, 2006 - June 30, 2006." He testified that he sent several drafts to Mr. Marshall and that the final version was submitted to Mr. Marshall and the Minister on August 31, 2006 (Exhibit G-2, tab 85). Included in the briefing note was the following table detailing the times, locations, topics to be discussed and the hosts of the meetings that he attended:

JUNE 26, 2006	
TIME	***MEETING***
1600 —1700 *Attended at High Commission Office in stead of Canada House as originally scheduled*	***Canadian High Commission*** *Location: High Commission Office - moved from Maison du Canada, Trafalgar Square, Pall Mall East London* *Topic: General briefing to the Canadian Deputy High Commissioner on the purpose of the visit, the agenda, and expected results.* *Host: Guy Saint-Jacques, Canadian Deputy High Commissioner*
1700-2130 *Attended*	***AT Kearney*** *Location: Lansdowne House, Berkeley Square, London, W1J 6ER* *Topic: Discuss Private Finance Initiatives, British outsourcing experience and implications for PWGSC* *Host: Charles Hughes, Vice President*
JUNE 27, 2006	
TIME	***MEETING***

0945-1700 *Attended*	***Office of Government Commerce*** *Location: Office of Government Commerce - Trevelyan House, 26-30 Great Peter Street* *Topic: To explore innovative practices in procurement and real property areas:* • *Buying solutions* • *P3 Initiatives* • *Best Private Practice on Outsourcing* *Host: Ian Glenday, Executive Director, Better Projects, OGC*
June 27 or 28 *To be confirmed* *Procurement related - did not attend*	***Sustainable Procurement Task Force*** *Topic: Discussion regarding:* • *Outsourcing* • *Recapitalization* • *British Private Finance Initiative* *Host: Sir Neville Sims, Chairman of the Sustainable Procurement Task Force.*
JUNE 28, 2006	
TIME	*MEETING*
1130 -1330 *Attended*	***RBC Capital Markets*** *Location RBC, Thames Court, One Queen – Upper Thames Street, London – EC4V 4DE* *Topic: PFI/PPP in Europe and other procurement routes applicable to Government Real Estate, including: Risk Transfer; Residual Value and surplus estate; Transparency; and Negotiating with the private sector. Sourcing Equity and Debt.* *Host: Adrian Bell, Chairman RBC Europe*
1400 - 1600 *Attended*	***Ministry of Defence*** *Location: H.M. Ministry of Defence, Main Building, Whitehall, London SW1* *Topic: Real estate issues faced by Ministry of Defence and in particular, the MODEL Project (real estate)* *Host: Ross Campbell, Private Finance Unit & Project manager for MODEL*
1615 - 1800 *Attended*	***H.M. Treasury*** *Location: Private Finance Unit, Treasury – H.M. Treasury, One Horse Guards, London – SW1* *Topic: Policy issues relating to outsourcing government real estate*

	including value for money, transparency and avoidance of tax leakage. *Host: Danny Daniels, PFI Financial Advisor*
1900 - 2130 *Did not attend*	*Dinner at Saint James Club with Ray Celli – acquaintance of David Rotor – St-James Club (London)*
Procurement related – did not attend	***Ministry of Defence – Defence Procurement Agency (DPA) and Defence Estates*** *Topic: Discuss new procurement practices and general methodology in efficiency procurement.*

JUNE 29, 2006

TIME	***MEETING***
0830 - 0930 *Attended*	***Partnership UK*** *Location: Partnership UK, Great George Street, London* *Topic: The role of Partnerships UK in developing Public Private Partnership; different procurement models relating to required and surplus Real Estate; and exploiting development opportunities for the public sector.* *Host: Alan Couzens, Project Director*
1300-1400 *Attended*	***Mapeley*** *Location: 20th flr, Euston Tower, 286 Euston Road* *Topic: The 'STEPS' Private Finance Initiative* *Host: Jameson Hopkins, Chief Executive Officer (CEO)*
1400 – 1530 *Attended*	***Carillon*** *Location: BT Centre, St-Paul's, London EC4* *Topic: The role of the private section in Real Estate PPPs. Alternative Outsourcing models; risk transfer; profit sharing.* *Host: Peter Jones; Director of Operations*
1400-1545 *Procurement related – did not attend*	***National Audit Office (NAO)*** *Topic: The role of Procurement Office, Toolkit, UK Efficiency Review Programme, Partnering projects under Private Finance Initiative.* *Host: Phil Airey, Audit Manager, NAO (Toolkit), other participants from NAO*

JUNE 30, 2006	
TIME	***MEETING***
0830-1200 *Attended*	***AT Kearney*** *Location: Lansdowne House* *Topic: Proposed PWGSC outsourcing* *Host: Charles Hughes, Vice President*
0930-1400 *Procurement related - did not attend*	***National Health Services Purchasing & Supply Agency (PSSA)*** *Topic: Policies, Processes and Systems (Major Improvement Effort); Sustainable Development Policy; Purchasing & Supply Policy*
1400-1500 *Attended*	***Land Securities*** *Location: Land Securities, 140 London Wall, London, EC27 5DW* *Topic: Trillium transaction and Private Finance Initiatives with Land Securities* *Host: Mike Schraer; Managing Director, Commercial Strategy*
	Conclusion of Business trip

[138] Mr. Tipple noted that the meetings dealing with real-property issues were coordinated by his staff and that Mr. Evanik forwarded his agenda to Ms. Dickson. He reiterated that he attended all the meetings that he was scheduled to attend and that he did not miss or cancel any meeting.

[139] Mr. Tipple testified that he was unaware that, on July 5, 2006, Mr. Trépanier sent an email to Mr. Marshall to inform him that the DFAIT was concerned that the special advisors had failed to show up for several scheduled meetings (Exhibit G-1, tab 20). He was also unaware that Mr. Trépanier sent a memo to Mr. Marshall on July 12, 2006 in which he indicated that Mr. Saint-Jacques would be sending letters of apology to the UK agencies involved (Exhibit G-1, tab 21).

[140] When Mr. Tipple was referred to the following extracts from the letters of apology that Mr. Saint-Jacques sent to the UK agencies involved, and in which he copied Mr. Marshall (Exhibit G1, tabs 16 to 18), Mr. Tipple replied that he was never consulted or informed of any allegations of poor behaviour on his part:

- The letter to the MOD stated the following: "... I would like to apologize most sincerely for the fact that two representatives from PWGSC did not show up to a day of meetings..." (Exhibit G-1, tab 16).

- The letter to the NAO stated the following: "... I would like to apologize most sincerely for the behaviour of Messrs. David Rotor and Douglas Tipple. . ." (Exhibit G-1, tab 18).

[141] With respect to Mr. Evanik's "Internal Status Report" of July 6, 2006 (Exhibit G-1, tab 14), Mr. Tipple stated that both PWGSC and the High Commission were responsible for the root cause of the scheduling conflicts. The Internal Status Report reads in part as follows:

...

> *2- Missed Meetings -While the no shows remain the core issues, it should be noted that the HC only partially fulfilled its commitment to us (particularly re the coordination and support for the MOD meetings)... causing significant problems. In addition PWGSC was not as diligent as it should have been in insisting that the HC provide us with the details which would have put into the materials and schedules ahead of time!....*

...

[142] Mr. Tipple testified that, on July 12, 2006, he met with Mr. Marshall to discuss Mr. Trépanier's email (Exhibit G-1, tab 20). He advised Mr. Marshall that he did not miss any scheduled meetings dealing with real-property issues and that scheduling conflicts were caused by the lack of coordination between PWGSC and the High Commission. He also told Mr. Marshall that Mr. Rotor had missed several meetings due to a lack of support by the High Commission. Mr. Marshall told him not to worry about it and asked him to prepare a trip report. During their meeting, Mr. Marshall did not inform him of his or Mr. Saint-Jacques' letters of apology or the allegations of poor behaviour. Mr. Tipple clarified that he had not been scheduled to attend meetings dealing with procurement issues since it was not his responsibility and that Ms. Dickson had been so advised.

[143] Mr. Tipple testified that, on August 9, 2006, he became aware that Mr. Leblanc had obtained a copy of his trip report. That same day, he also learned that letters of apology had been sent on July 17, 2006, to Mr. Saint-Jacques and to the UK agencies

involved. Mr. Tipple immediately informed Mr. Baril that he did not miss any of his scheduled meetings and asked him to explain how Mr. Leblanc had obtained a copy of his trip report. Although Mr. Baril replied that he would look into it, he did not inform Mr. Tipple.

[144] Mr. Tipple recounted that a few months earlier documents of a sensitive nature that he had been preparing for the Minister and the Privy Council Office (PCO) had been taken from his office and that the details from them had been published on the front page of *The Ottawa Citizen*. Mr. Marshall initiated an internal investigation as well as an RCMP investigation. A forensic audit was conducted on a number of PWGSC and employee personal computers to determine who had leaked the information. Mr. Tipple remarked as follows: "Now I find out that my trip report has been leaked to The Globe and Mail. I was concerned if other sensitive government documents had been leaked as well and to whom."

[145] Mr. Tipple's counsel then referred him to the email that Mr. Baril sent him on August 9, 2006, requesting his comments on the key messages prepared for Mr. Baril's interview with Mr. Leblanc. (Exhibit G-1, tab 32). Mr. Tipple stated that he provided his comments. Later that same day Mr. Anderson replied as follows (Exhibit G-1, tab 32):

. . .

> *With regard to your earlier message, we will provide you with a copy of our email exchanges with the journalist. We also prepare media reports, which are a synopsis of conversations, whenever we speak to a journalist. We'll get you those, as well. However, please note that we are not equipped to provide transcripts.*

. . .

Mr. Tipple testified that he never received a copy of the emails exchanged between Mr. Leblanc and PWGSC or the synopsis of those conversations.

[146] Mr. Tipple noted that, when he asked Mr. Baril if he could attend the interview with Mr. Leblanc, Mr. Baril forwarded his request to Mr. Loiselle, who responded that he did not think it wise (Exhibit G-1, tab 34). Later that day, Mr. Leblanc interviewed Mr. Baril.

[147] Mr. Tipple stated that, on August 10, 2006, he sent the following email to Messrs. Marshall, Baril, Loiselle and Trépanier and Ms. Aloïsi (Exhibit G-1, tab 39):

. . .

> *I was unaware until late yesterday that the DM sent apology letters . . . I was not consulted on this matter at all. I have not received any copies of these letters so I can't comment on them. I want to make it clear that I attended all of the meetings pertaining to Real Estate that were scheduled.*

. . .

Mr. Tipple was shocked when he received Ms. Aloïsi's reply specifying that it was normal practice to apologize, and he advised her that he was dissatisfied with her answer. He then sent another email to Ms. Aloïsi and Mr. Loiselle requesting that PWGSC conduct an investigation to determine who had accessed his computer and leaked the information to Mr. Leblanc (Exhibit G-1, tab 38). Ms. Aloïsi agreed to his request and instructed Richard Marleau, Corporate Services, PWGSC, to investigate the matter. However, Mr. Tipple was never informed of the results of Mr. Marleau's investigation. He stated that he was amazed that he was the one who had to request the investigation.

[148] Mr. Tipple testified that, on August 10, 2006, Mr. Merklinger sent the following email to Mr. Anderson about Mr. Leblanc's allegations that Mr. Tipple had plagiarized his trip report (Exhibit G-1, tab 41):

. . .

> 1. *In advance of Doug's UK trip he appropriately tasked one of our RPB analysts Andrew James to do advance research on pertinent topics. In advance of the UK trip, Andrew forwarded research to Doug (original electronic copy attached), with appropriate accreditation references (e.g., Adam Smith Institute).*
>
> 2. *Doug found some of the research to be relevant and requested that portions be included in the first draft of his trip report. He tasked his admin Rod McKie to prepare a first draft from several source documents, including extracts from some of Andrew's research, Doug's handwritten trip notes, etc. In preparing the first draft of the trip report, Rod inadvertently excluded the accreditation references (e.g., Adam Smith Institute) which were originally included in the attached document. This oversight would have been picked up in the final QA if this text remained in the final version of the trip report.*
>
> 3. *No matter "how it looks" to the reporter, based upon inappropriately leaked documents (Doug has requested*

> *that Associate DM initiate an investigation), there was in fact no plagiarism, intended or accidental, Final QA of draft working documents would have picked this up, and it is clear from the attached original research that appropriate academic accreditation had occurred.*

. . .

[149] With respect to the August 15, 2006, article that appeared on the front page of *The Globe and Mail* (Exhibit G-1, tab 42), Mr. Tipple confirmed that his picture appeared underneath the following heading: "Federal advisers' trip to Britain raises ire. Officials left trail of cancelled meetings." He stated that the article was very damaging to his reputation and that it made him "sick." The article reported that PWGSC had sent letters of apology for missed meetings and that there were allegations of plagiarism and unethical behaviour, which left the impression that he was guilty of transgressions.

[150] Mr. Tipple confirmed that the Minister and Mr. Loiselle were well aware of the *Globe and Mail* article of August 15, 2006 since they had exchanged the following emails (Exhibit G-8, tab 13):

- The Minister's email to Mr. Loiselle: "The GM's front page is not pretty . . . see Daniel Leblanc's article."
- Mr. Loiselle's response: "I think it's the kind of article that will light a fire under the ass of 'the centre'. . . as well as the boss."
- The Minister's reply: "We've got to get in touch with Marshall (you) and enquire about the reason for this trip. It may be that the article is exaggerated. I want to know about this asap [*sic*]."

[151] On August 15, 2006, Mr. Tipple informed Mr. Baril that Mr. Leblanc had contacted his office, and Mr. Tipple asked to meet with Mr. Leblanc. He testified that Mr. Leblanc wanted to know the plan of action and that Mr. Baril advised him that calls from reporters should be forwarded to PWGSC's Media Relations Branch. Mr. Tipple noted that his executive assistant had advised Mr. Baril that Mr. Tipple was still waiting for a media plan and, as a result, Mr. Anderson emailed Mr. Trépanier and Ms. Aloïsi to ask them how they wanted to proceed with Mr. Tipple's request. Mr. Tipple noted that Mr. Trépanier instructed Mr. Anderson not to respond to his email (Exhibit G-8, tab 18).

[152] Mr. Tipple testified that later on August 15, 2006 he called Mr. Baril to obtain his approval to meet with Mr. Leblanc to refute the incorrect statements published in the article. He also asked if he could meet with the Minister to explain his side of the story. He stated that Mr. Baril informed him that he could not meet with either one and that he had prepared a media plan. Mr. Tipple noted that he did not receive a copy of the media plan.

[153] Mr. Tipple's counsel then referred him to the article published on August 16, 2006, in *The Globe and Mail* entitled "MPs aim to question aides on British trip" (Exhibit G-1, tab 50). Mr. Tipple stated that Peggy Nash, Vice-Chairwoman of the House of Commons Government Operations Committee, and the Liberal and Bloc Québécois MPs who formed the majority of the Committee, wanted a more complete report of the UK trip. Mr. Tipple referred to the following sentence in the article: ". . . Public Works spokesman Mario Baril defended the trip this week and said the meetings were cancelled because of logistical problems . . . ." He stated that he was quite upset that PWGSC was providing misleading information and that it was not defending him. He felt helpless that he was not permitted to defend himself against the false allegations and therefore sent the following email to Mr. Baril, with a copy to Mr. Loiselle and Ms. Aloïsi (Exhibit G-1, tab 52):

. . .

> *I have now received an ATIP request pertaining to the trip, internal requests regarding my calendar, a summary of accomplishments and I see that questions may be raised in the House. I repeat my earlier question which was not answered except to direct me not to speak to the media. Do we have a media plan and if so, would you kindly share it with me as my reputation is being tarnished?*

. . .

[154] Mr. Tipple stated that he was advised to prepare a briefing note to the Minister summarizing his trip to the UK (Exhibit G-1, tab 58). Although on August 17, 2006, he sent an email to Mr. Loiselle asking him whether the purpose of the briefing note was to prepare a statement for the Parliamentary Secretary to the Minister (Exhibit G-1, tab 27), Mr. Loiselle never responded.

[155] On August 17, 2006, *The Globe and Mail* published an article in which it reported as follows (Exhibit G-1, tab 55):

. . .

> *MPs from the Liberal Party, New Democratic Party and the Bloc Quebecois said they want a full report on the trip and will ask Mr. Rotor and Mr. Tipple to appear before a parliamentary committee after the House of Commons returns next month.*

. . .

Mr. Tipple stated that he was excited to finally have an opportunity to meet with the House of Commons Committee to set the facts straight. As well, he was concerned with PWGSC's media messages because *The Globe and Mail* had also stated the following: "There are serious issues here of openness and accountability. Despite the lesson of the Sponsorship Scandal, Public Works Officials continue to be defensive and highly secretive."

[156] Later on August 17, 2006, Mr. Tipple sent the following email about the media plan to Mr. Trépanier, with a copy to Mr. Loiselle and Ms. Aloïsi (Exhibit G-1, tab 61):

. . .

> *. . . I must express my concern and disappointment of the media plan you describe. This is simply reactive and makes no attempt to "set the record straight" for me personally. I was hopeful after our last meeting where I expressed these same concerns that the media plan would address them.*
>
> *Further, Lucie Scott attempted to schedule a meeting with Communications on my behalf yesterday afternoon but the request was denied. She was told that I should speak to the Associate DM.*
>
> *My purpose in seeking a meeting with Communications was to request a proactive approach to salvaging my reputation. Since I was first informed of the article last week, the messages I asked to be conveyed to Mr. Leblanc at the Globe and Mail were:*
>
> *1) Mr. Tipple did not miss any real estate related meetings of any kind set up by any party The meeting in question involved procurement and Mr. Rotor invited Mr. Tipple to attend procurement related meetings if his schedule permitted. Mr. Tipple had a full schedule and consequently did not attend.*
>
> *2) Apology letters were not sent by the Dept on behalf of or as result of Mr. Tipple's actions As*

> *the cancelled meetings did not involve Mr. Tipple, he was not consulted in the preparation and issuance of the letters.*
>
> . . .

Mr. Trépanier replied as follows (Exhibit G-1, tab 61):

> . . .
>
> *As you know (because you approved the text of the media lines) the department conveyed its response as set out in the text in clear terms to the journalist when he first enquired about the report and prior to publication of any newspaper article.*
>
> *This being said, it is important to note that the newspaper article raised issues of relevance to the government and to the department. In Canada's parliamentary system, Ministers are accountable for the actions of their departments. As a result, Ministers have ultimate responsibility for communications.*
>
> *The communications strategy followed by the department since the article appeared on Tuesday has been chosen as the best option to communicate the position of the government. We have implemented that strategy.*
>
> *As the situation evolves, we will continually re-evaluate the department's approach and will keep you informed of developments.*
>
> . . .

Mr. Tipple explained that he agreed with the original "Media Heads-up" since that was all that PWGSC was willing to do. The articles in *The Globe and Mail* were becoming more personal, with more serious allegations, and PWGSC was not revising its communications strategy or providing him with the media plan. He requested a copy of the communications strategy and the media plan, but they were not provided to him.

[157] On August 18, 2006, *The Globe and Mail* published an article entitled, "Minister demands answers. Fortier seeking full details of fact-finding trip to London." Mr. Tipple testified that the article contained excerpts from an email that he had sent to his colleagues the day before (Exhibit G-1, tab 61). He again remarked, "Someone in the department was leaking internal communications to *The Globe and Mail.*" The article detailed three missed meetings and referred to the apology letters and to

procurement issues. He noted that nobody was defending his reputation even though he had repeatedly asked PWGSC and the Minister's office for a copy of the media plan (Exhibit G-5, tab 1).

[158] Later on August 18, 2006, Mr. Read sent an email to Ms. Thorsteinson (Exhibit G-8, tab 26) in which he referred to an article by Kathryn May that appeared on the front page of *The Ottawa Citizen* that morning. The article suggested that a secret report angered federal suppliers and that the Minister had asked Mr. Marshall for a full report of the UK trip. Ms. Thorsteinson replied as follows to Mr. Read: "I have it and check out The Globe and Mail" (Exhibit G-8, tab 26). Mr. Read then replied as follows: "Good golly, Miss Molly . . . isn't Marshall supposed to fall on his sword, or try hara kiri, or something?" (Exhibit G-8, tab 26). Ms. Thorsteinson responded as follows: "Offer up a sacrificial lamb more likely" (Exhibit G-8, tab 26). Mr. Tipple stated that Mr. Marshall offered him up as the sacrificial lamb to appease the Minister, the opposition parties, the public and the press.

[159] Mr. Tipple summarized his August 22, 2006 interview with Mr. Minto and the Minto Report (Exhibit G-1, tab 65). Mr. Tipple noted that the Minto Report indicated that he would need to understand the rules of authority if he were called to appear before a House of Commons Committee. As well, Mr. Minto advised Mr. Marshall that Mr. Tipple was upset that PWGSC was not defending him against the false media reports and that Mr. Tipple believed that his documents were being deliberately leaked by someone in PWGSC who did not like the changes and the savings that he had achieved.

[160] Mr. Tipple testified that, on August 23, 2006, following a request from Mr. Marshall, Mr. Minto reviewed Mr. Tipple's briefing note to the Minister (Exhibit G-1, tab 69), which included the following statement:

> *Although Mr. Tipple was welcome to attend procurement related meetings, his full schedule of real property related meetings precluded this. Mr. Tipple attended all scheduled meetings pertaining to real property. Nothing he did or did not do was properly the subject of, or necessitated, a letter of apology. Mr. Tipple was not aware of the existence of the apology letters as he was not consulted on the preparation or issuance of same.*

Mr. Minto advised Mr. Tipple that he was uncomfortable with the reference to the apology letters, and he recommended that Mr. Tipple remove it. Mr. Tipple testified that he responded that the apology letters were the centre of the controversy, that not referencing them would be conspicuous and that he felt that the issue needed to be directly addressed. After further discussions with Mr. Minto, he agreed to change his statement to the following: "Meetings were then scheduled and confirmed with public and private-sector organizations and travel arrangements were finalized" (Exhibit G-2, tab 85).

[161] Mr. Tipple testified that, on August 29, 2006, Pierre Berthiaume, Manager, Parliamentary Affairs, Communications Directorate, Corporate Services, Policy and Communications Branch, PWGSC, advised him that, although normally the DM would appear before a House of Commons Committee, it seemed likely that Mr. Tipple would be called to appear sometime in late September or early October 2006 (Exhibit G-2, tab 75). As such, Mr. Tipple would need to attend a two-day training course entitled, "Appearing before a parliamentary committee."

[162] Mr. Tipple testified that Mr. Marshall never discussed with him that his job performance was unsatisfactory, that The Way Forward had hit the saturation point or that there was a possibility that he could be laid off. He remarked that, before the termination of his employment, "it was business as usual."

[163] On August 31, 2006, Mr. Marshall called Mr. Tipple into his office and presented him with the letter of termination of employment. Mr. Tipple testified that he was not told the reason for the termination of his employment other than that his duties had been merged with those of Mr. McGrath. He stated that he advised Mr. Marshall that Mr. McGrath was already fully occupied with his own duties and that he was having difficulty doing all the work he had in progress. When Mr. Tipple asked Mr. Marshall if his decision was final, Mr. Marshall replied that there was nothing further to discuss and that it would be better if he left the premises immediately. Mr. Tipple stated that he was in shock. He noted that Mr. Marshall had never discussed integrating his duties with those of Mr. McGrath. Mr. Tipple noted as well that he was having difficulty doing all the work that was in progress and that at no time before August 31, 2006, was the possibility of a layoff ever mentioned to him.

[164] Mr. Tipple stated that the termination of his employment was very unusual since there was no transition plan from him to Mr. McGrath, no analysis of the work

plan and no briefing to his staff and because he was asked to leave the premises immediately. He stated that that is not the normal practice when an employee is laid off. It was like a termination of employment for misconduct or wrongdoing, and he felt as if he were being treated as "a felon." On September 1, 2006, he met with Ms. Lorenzato, returned all his PWGSC property and retrieved his personal effects from his office.

[165] Mr. Tipple's counsel then referred Mr. Tipple to the "Memorandum to the Deputy Minister" that Ms. Lorenzato prepared (Exhibit G-2, tab 92). Mr. Tipple stated that the statement: ". . . as part of the review of the organizational structure of the department. . ." was false. As well, with respect to the statement that ". . . [t]he design and planning stage, for which the special advisors' were especially hired, has now ended . . . ," he replied that, not only was the design and planning stage still ongoing, the implementation phase for which he had been hired also had not yet started for most projects. He remarked that Mr. Marshall hired him knowing full well that it was not the design and planning stage that would take years but the implementation phase that could take three to five years. Mr. Tipple stated that Ms. Lorenzato's "Memorandum to the Deputy Minister" was nothing more than a cover-up to justify the termination of his employment.

[166] With respect to the September 1, 2006, front page headline in *The Globe and Mail* entitled "Public Works advisors sent packing" (Exhibit G-2, tab 90), which also included his photograph, Mr. Tipple testified that he was embarrassed and distressed since it implied that his employment was terminated for wrongdoing as a result of his trip to the UK, and it caused enormous damage to his reputation.

[167] When referred to the House of Commons debate of November 9, 2006 (Exhibit G-2, tab 100), and Ms. Nash's comment that no reports had been produced, Mr. Tipple stated that reports had in fact been produced. He provided a briefing note to the Minister, as he had been instructed to do, as well as his schedule for the UK trip (Exhibit G-2, tab 85). There also was the Minto Report (Exhibit G-2, tab 74), which exonerated him, and Mr. Desmarais's report ("the Desmarais Report") (Exhibit G-2, tab 117), which identified Mses. Thorsteinson and Dickson as the persons responsible for leaking his trip report to *The Globe and Mail.* PWGSC and the Minister could have produced those reports, but they chose not to because they had no intention of revealing the truth either to Parliament or to the public. Mr. Tipple stated that the

comments of the Parliamentary Secretary to the Minister were consistent with a cover-up. PWGSC produced no documents, thus effectively leaving the impression that it was not a layoff but a termination of employment for misconduct. Mr. Tipple stated that it was the strategy of the Minister and PWGSC to relieve the pressure from the media and Parliament and not to relive the sponsorship scandal.

[168] Mr. Tipple testified that, on September 5, 2006, he instructed his counsel to advise Mr. Marshall that, as a result of his termination, he would be commencing legal proceedings against PWGSC (Exhibit G-2, tab 94). On October 4, 2006, he filed a Statement of Claim with the Ontario Superior Court of Justice (Exhibit G-2, tab 97).

[169] On December 11, 2006, Mr. Tipple requested that Mr. Marshall convene a final-level grievance hearing. On January 25, 2007, Mr. Marshall heard the grievance at the final level of the grievance process, and on March 1, 2007, he replied as follows after the grievance was referred to adjudication (Exhibit G-2, tab 105):

> . . .
>
> *As the transformation of the real property function moved from the design and planning phase (for which you were hired) to its implementation phase, it became necessary to realign various functions to support this. Accordingly, you were advised on August 31, 2006, that the duties you performed would be integrated into the role of the Assistant Deputy Minister, Real Property Branch.*
>
> *I cannot agree to the relief sought by you and your grievance is denied.*
>
> . . .

[170] Mr. Tipple testified that he was hired not only for the design phase but also for the implementation phase. He referred to the revised Flash Reports for the week of August 25, 2006 (Exhibit G-2, tab 73), which correlate with the "PWGSC Real Property Branch Outsourcing Initiatives" as of June 1, 2006 (Exhibit G-8, tab 1). He summarized that the 8 projects that he was leading and had to implement were from 0 percent to (in one case) 50 percent completed. He stated that there were a number of other major projects that had not yet been completed or implemented, such as the JDS Uniphase Building relocation and the Request for Proposal Real Estate Model.

[171] Mr. Tipple was referred to PWGSC's news release of August 20, 2007, which announced that the Government of Canada was proceeding with the sale of nine

federal government buildings (Exhibit G-2, tab 119). He stated that it was yet another example of one of his projects that continued after his employment was terminated. He stated that another major initiative that he proposed and started to develop before his employment was terminated was the Commercial-Off-The-Shelf initiative, which subsequently had a request for proposal on October 26, 2007 (Exhibit G-7).

[172] Mr. Tipple was referred to Exhibit G-14, which he accessed through an access to information request. He explained that, on April 23, 2007, less than eight months after the termination of his employment, PWGSC created an executive group position description for an associate assistant DM, Real Property Branch. The incumbent of the three-year term position would report to the DM and provide strategic and corporate support to the assistant DM, Real Property Branch, in accordance with The Way Forward strategy. Mr. Tipple stated that, although the position had a different title, the duties mirrored his own when he had been special advisor to the DM. On July 18, 2007, the Treasury Board Secretariat approved that position (Exhibit G-15). According to Mr. Tipple, PWGSC's website identifies John McBain as the incumbent of the position, which did not exist before the termination of Mr. Tipple's employment.

[173] Mr. Tipple commented on "The Way Forward: Real Property Renewal and Transformation," a document presented to the DM on June 4, 2007 (Exhibit G-16). He stated that the document identified the ongoing projects that he had carriage of until his employment was terminated.

[174] Mr. Tipple noted that the respondent had not given him proper and timely disclosure of the documents that he requested in order to proceed with this hearing. His counsel also made numerous requests to the respondent and to the adjudicator for the production of all the relevant documentation, but the respondent either refused to produce them or delayed the process. Although the first request for disclosure was made in May 2007, the requests were not fully complied with until March 2009, which considerably lengthened the hearing. As a result, Mr. Tipple incurred additional legal costs.

[175] Mr. Tipple stated that, from August 31, 2006 to October 8, 2009, he was unable to secure permanent employment. However, he did state that he obtained four small contracts. He identified Exhibit G-9 as a list of 15 executive recruiters and 37 consulting firms that he emailed, telephoned or met with to secure meaningful work. Mr. Tipple stated that he explained that, during discussions with the executive

recruiters and the consulting firms, he was told that they were aware of the negative publicity reported in the newspapers and that, until he was vindicated, he was "basically off limits." A number of the executive recruiters mentioned that, when they searched for his name on the Internet, the results were newspaper articles with unflattering and damaging remarks that questioned his integrity (Exhibit G-25).

[176] In support of his evidence that he was unable to secure meaningful employment, Mr. Tipple reviewed his income tax returns for 2006 and 2007 (Exhibits G-10 and G-11) and his 2008 financial statements for Solus Financial Corporation (a company that he started) (Exhibit G-24). Mr. Tipple testified that in 2006 and 2007 he earned no income and that in 2008 through Solus Financial Corporation he earned $38 172.00. Those exhibits have been sealed: *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 110.

[177] Mr. Tipple stated that, before his termination, he had had an unblemished 25-year career as an executive but that it was destroyed within a couple of weeks. His inability to secure meaningful employment substantially affected his quality of life. Before the termination of his employment, he sat on a number of boards of governance. The ordeal has been very stressful, and it has affected both his and his family's mental and physical health. Mr. Tipple stated that, as a result of his termination of employment, he has suffered from bouts of low self esteem, lack of confidence, stress, anxiety, feelings of betrayal, humiliation and hurt feelings. Mr. Tipple stated, "this ordeal has been very emotional and traumatic and my mental and physical health have been affected."

[178] In cross-examination, when Mr. Tipple was asked if, as a result of the *Globe and Mail* articles of August 15, 16 and 17, 2006, he was pursuing legal proceedings for defamation of character, he replied in the affirmative. He also noted that there was no claim for loss of income in the Statement of Claim filed with the Ontario Superior Court of Justice between himself and Bell Globe Media Publishing Inc., *The Globe and Mail*, Phillip Crawley, Edward Greenspon, Daniel Leblanc and Brian Laghi (Exhibit G-26).

[179] Mr. Tipple was asked if Mr. Marshall had indicated to him before he accepted the offer for a specified-term appointment that he was primarily looking for an individual to think of strategies, i.e., an "idea person," and that if those strategies were properly implemented it would save the Government of Canada $1 billion. Mr. Tipple replied that Mr. Marshall's vision ('The Way Forward") was all phases: visioning,

designing and creating, planning, and implementing. He stated that, during his meetings with Mr. Marshall before he accepted the offer of specified-term appointment, Mr. Marshall had explicitly told him that it would take at least three to five years to complete The Way Forward. He noted that, had he been told that he was being hired just as an "idea person," he would not have relocated his family from Toronto to Ottawa.

[180] When asked about his meeting with Mr. Marshall on July 12, 2006, Mr. Tipple replied that he told Mr. Marshall that he had not missed any scheduled meetings dealing with real-property issues during the UK trip and that Mr. Rotor had told him that he had missed several meetings as a result of poor communications and a lack of support from PWGSC and the High Commission.

[181] When Mr. Tipple was asked if Mr. Baril had been helpful in defending him and responding to the questions by the press, he replied that Mr. Baril mishandled the situation and that Mr. Baril never provided him with the media plan, "if there ever was one." Mr. Tipple was then referred to the following excerpt of the August 16, 2006, article in *The Globe and Mail* (Exhibit G-1, tab 58): ". . . Public Works spokesman Mario Baril defended the trip this week and said the meetings were cancelled because of logistical problems . . . ." Mr. Tipple commented that Mr. Baril did not report that he had not missed any meetings. Mr. Tipple stated that he told Messrs. Marshall, Baril and Trépanier and Ms. Aloïsi on numerous occasions that he had not missed or cancelled meetings, but they did not make that distinction to Mr. Saint-Jacques, the UK agencies involved, the media and staff. He remarked that the letters of apology had already been sent and that they would not correct their mistake, "most likely to save themselves embarrassment."

[182] When Mr. Tipple was asked if he knew Dave Zevy, he responded that Mr. Zevy is an executive recruiter. Counsel for the respondent then asked Mr. Tipple if Mr. Zevy had approached him to see if he would be interested in the position of President of Great Gulf Homes with an annual salary of approximately $300 000.00, including bonuses. Mr. Tipple confirmed that Mr. Zevy had approached him and that, although he did not think that it would be a good career move, he did put his name forward to Mr. Zevy as a possible candidate. In the end, he was not offered the position.

[183] Mr. Tipple was then referred to a series of letters exchanged between his counsel and Mr. Marshall and John McCarthy, Senior Counsel, PWGSC Legal Services

Unit, Department of Justice. In a letter dated April 16, 2007, Mr. Tipple's counsel advised Messrs. Marshall and McCarthy of an opportunity (with a private firm) for Mr. Tipple to pursue real-property assets that might be offered for sale by the Government of Canada and sought permission for Mr. Tipple to pursue the opportunity (Exhibit G-2, tab 103). On April 19, 2007, Mr. McCarthy responded that Chapter 3 of the *Post-Employment Measures* of the federal government's *Value and Ethics Code for the Public Service* would come into effect. To grant Mr. Tipple permission to pursue the opportunity, Mr. McCarthy needed to know the name of the private firm (Exhibit G-2, tab 111). On April 20, 2007, Mr. Tipple's counsel responded to Messrs. Marshall and McCarthy, advising them that Mr. Tipple's duties would include providing profession consulting services, which would lead to a due diligence review of the real-property assets that the private firm might acquire. The private firm again expressed that their identity was of a sensitive nature and that confidentiality had to be maintained. On April 24, 2007, Mr. McCarthy responded to Mr. Tipple's counsel and advised him that, without the identity of the private firm, PWGSC was unable to waive or reduce the 12-month limitation period set out in Chapter 3 of *The Post-Employment Measures* of the *Values and Ethics Code for the Public Service.* When asked in cross-examination if he agreed that, by not providing the name of the private firm, he lost an opportunity for employment, Mr. Tipple stated that that was correct but explained that he did not provide the name of the private firm because the company had instructed him not to. As well, following the leak of his draft trip report and other sensitive documents that he had worked on for the Minister and the PCO by persons employed at PWGSC, he did not trust that the information would remain confidential.

[184] When Mr. Tipple was asked why he did not contact *The Globe and Mail* after August 31, 2006 to set the record straight, he responded that he followed his counsel's advice not to contact the newspaper.

[185] Mr. Tipple agreed that he had saved the Government of Canada approximately $150 million while he was employed at PWGSC.

[186] When asked if he believed that Mr. Marshall was a man of integrity, Mr. Tipple stated that when he first met him, he thought so. However, he no longer does because of Mr. Marshall's testimony at the hearing, because Mr. Marshall dismissed his grievance out of hand and because Mr. Marshall did not advise him of his decision to

send letters of apology. Mr. Tipple concluded by stating, "I trusted him and was relying on his support. But now, no, I do not consider him to be a man of integrity."

IV. Summary of the arguments

A. For the respondent

[187] On behalf of the respondent, counsel argued that Mr. Tipple was laid off under subsection 64(1) of the *PSEA* and that I therefore do not have jurisdiction. However, if I decide that I do have jurisdiction, he argued that no damages are owed to Mr. Tipple since Mr. Tipple failed to mitigate his losses in a reasonable manner. There is no basis to declare bad faith, award punitive damages or legal costs.

[188] Counsel for the respondent stated that, to dispose of this case, I need only consider the following six documents:

- the letter of offer dated October 7, 2005 (Exhibit G-1, tab 6);
- the letter of termination dated August 31, 2006 (Exhibit G-2, tab 82);
- the Treasury Board *Term Employment Policy* (Exhibit E-5), which is mentioned in the letter of termination;
- Mr. Tipple's résumé (Exhibit G-1, tab 1);
- the Minto Report, dated August 31, 2006 (Exhibit G-2, tab 74); and
- the letters exchanged between Mr. Tipple's counsel, Mr. Victor, and the PWGSC's counsel, Mr. McCarthy, dated April 16, 19, 20 and 24, 2007, concerning Mr. Tipple's request to seek employment with a private-sector company after he was laid off (Exhibit G-2, tabs 103, 111, 112 and 113).

[189] Counsel for the respondent stated that I should also rely on the following cases: *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.); *Schofield v. Canada (Attorney General)*, 2004 FC 622; *Shneidman v. Canada (Attorney General)*, 2007 FCA 192; *Canada (Treasury Board) v. Rinaldi*, (1997), 127 F.T.R. 60 (T.D.); and *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529.

[190] Counsel for the respondent noted that, although the letter of termination did not mention the word "layoff," the Treasury Board *Term Employment Policy*, which is referred to in the letter, does. The letter of offer clearly stated that Mr. Tipple was being hired as a term employee. The reference to the PSC confirmed that he was a public service term employee. Counsel for the respondent also referred to the following sentence: ". . . your services may be required for a shorter period depending upon the availability of work and the continuance of the duties to be performed . . . ." He argued that, if a function is discontinued, it does not necessarily mean that there is a lack of work and that therefore an employee can be laid off.

[191] With respect to Mr. Tipple's factum of law, which repeatedly mentions that the respondent did not call Ms. Aloïsi as a witness and that I should consider that lapse in an adverse light, counsel for the respondent argued that, if Mr. Tipple felt that Ms. Aloïsi's testimony was crucial to his case, he should have summonsed her to appear as a witness.

[192] With respect to the allegation that there was still work to be done on The Way Forward, counsel for the respondent argued that, regardless of whether there was still work to be done, if an employer believes that there is a discontinuance of a function and decides to have another employee perform that work, then it is within the employer's right to do so. If the employer does not retain that right, then the public service can never reorganize itself.

[193] Counsel for the respondent stated that Mr. Marshall testified that Mr. Tipple performed excellent work and that he was a valued employee. As well, Mr. Tipple's résumé notes that his key accomplishments exceeded the targeted budget of $150 million for the 2005-2006 fiscal year. Had the $150 million savings continued for the next 4 years of The Way Forward, the projected dollar figure savings could have been $750 million of the budgeted target. In other words, Mr. Tipple had accomplished a lot, and PWGSC could not absorb further changes.

[194] Counsel for the respondent conceded that the Minto Report exonerated Mr. Tipple from any wrongdoing while in the UK and confirmed that he did not miss any scheduled meetings. Therefore, what occurred in the UK is a non-issue and is not related to the layoff. Even had it wanted to, the respondent could not have terminated Mr. Tipple's employment because of the Minto Report findings.

[195] Counsel for the respondent stated that it is mystifying that Mr. Tipple believes that his layoff was an underhanded ploy to terminate his employment for the alleged embarrassment caused by the trip to the UK since Mr. Marshall commissioned the Minto Report and agreed that it exonerated Mr. Tipple from any wrongdoing.

[196] Counsel for the respondent argued that Mr. Tipple's letter of termination states that "[i]n accordance with the Treasury Board Term Employment Policy, you are entitled to one month notice . . ." and that that policy provides for an early termination of a term employee "[w]here a person employed as a term employee will be renewed, will not be renewed, or will be laid off before the originally specified end of term, departments/agencies are required to provide one month written notification to the employee." He noted that the respondent provided Mr. Tipple with one month's pay in lieu of notice.

[197] Counsel for the respondent referred me to *Rinaldi*, where the then Trial Division of the Federal Court held that ". . . the Adjudicator was right to assume jurisdiction subject to the respondent's ability to prove his assertion." Counsel for the respondent argued that footnote 15 in *Rinaldi* is of assistance in deciding this case because, for Mr. Tipple to succeed, he must meet that test. Footnote 15 reads as follows:

> *15 I want to emphasize that in so far as the action or termination of employment occurred under section 29, a simple demonstration of bad faith or malicious intent on the employer's part (such as proof of an obvious desire to get rid of the employee at the first opportunity) would not confer jurisdiction on the Adjudicator since, whether or not there was bad faith, the grievance would still be a grievance with respect to a termination of employment under the Public Service Employment Act, which subsection 92(3) of the Public Service Staff Relations Act excludes from the Adjudicator's jurisdiction. When the employer argues that the employment was terminated under the Public Service Employment Act, the only way to show that it was not would be to prove that the conditions required to apply it where in fact not present at the relevant time and that the employment cannot therefore have been terminated under that Act.*

[198] Counsel for the respondent noted that Mr. Marshall testified that The Way Forward was ahead of schedule in terms of saving PWGSC money, that he was considering whether Mr. Tipple's position was adding any value and that Ms. Aloïsi shared his view. In addition, Mr. Marshall felt that Mr. McGrath was progressing well and that he would be able to assume Mr. Tipple's responsibilities. His other

considerations were that the Government of Canada did not envision a Crown corporation or a major outsourcing of jobs, that there were concerns about PWGSC's capacity to absorb more changes and that the bargaining agents were preparing a campaign to challenge any major outsourcing of their memberships.

[199] In conclusion, in support of his arguments, counsel for the respondent referred to the following cases: *Leonarduzzi*; *Coulombe v. Canada*, [1984] F.C.J. No. 304 (T.D.) (QL); *Flieger v. New Brunswick*, [1993] 2 S.C.R. 651; *Mudarth v. Canada (Minister of Public Works)* (1988), [1989] 3 F.C. 371 (T.D.); *Mudarth v. Canada (Department of Public Works)* (1990), 113 N.R. 159 (F.C.A.); *St. Lawrence Seaway Management Corporation v. Bourgeois*, 2003 FC 1117; *Sea-Link Marine Services Ltd. v. Doman Forest Products Limited*, 2003 FCT 712; *Spartan Developments Ltd. v. Capital City Savings and Credit Union Limited*, 2004 ABCA 12; *Canada (Attorney General) v. Bédirian*, 2007 FCA 221; *Honda Canada Inc. v. Keays*, 2008 SCC 39; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Pepper v. Deputy Head (Department of National Defence)*, 2008 PSLRB 71; *Vaughan v. Canada*, 2005 SCC 11; *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085; and *Wallace v. United Grain Growers Limited*, [1997] 3 S.C.R. 701.

B. For the grievor

[200] Mr. Tipple's counsel noted that, although the Minto Report concluded that while Mr. Tipple was in the UK he used his time in a responsible and productive manner and that it exonerated him from any wrongdoing, it was never made public. It was not provided to the media by either PWGSC or the Minister, it was not mentioned by the Parliamentary Secretary to the Minister during the Parliamentary Question Period and it was not referred to in any of PWGSC's internal notices to staff. Counsel for Mr. Tipple argued that the document was "buried" by Mr. Marshall and the Minister and that it "did not see the light of day." Had the Minto Report been made public, it would have restored Mr. Tipple's reputation. Neither the Minister nor PWGSC produced or published the Minto Report when they could have, even though they had every opportunity.

[201] With respect to the November 9, 2006 House of Commons debate, counsel for Mr. Tipple argued that the Parliamentary Secretary to the Minister had an opportunity to inform Parliament and taxpayers that Mr. Tipple had been exonerated. However, he stated, "Mr. Speaker, the two people in question whom the Member had referenced and

whom the Minister talked about today at committee were in fact held accountable. They no longer work for the federal government." The UK trip notes, Mr. Tipple's briefing note to the Minister and the Minto Report were not mentioned. The clear implication was that Mr. Tipple's employment was terminated as a result of the UK trip.

[202] Counsel for Mr. Tipple referred to the suggested response for the Minister during the Parliamentary Question Period that was prepared by Ms. Lorenzato on September 18, 2006 (Exhibit G-5, tab 15). The background notes indicate that the High Commission had advised PWGSC that three meetings had been missed, that letters of apology had been sent and that there had been negative press coverage. Counsel for Mr. Tipple noted that it did not, however, mention that the Minto Report exonerated Mr. Tipple.

[203] Counsel for Mr. Tipple referred to Mr. Marshall's testimony that, in May 2006, he was thinking about merging Mr. Tipple's duties with those of Mr. McGrath, which he apparently mentioned to Ms. Aloïsi. Although counsel for the respondent stated that Ms. Aloïsi would be called to testify, she was not. Therefore, there is no independent evidence to support Mr. Marshall's evidence that he was considering a change.

[204] Counsel for Mr. Tipple remarked that it took eight months to hire Mr. Tipple and to go through all the procedures for hiring and establishing the structure for The Way Forward, but then the whole change was accomplished in less than 10 days from Mr. Marshall's return from vacation on August 22, 2006, and his meeting with the Minister on August 25, 2006. In that short period, the entire $1 billion The Way Forward initiative was restructured. There was a lot of documentation about how the work was to be done and how it was to be carried out and about the work that had to be continued, but not one document was adduced showing that there was going to be a reorganization or an integration of Mr. Tipple's responsibilities with those of Mr. McGrath. Counsel for Mr. Tipple remarked that, although Mr. Marshall was thinking about all those changes, he nevertheless gave Mr. Tipple a "surpassed" rating on his Performance Agreement two months before terminating his employment. In addition, because Mr. Tipple surpassed all his key expectations, he received a 15 percent pro-rated performance award 5 weeks before his employment was terminated. And, in June 2006, Mr. Marshall approved the payment of his membership fee for the National Club

in Toronto. Counsel for Mr. Tipple questioned why Mr. Marshall would do that if he were thinking of terminating Mr. Tipple's employment.

[205] Counsel for Mr. Tipple stated that Mr. Marshall testified that, on August 25, 2006, the Minister asked him if there was any value in the work being performed by Mr. Tipple. Counsel for Mr. Tipple argued that at that point Mr. Marshall began "crystallizing his thinking." He remarked that it was a disingenuous argument when there were savings of $150 million over a 1-year period. Mr. Tipple surpassed his key performance objectives and received a bonus. Change was accelerating. He was doing an excellent job, but his employment was terminated. It was insincere to terminate his employment because he was doing a good job. Counsel for Mr. Tipple also questioned why Mr. Marshall approved the trip to the UK if he was thinking of getting rid of Mr. Tipple.

[206] Counsel for Mr. Tipple remarked that, on August 25, 2006, Mr. Marshall advised Ms. Lorenzato that he was thinking of terminating Mr. Tipple's term employment, but he never mentioned it to Mr. Tipple. More important, no feasibility study or analysis was conducted on who would assume Mr. Tipple's duties and on the work that had to be completed or continued within the $1 billion The Way Forward initiative. No feasibility study was conducted about Mr. Tipple's work with respect to his day-to-day activities and the integration of those activities. Only one document exists: the draft "Memorandum to the Deputy Minister" prepared by Ms. Lorenzato on August 30, 2006, the day before Mr. Tipple's employment was terminated. Counsel for Mr. Tipple noted that Ms. Lorenzato and Mr. Marshall both testified that no written analysis or feasibility study was carried out before Mr. Tipple's employment was terminated.

[207] Counsel for Mr. Tipple remarked, "What a coincidence that after all of Mr. Marshall's musings, both special advisors were terminated at the same time."

[208] Counsel for Mr. Tipple stated that another event that crystallized Mr. Marshall's thinking was the fact that there was misconduct by Ms. Thorsteinson, who gave Ms. Dickson a copy of Mr. Tipple's draft trip report, and by Ms. Dickson, who then communicated with Mr. Leblanc. The *Globe and Mail* articles embarrassed PWGSC. They created a scandal. Questions arose, and answers were being asked by the House of Commons Committee, which wanted Mr. Tipple to appear before it. Not only was Mr. Marshall involved, the Minister's office was also involved, and it was in the public domain. There was bad publicity, and it was being connected to the sponsorship

scandal. Therefore, PWGSC had to do something, and it decided to make Mr. Tipple the scapegoat and to terminate his employment. That decision was made on August 28, 2006, three days before he received the letter of termination and one business day after the meeting between Mr. Marshall and the Minister. Counsel for Mr. Tipple argued that that is the real reason for terminating Mr. Tipple's employment. He submitted the following: "The rite of the ancient Jews on Yom Kippur where they visited the sins of the people on a goat and then they vanished the goat to the wilderness that is the definition of a scapegoat."

[209] Counsel for Mr. Tipple further argued that the respondent presented the termination of employment under the guise of a layoff. He stated that, not only is that bad faith, it is also callous, and it meets all the criteria for punitive damages. Mr. Tipple was wrongfully terminated, and the respondent disguised it as a layoff. It was a contrived and a sham layoff. In fact, it was not a *bona fide* layoff. The contract of employment provided a clause about the availability of work and the continued existence of the duties to be performed. Mr. Tipple's employment was not terminated because there was no work to be performed or because his duties did not continue to exist. There was no basis to put that clause into effect; nor was there a basis for a layoff.

[210] Counsel for Mr. Tipple argued that I have jurisdiction as established by subparagraph 209(1)(*c*)(i) of the *PSLRA* and paragraph 12(1)(*e*) of the *Financial Administration Act* (*FAA*), because this case involves a termination of employment for a reason that does not relate to a breach of discipline or misconduct. Mr. Tipple was an employee in the core public administration, and his termination of employment was effected under paragraph 12(1)(*e*) of the *FAA*, which gives an adjudicator jurisdiction. Mr. Tipple was not laid off pursuant to subsection 64(1) of the *PSEA*. There was no discontinuance of his functions.

[211] Counsel for Mr. Tipple submitted that the respondent did not act in good faith and referred me to *Flieger*, at page 664, which reads as follows:

. . .

> *Therefore, "a discontinuance of function" will occur when that set of activities which forms an office is no longer carried out as a result of a decision of an employer acting in good faith. For example, if a particular set of activities is merely handed over in its entirely to another person, or, if*

> *the activity or duty is simply given a new and different title so as to fit another job description then there would be no "discontinuance of a function". On the other hand, if the activities that form part of the set or bundle are divided among other people such as occurred in* Mudarth, supra, *there would be a "discontinuance of a function".*

. . .

In this case, Mr. Tipple's functions were handed over to Mr. McGrath.

[212] Counsel for Mr. Tipple referred to the first paragraph of Mr. Tipple's letter of termination, which states as follows: "As the transformation moves into its next phase, I have decided that it would be more appropriate that the functions you are performing be integrated into the ADM Real Property's role. . . . "

[213] Counsel for Mr. Tipple argued that, according to the majority of the Supreme Court of Canada in *Flieger*, integrating the functions that Mr. Tipple performed into those of Mr. McGrath does not constitute discontinuance of a function. Mr. Tipple was hired for a specified term, and by terminating his employment, the respondent breached that contract. At page 3, the letter of offer states as follows: "Your services may be required for a shorter period depending upon the availability of work and continuance of the duties to be performed." The letter of termination states as follows: ". . . your letter, contained a clause which indicated that your services may be required for a shorter period depending upon the availability of work and the continuance of the duties to be performed." Counsel for Mr. Tipple argued that the evidence is clear that work was available because it continued to be performed after August 31, 2006. There was a continuance of Mr. Tipple's duties. If the functions were being integrated, then they were still required to be performed, and the basis for the termination does not exist. By terminating Mr. Tipple's employment for those reasons, which are disguised, inaccurate and false, the respondent breached an agreement, and therefore, this was a wrongful termination of employment and not a layoff. The word "layoff" is not mentioned in the letter of termination or in any other document. Counsel for Mr. Tipple further argued that the other false statement in the letter of termination is the following: "As the transformation moves into its next phase . . . ." It is clear from the evidence that PWGSC was still in the planning and design phase. That phase had not ended. PWGSC had not yet gone into the implementation phase. Some implementation had occurred, but not all. In any event, Mr. Tipple's Executive Group Position Description clearly indicated that he was responsible for monitoring and leading the

implementation phase. He was hired to lead an unprecedented transformation of PWGSC's real property and to provide strategic leadership to introduce, develop and monitor implementation strategies.

[214] Counsel for Mr. Tipple argued that it is important to note that Mr. Tipple moved from Toronto to Ottawa in March 2006 because during his meetings with Mr. Marshall he was given the impression that he would be employed for three years and possibly longer.

[215] One of the aspects of the respondent's bad faith is that, despite Mr. Tipple's requests that PWGSC defend his reputation, it failed to when the first article appeared in *The Globe and Mail*, and it failed subsequently to restore his image and reputation. PWGSC did nothing to mitigate the damage caused to Mr. Tipple. Rather, it exacerbated the situation and caused further damage by terminating his employment in an atmosphere of scandal.

[216] Nowhere in Ms. Lorenzato's notes does the word "layoff" appear. Different scenarios were considered (rejection on probation, abolishing the position, interchange, transferring the work, discontinuing the work, constructive dismissal, etc.). They were searching for a way to get rid of Mr. Tipple. In other words, it is not possible to find in the notes that they were considering a layoff because the word "layoff" does not appear, and they did not discuss discontinuing Mr. Tipple's functions or integrating them with those of Mr. McGrath. Those notes are telling because they show that integration and layoff were not even being contemplated.

[217] Mr. Tipple received his letter of termination on August 31, 2006, in a meeting with Mr. Marshall. The evidence is clear that he had received no prior notice. Other indicators that it was not a layoff are that there was no transition plan and that there were no discussions with Mr. McGrath or with Mr. Tipple about restructuring. His termination of employment was abrupt, and it occurred without notice. He was told to leave the premises on August 31, 2006. This is typical of a firing or a wrongful dismissal and not a layoff. Mr. Tipple testified as to how he was shocked by the termination of his employment. As well, an article on September 1, 2006 in *The Globe and Mail* stated the following: "Public Works advisors sent packing." The public was given the clear impression that Mr. Tipple was fired as a result of the UK trip, which is the impression that the Government of Canada and PWGSC wanted to create.

[218] Counsel for Mr. Tipple argued that, in terminating Mr. Tipple's employment for reasons other than those stated by the respondent and in asserting a reason for the termination that was contrived and false, the respondent breached its duty of good faith and fair dealing that it owed Mr. Tipple. In failing to properly respond to the false and defamatory statements and in contributing to the damage done to Mr. Tipple's reputation, the respondent breached its duty of good faith, which is why damages are being claimed. The respondent demonstrated conduct that was unfair, disingenuous, arbitrary and high-handed.

[219] Mr. Tipple testified about the stress, the anxiety, the damage to his reputation and the disruption to his personal life. Counsel for Mr. Tipple argued that that conduct deserves the sanction and the condemnation of this adjudicator.

[220] With respect to the remedies requested, counsel for Mr. Tipple stated that reinstatement is no longer a viable option since Mr. Tipple's term has expired. Mr. Tipple requests that damages be awarded for the loss of past and future salary in the sum of $726 923.08 from October 1, 2006 to October 6, 2008, as well as the 15 percent performance awards that would have been given to him, which equals $109 038.46. He also requests damages for the loss of benefits, which have been estimated at 15 percent, payment of his relocation expenses of $10 000.00, which have yet to be paid, and punitive damages and costs including interest.

[221] Mr. Tipple's résumé demonstrates that he is a senior business executive who has successfully implemented strategic transformations for Bell Canada, BCE and CN Rail, which involved hundreds of millions of dollars. Counsel for Mr. Tipple stated that Mr. Tipple should not have been treated the way he was. His reputation was hurt. Mr. Tipple never felt that he was above the law. He sent an email to Messrs. Marshall and Baril and Ms. Aloïsi asking to have his reputation restored, but they did not react. He asked for an explanation about the apology letters. However, PWGSC never corrected the misleading and incorrect statements in any of the apology letters. Mr. Tipple further asked that the press be informed that he should not have been included in any of the apology letters, but again nothing was done. Although Mr. Tipple requested a copy of the comprehensive media plan, none was ever prepared. The *Globe and Mail* articles were defamatory, and when Mr. Tipple asked if he could advise the press of the inaccurate allegations, he was told that he could not. The information printed in *The Globe and Mail* was false and incorrect, but PWGSC did

nothing about it. The evidence is clear that PWGSC did not support Mr. Tipple. PWGSC did not provide *The Globe and Mail* with the correct facts or a copy of the Minto Report that exonerated Mr. Tipple. Counsel for Mr. Tipple argued that that is how PWGSC did not act in good faith. It did not contribute to restoring Mr. Tipple's reputation.

[222] Counsel for Mr. Tipple argued that one of the reasons for the urgency in terminating Mr. Tipple's employment was that the Minister was very concerned about the prospect of a House of Commons Committee hearing.

[223] With respect to mitigation, counsel for Mr. Tipple argued that Mr. Tipple's mitigation efforts were extensive and exemplary. He corresponded and met with 15 executive recruiters to let them know that he was looking for permanent employment. He also approached approximately 40 consulting firms, but obtained only 4 small contracts. With respect to the opportunity with Great Gulf Homes, the evidence is clear that, although Mr. Tipple did not consider it a great career move, he did put his name forward.

[224] On April 16, 2007, Mr. Tipple's counsel sent a letter to Messrs. Marshall and McCarthy, in which he stated in part as follows:

> . . .
>
> *A private sector entity had expressed an interest in our client acting on its behalf with respect to its acquisition of Government of Canada Real Property assets. We are of the view that no conflict of interest will exist . . . In considering this opportunity, our client is cognizant of his duty to mitigate the damages that he has sustained as a result of the termination of his employment.*
>
> . . .

[225] On April 19, 2007, Mr. McCarthy responded as follows and raised the possibility of a conflict of interest:

> . . .
>
> *The requested permission cannot be considered until further information is made available. In particular. . .we would need to know the name of the private firm . . . the purpose of his engagement by this firm as well as a summary of his duties . . . with regard to the mitigation . . . your client has a duty to mitigate whatever losses or damages he plans to claim from the government in adjudication. . . .*

. . .

[226] On April 20, 2007, Mr. Tipple's counsel replied as follows:

. . .

> *However, we cannot provide all the information that you "need to know" as the identity of the private sector entity* [*sic*] *highly sensitive and confidential', we will not be identifying the name, our client will be engaged in professional consulting services to the private sector entity. His duties in that regard will be lead to a due diligence review of real property assets. Our client again requests to pursue this opportunity.*

. . .

[227] On April 24, 2006, Mr. McCarthy responded that there would be a conflict of interest. Counsel for Mr. Tipple argued that the only information that was not provided was the name of the private firm. Mr. Tipple was not acting above the law. He was asking for a right to mitigate, which would have been significant, but his request was rejected. There was no failure to mitigate because Mr. Tipple attempted beyond reasonable efforts to do so. The evidence shows that, if you Google Mr. Tipple's name, the result that appears is his termination of employment. Thus, he was able to mitigate only to the extent of $38 172.00.

[228] Counsel for Mr. Tipple stated that the July 28, 2006, and August 25, 2006, Flash Reports extensively demonstrate that the work performed by Mr. Tipple continued after August 31, 2006, and that they are important as they contradict Mr. Marshall's testimony on a significant point. When Mr. Marshall was questioned in cross-examination about the Flash Reports, he indicated that the Business Transformation request for proposal and the Corporate Real Estate Organizational Model and other initiatives of Mr. Tipple were not being pursued. Counsel for Mr. Tipple argued that. when I directly asked Mr. Marshall whether the Business Transformation initiatives were discontinued and not pursued, Mr. Marshall stated that that was correct. Documents were then put to Mr. Marshall that contradicted his evidence. The first was the "PWGSC 2006-2007 Departmental Performance Report" for the period ending March 31, 2007, which clearly indicated that The Way Forward continued. The other was Mr. Tipple's involvement with the sale of federal real estate properties while he was the chairperson of the selection committee to organize and obtain the BMO and

the RBC as consultants. That work continued after his employment was terminated since there was a press release issued about the sale of nine federal office properties.

[229] Counsel for Mr. Tipple argued that the difficulty with the respondent's compliance with the disclosure orders issued in this case is significant because Mr. Marshall referred to his musings during his testimony. One way to dispel any such ambiguity is through documents. Counsel for Mr. Tipple argued that, not only was there a failure to disclose all the relevant documents relating to the termination of employment and other relevant matters, disclosure orders were also made on a number of separate occasions because PWGSC failed to provide the documents and did so only reluctantly, after the orders were issued. Counsel for Mr. Tipple argued that the respondent was trying to hide the documents, which is an important factor when one considers legal costs because it created substantially more costs for Mr. Tipple. Had there been timely disclosure, the hearing would have been more efficient and less time consuming. The respondent's aggravating conduct should be a factor in awarding costs.

[230] Counsel for Mr. Tipple argued that *Greaves v. Economy Carriers Limited,* [1995] C.L.A.D. No. 21 (QL), holds as follows that, while oral evidence can be helpful, it is insufficient to meet the respondent's burden of proof, as documentary evidence is required:

. . .

> *Oral testimony alone is insufficient for discharging the Company's burden. . . .*
>
> > *... in determining whether or not an Employer has discharged the burden, adjudicators must, where possible rely on objective indicators. They should be slow to accept all assertions by Employers that a lack of work exists. Otherwise, Section 61.5(3)(a) could easily become little more than a convenient excuse for Employers who are dismissing employees for other reasons. Consequently, unless an Employer can demonstrate by objective evidence that a lack of work exists, adjudicators should, as a rule, reject that explanation and proceed to determine the complaint on its merits.*

. . .

Counsel for Mr. Tipple argued that, in this case, documentary evidence supporting the respondent's justification for terminating Mr. Tipple's employment is completely non-existent.

[231] With respect to the issue of not contacting *The Globe and Mail* after the termination of his employment, Mr. Tipple proceeded in a way that an employee normally does when he or she has been harmed and wronged. He sought remedy through a Statement of Claim in the Ontario Superior Court of Justice and through the grievance procedure and this adjudication.

[232] With respect to remedies, section 226 of the *PSLRA* gives an adjudicator jurisdiction to award interest. Mr. Tipple's counsel specified that the interest claimed in this case is only for the period from October 1, 2006 to October 6, 2008. Further, section 228 contains a more general grant of jurisdiction that allows an adjudicator to make the order that he or she considers appropriate in the circumstances.

[233] Counsel for Mr. Tipple referred to *Vaughan* to argue that an adjudicator can award appropriate remedies, including damages for both a loss and a breach of good faith, punitive damages, and, more importantly, costs.

[234] In terms of bad faith damages, counsel for Mr. Tipple argued that *Keays* indicates that there are now damages for bad faith and for a breach of the duty of good faith and fair dealing owed Mr. Tipple. *Keays* allows for such damages. With respect to the principles in *Keays*, counsel for Mr. Tipple submitted that the respondent breached its duty of good faith and fair dealing by failing to respond to the false, defamatory and disparaging statements and imputations made in *The Globe and Mail*, by failing to release and make public the Minto Report that exonerated Mr. Tipple, and by misstating and misrepresenting the reasons for the termination of his employment. With respect to the issue of legal costs, an adjudicator has jurisdiction. Counsel for Mr. Tipple argued that section 228 of the *PSLRA* allows an adjudicator to make an order that he or she considers appropriate in the circumstances. In this case, it would be entirely unfair to Mr. Tipple not to award costs if he is successful. Not to award costs would make this decision meaningless because of the large amount of time that it has taken to present Mr. Tipple's case.

[235] Counsel for Mr. Tipple noted that costs are always at the discretion of the adjudicator. If an employee appears before an adjudicator and is not successful, the

adjudicator has the discretion to award costs. If damages are awarded in this case, it would hold employers responsible when they terminate employees in bad faith. The respondent should be held liable for costs, as is normal in civil matters. Costs should be awarded for the respondent's conduct and as one of the additional remedies. Otherwise, employers will act capriciously and with tremendous misconduct and will not be liable for legal costs incurred by employees who go through the trouble that Mr. Tipple has to have his case heard and to force the respondent to disclose documents that enabled him to prove his case.

[236] In conclusion, counsel for Mr. Tipple referred me to the following cases: *Ontario (Ministry of Community, Family and Children Services) v. Crown Employees Grievance Settlement Board* (2006), 81 O.R. (3d) 419 (C.A.); *Clements v. Bearskin Lake Air Service Ltd.*, [1995] C.L.A.D. No. 942 (QL); *Greaves*; *Corbett v. Falcon Environmental Services Inc.*, [2008] C.L.A.D. No. 47 (QL); *Hamel v. Laidlaw Carriers Tank GP Inc.*, [2006] C.L.A.D. No. 495 (QL); *Sprint Canada v. Lancaster*, [2003] C.L.A.D. No. 567 (QL); *MacCormac v. Esquimalt Nation*, [1997] C.L.A.D. No. 521 (QL); *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Spark v. Generex Pharmaceuticals Inc.* (1999), 107 O.T.C. 56 (Sup. Ct. J); *Laird v. Treasury Board (Employment and Immigration)*, PSSRB File No. 166-02-19981 (19901207); *Beardy v. Lake St. Martin First Nation*, [2008] C.L.A.D. No. 359 (QL); *Limo Jet Gold Express Ltd. v. Public Service Alliance of Canada, Local 05/21081* (2008), 171 L.A.C. (4th) 28; *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (C.A.); *Bell Canada v. Halle* (1989), 99 N.R. 149 (F.C.A.); and *Banca Nazionale Del Lavoro of Canada Limited v. Lee-Shanok* (1988), 87 N.R. 178 (F.C.A.).

C. Respondent's reply

[237] Counsel for the respondent argued that the documentary evidence that establishes that Mr. Tipple was laid off is his résumé. It confirms Mr. Marshall's evidence that Mr. Tipple was doing a great job and that he saved PWGSC and the Government of Canada millions of dollars. However, PWGSC was unable to absorb further changes. In other words, everything was going too fast. That is why Mr. Tipple was laid off.

[238] Counsel for the respondent argued that there is no evidence that Mr. Tipple's employment was terminated because the respondent needed a scapegoat and that I cannot make such a finding based simply on a theory.

[239] Finally, counsel for the respondent stated that Mr. Marshall testified that some of Mr. Tipple's duties would be given to Ms. Orange. The respondent conceded that that is true, even though Mr. Tipple's letter of termination states that the functions would be integrated into the assistant DM's role (that of Mr. McGrath).

V. Reasons

A. Jurisdiction

[240] On October 11, 2005, Mr. Tipple was hired as Special Advisor to the DM, Real Property Business Transformation, PWGSC, for a specified period of appointment from October 11, 2005 to October 6, 2008. The letter of offer contained a clause stating that Mr. Tipple's services could be required for a shorter period depending on the availability of work and the continuance of the duties to be performed.

[241] The job description and the Flash Reports convince me that Mr. Tipple was responsible for developing, planning, monitoring, leading and ensuring the implementation strategies and initiatives of The Way Forward. Mr. Tipple testified that he met with Mr. Marshall on several occasions before he accepted the offer of employment. He also testified that he was not only hired to develop strategies and initiatives but also to implement them. He stated that Mr. Marshall advised him that The Way Forward could take from five to seven years even though the letter of offer indicated that the specified period of appointment was for three years. I find that this is consistent with Mr. Marshall's testimony that the person who gives advice is responsible for implementing it. It only stands to reason that Mr. Tipple accepted the offer of employment not only to design and develop the initiatives, but also to implement and monitor them. Otherwise, why would he have relocated his family from Toronto to Ottawa? I accept that Mr. Tipple signed the letter of offer in good faith based on the job description and the functions that he was to perform for a period of no less than three years.

[242] On August 31, 2006, Mr. Tipple received a letter from Mr. Marshall advising him that his specified period of appointment was ending earlier than previously indicated in the letter of offer and that his services would no longer be required as of the close of business on September 29, 2006. Mr. Tipple was barred from the workplace as of August 31, 2006.

[243] Counsel for the respondent argued that Mr. Tipple was laid off under subsection 64(1) of the *PSEA*, which reads as follows:

> *64. (1) Where the services of an employee are no longer required by reason of lack of work, the discontinuance of a function or the transfer of work or a function outside those portions of the federal public administration named in Schedule I, IV or V to the* Financial Administration Act, *the deputy head may, in accordance with the regulations of the Commission, lay off the employee, in which case the deputy head shall so advise the employee.*
>
> *(2) Where the deputy head determines under subsection (1) that some but not all of the employees in any part of the deputy head's organization will be laid off, the employees to be laid off shall be selected in accordance with the regulations of the Commission.*
>
> *(3) Subsection (1) does not apply where employment is terminated in the circumstances referred to in paragraph 12(1)(*f*) of the* Financial Administration Act.

He noted that paragraph 211(*a*) of the *PSLRA* does not permit a referral to adjudication if the grievance is about a termination of employment under the *PSEA*. That paragraph provides as follows:

> *211. Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to*
>
> (a) *any termination of employment under the* Public Service Employment Act . . .

[244] Counsel for the respondent further argued that Mr. Tipple's position was abolished and not recreated and that his duties were merged with those of Mr. McGrath, with the potential assistance of Ms. Orange. Counsel for the respondent submitted that no bad faith was involved since Mr. Tipple was laid off due to the discontinuance of his functions.

[245] Counsel for the respondent referred to *Rinaldi*. In that case, the then Trial Division of the Federal Court held that subsection 92(3) of the *Public Service Staff Relations Act* did not remove an adjudicator's jurisdiction solely because an employer relied on the *PSEA* in support of termination. It held that an adjudicator has jurisdiction to hear an allegation that an employer disguised the termination of employment under cover of the abolishment of a position by a contrived reliance on

the *PSEA*. Counsel for the respondent argued before me that, for Mr. Tipple to succeed, he must prove that the conditions required to lay him off were not present at the relevant time and that therefore the employment cannot have been terminated under the *PSEA*.

[246] Counsel for the respondent noted that, in *Flieger*, the majority of the Supreme Court of Canada interpreted the meaning of "discontinuance of a function." That decision states the following at page 664:

> . . .
>
> *Therefore, a "discontinuance of a function" will occur when that set of activities which form an office is no longer carried out as a result of a decision of an employer acting in good faith. For example, if a particular set of activities is merely handed over in its entirely [sic] to another person, or, if the activity or duty is simply given a new and different title so as to fit another job description then there would be no "discontinuance of a function". On the other hand, if the activities that form part of the set or bundle are divided among other people such as occurred in* Mudarth, supra, *there would be a "discontinuance of a function". Similarly, if the responsibilities are decentralized, as happened in* Coulombe, supra, *there would also be a "discontinuance of a function".*
>
> . . .

[247] Counsel for the respondent further noted that the Supreme Court of Canada referred to two cases in its analysis of a "discontinuance of a function" in *Flieger*. In the first case (*Mudarth* (T.D.)), in determining the meaning of a "function," the then Trial Division of the Federal Court stated as follows:

> . . .
>
> *To give effect to the argument of the plaintiff regarding the meaning to be attributed to the word function would preclude the Government from abolishing any position and discharging the employee unless some part of the tasks or work performed by that employee was completely discontinued and no longer performed by any other person or group in the Civil Service. This would of course greatly preclude reorganization of the departments and branches of the service by the redistribution of tasks and would, to a large extent, paralyse any updating of the administrative procedures. Such a radical interpretation of subsection 29(1) of the Public Service Employment Act is not at all required in*

> *order to give full effect to the scheme and spirit of the legislation. The Act, of course, does encroach on and limit the general powers of management which are given to the Government of Canada and its various departments but the encroachments should be limited to the extent required to give effect to its objects and provisions.*
>
> . . .

Counsel for the respondent argued that this approach relates the word "function" to the "office" held by Ms. Mudarth. Ms. Mudarth's office consisted of a bundle of tasks and responsibilities that were no longer being performed, and thus ceased to exist, and accordingly, there was a "discontinuance of a function."

[248] The other case referred to by the majority of the Supreme Court of Canada in *Flieger* is *Coulombe.* In that case, the activities that had been undertaken by Mr. Coulombe were parcelled out to a number of people within the organization. The then Trial Division of the Federal Court held that it constituted a "discontinuance of a function." It stated as follows:

> . . .
>
> *Function is the act of performing and is defined as the kind of action belonging to the holder of an office, hence the function is the performance of the duties of that office. By the performance of the duties of an office the holder thereof can be said to fulfill his function. Functions are therefore the powers and duties of an office.*
>
> *Thus it seems to me that when the functions of an office are transferred elsewhere in the course of a reorganization and the office is abolished while the functions are continued the function of the holder of the office is discontinued from which it follows that the service of an employee who held that office are no longer required because of the discontinuance of the function formerly performed by him. . . .*
>
> . . .

[249] Counsel for Mr. Tipple argued that my jurisdiction is established by subparagraph 209(1)(*c*)(i) of the *PSLRA,* which provides that a grievance can be referred to adjudication, in the case of an employee in the core public administration, if the grievance involves a termination of employment under paragraph 12(1)(*e*) of the *FAA* for reasons other than breaches of discipline or misconduct. Subparagraph 209(1)(*c*)(i) of the *PSLRA* reads as follows:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> . . .
>
> *(c) in the case of an employee in the core public administration,*
>
> *(i) demotion or termination under paragraph 12(1)(*d*) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or*

For its part, paragraph 12(1)(*e*) of the *FAA* provides for the following:

> ***12.*** *(1) . . . every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*
>
> . . .
>
> *(*e*) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct . . . .*

Counsel for Mr. Tipple further argued that the alleged layoff was a termination of employment that falls within the ambit of paragraph 12(1)(*e*) of the *FAA*. According to him, Mr. Tipple's termination of employment was not a bona fide layoff as a result of a lack of work or the discontinuance of a function but was effected in bad faith.

[250] In a case involving an alleged layoff, the burden of proof rests on the deputy head to show that the services of the employee are no longer required by reason of a lack of work, the discontinuance of a function, or the transfer of work or a function outside the public service. In this case, the respondent alleged the discontinuance of Mr. Tipple's functions. If the deputy head discharges that burden, then it shifts to the grievor to demonstrate that the respondent's actions were a contrived reliance on section 64 of the *PSEA*, a sham or a camouflage.

[251] I believe that it is common ground between the parties that, from October 2005 to March 2006, the employment relationship between PWGSC and Mr. Tipple was on a solid foundation. Mr. Tipple was leading a number of ongoing initiatives. Mr. Marshall

testified that the initiatives developed by Mr. Tipple from October 2005 to March 2006 put PWGSC ahead of the game in terms of saving the Government of Canada approximately $150 million annually. Mr. Marshall testified that he gave Mr. Tipple a surpassed performance rating and a 15 percent bonus because of the work that Mr. Tipple accomplished during that period.

[252] I will now examine the period from March onward and examine the evidence in its totality to decide whether the respondent's decision to terminate Mr. Tipple's employment was because his services were no longer required by reason of the discontinuance of a function or whether it was a contrived reliance on the *PSEA*, a sham or a camouflage.

[253] The rest of the evidence presented to me at the hearing relates to conflicting views of the same events. To assess the credibility of that evidence, I must determine if it is consistent with the evidence as a whole.

[254] In determining the credibility of witnesses, I turn to the well-known case of *Faryna v. Chorny* (1951), [1952] 2 D.L.R. (B.C.C.A.), which identified the following criteria in assessing the credibility of a witness:

. . .

> *. . . If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection, it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgement and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.*

. . .

> *The credibility of interested witnesses, particularly in cases of conflict, cannot be gauged solely by the test whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person*

> *would readily recognize as reasonable, in that place and in those conditions, Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. . . .*
>
> . . .
>
> *The trial Judge ought to go further and say the evidence of the witness he believes is in accordance with the preponderance of possibilities in the case and, in his views to command confidence, also state his reasons for that conclusion. The law does not clothe the judge with a divine insight into the hearts and minds of witnesses. And a Court of Appeal must be satisfied that the Trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case. . . .*
>
> . . .

This approach was recently confirmed by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53. At paragraph 58, the Court found as follows:

> *[58] ... where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.*

[255] Mr. Marshall testified that in May 2006 he was considering whether to continue to retain Mr. Tipple's services because of Mr. McGrath's progress on some of The Way Forward strategies. From April to June 2006, he had several discussions with Ms. Aloïsi, who felt that Mr. Tipple's role as special advisor was not working out. In that context, one would question why, if Mr. Tipple's role was not working out, no analysis or strategic review of the organization was effected during that period to redefine the role, reorganize it within or outside PWGSC, or abolish it. No evidence was adduced that either Mr. Marshall or Ms. Aloïsi conducted an analysis or a review or entered into discussions with Mr. Tipple to that effect.

[256] Mr. Marshall also testified that the implementation of the initiatives led by Mr. Tipple was creating stress on PWGSC and was affecting its ability to absorb further

changes, as employees were very concerned about the number of changes, and the bargaining agents were preparing a campaign to challenge any major outsourcing of their memberships. As well, Mr. Marshall testified that a Crown corporation was not on the agenda of the Government of Canada. The Crown corporation was but one of Mr. Tipple's ideas, and although PWGSC had no desire to implement it, the other initiatives of The Way Forward continued, and new ideas to save the Government of Canada money were brought forward for consideration. For Mr. Marshall to refer to the Crown corporation proposal as one of his reasons for terminating Mr. Tipple's employment is a stretch at best, and it undermines his credibility.

[257] In addition, why did Mr. Marshall approve, on May 12, 2006, Mr. Tipple's request to travel to the UK from June 25 to 30, 2006 if, at that time, he was considering terminating Mr. Tipple's employment? In early May 2006, Mr. Tipple requested Mr. Marshall's approval so that he and Mr. Rotor could travel to the UK at the end of June 2006 to discuss best practices with UK government officials and their real-property service providers. Mr. Marshall approved Mr. Tipple's request but indicated that Mr. Rotor would have to provide a separate trip rationale. PWGSC's Corporate Policy and Planning Branch and the High Commission arranged the trip and scheduled a number of meetings. On the day that Mr. Tipple left for the UK, he still had not received the details of the meetings. When he arrived in London, Mr. Tipple advised Ms. Dickson and Mr. Saint-Jacques that he would not attend any meetings relating to procurement-related issues but that he would attend meetings that related to real-property issues, since that was his responsibility. Mr. Tipple substituted the procurement-related meetings with meetings with private-sector companies that dealt with real-property issues. He attended nine scheduled meetings, from June 26 to 30, 2006, which related to his portfolio. This was reflected in the Minto Report, which confirmed that Mr. Tipple used his time in a responsible and productive manner.

[258] What is also disturbing is that, although Mr. Marshall was considering terminating Mr. Tipple's employment and had allegedly discussed it with Ms. Aloïsi, he nevertheless approved in late June 2006 the payment of Mr. Tipple's annual membership fees in the amount of $2407.50 for the National Club in Toronto. The fees were paid in late July.

[259] On July 6, 2006, Ms. Dickson advised Messrs. Evanik and Westler that Mr. Tipple had missed meetings with the NAO, MOD and NHS-PASA and that Mr. Saint-Jacques

had sent letters of apology to the UK agencies involved. However, the evidence is clear that Mr. Tipple did in fact attend the meeting with the MOD on the afternoon of June 28, 2006, which related to real-property issues. The morning meeting with the MOD related to procurement issues, as were the meetings with the NAO and the NHS-PASA. Therefore, Mr. Tipple did not attend those meetings.

[260] Still on July 6, 2006, Mr. Evanik advised Mr. Trépanier that the special advisors missed the meetings because the High Commission only partially fulfilled its commitment to coordinate the meetings and support the special advisors and that PWGSC was not as diligent as it should have been in insisting that the High Commission provide detailed information.

[261] During their meeting on July 12, 2006, Mr. Marshall asked Mr. Tipple if he had missed any meetings while in the UK. Mr. Tipple advised him that he attended all the scheduled meetings relating to real-property issues. I also note that Mr. Marshall had advised Mr. Tipple that Mr. Rotor had to provide his own trip rationale. Thus, I am not convinced that Mr. Marshall was unaware that the reason Mr. Tipple did not attend some of the meetings was that they dealt with procurement-related issues. Mr. Tipple also told Mr. Marshall that, when he arrived in the UK, he informed Mr. Saint-Jacques and Ms. Dickson that he would not attend the procurement-related meetings. He also informed Mr. Marshall that there was a lack of coordination between PWGSC and the High Commission, that Mr. Rotor had missed several meetings because of scheduling conflicts and that Ms. Dickson provided no logistical or note-taking support, contrary to what had been promised. Mr. Marshall asked him to prepare a trip report detailing the benefits of the trip, the meetings he attended and the use of his time.

[262] On July 17, 2006, on Mr. Marshall's behalf, Ms. Aloïsi sent the letters of apology to Mr. Saint-Jacques and the UK agencies involved. At the centre of Mr. Tipple's contention is the sending of the apology letters and the ramifications that ensued, which he believes is what led to the termination of his employment. A close examination of the circumstances surrounding the letters of apology leads me to the following findings. Mr. Tipple advised Mr. Marshall on July 12, 2006 that he did not miss any scheduled meetings dealing with real-property issues, that scheduling conflicts were caused by the lack of coordination between PWGSC and the High Commission, and that Mr. Rotor missed several meetings due to a lack of support by the High Commission. There was uncontradicted testimony that Messrs. Marshall and

Tipple met almost daily from July 12 to 17, 2006. Then why is it that, during that period, Mr. Marshall never mentioned to Mr. Tipple that he would send letters of apology? Although Mr. Marshall testified that he sent the letters as a matter of protocol, the evidence shows that not only did Mr. Marshall apologize for the special advisors not showing up for scheduled meetings, he also never informed Mr. Tipple that Mr. Saint-Jacques had already apologized for Mr. Tipple's behaviour. Mr. Tipple found out inadvertently on August 9, 2006 that apology letters had been sent. Mr. Marshall never informed him that there were allegations of misbehaviour against him. Allegations of poor behaviour generally refer to some kind of impropriety or misconduct. Although Mr. Marshall agreed at this hearing that he should have informed Mr. Tipple that he sent the apology letters, the fact remains that he did not. I believe that Mr. Marshall had the opportunity to inform Mr. Tipple of the allegations made against him and that he had an obligation to do so and give him an opportunity to respond to them before sending the letters of apology. If Mr. Marshall doubted Mr. Tipple's explanation that he attended all the meetings related to real-property issues and that it was Mr. Rotor who had missed scheduled meetings, then he should have conducted an investigation into the matter before sending the letters of apology.

[263] Following the July 12, 2006 meeting with Mr. Marshall, Mr. Tipple began preparing a trip report. On July 31, 2006, unbeknownst to Mr. Tipple, Mr. Evanik received a copy of his draft "via the back door." Mr. Evanik then forwarded the draft to Mr. Trépanier. The draft was then leaked by a senior PWGSC official to an official at the High Commission before Mr. Leblanc obtained a copy of it.

[264] On August 9, 2006, Mr. Leblanc emailed Mr. Baril requesting answers to the following questions about the UK trip: to whom did Mr. Marshall send the letters of apology; the cost of the trip; whether Mr. Tipple had extended the trip for personal reasons; did his wife accompany him; did PWGSC pay her expenses; who was the trip report prepared for; etc. Mr. Baril sent his email to both Mr. Marshall's chief of staff and that of the Minister. At that point, the Minister's office became involved. It was only then that Mr. Tipple learned that Mr. Leblanc had a copy of his draft and that Mr. Marshall had sent letters of apology to Mr. Saint-Jacques and the UK agencies involved.

[265] On August 15, 2006, *The Globe and Mail* published an article on the front page with the heading, "Federal advisors' trip to Britain raises ire. Officials left trail of

cancelled meetings." The Minister saw the article and emailed Mr. Loiselle. Mr. Loiselle replied that "I think it's the kind of article that will light a fire under the ass of 'the centre' . . . as well as the boss." It is safe to assume that Mr. Loiselle's reference to "the boss" meant the Prime Minister. Suffice it to say that not only did the *Globe and Mail* article have the Minister's attention, it also had that of the Government of Canada.

[266] Later on August 15, 2006, Mr. Tipple emailed Mr. Baril asking about the plan of action and what media plan was in place. His request was forwarded to Ms. Aloïsi and Mr. Trépanier. Mr. Trépanier instructed Mr. Anderson not to respond to Mr. Tipple's request. Mr. Tipple sent another email to Mr. Baril to obtain his approval to meet with the Minister and Mr. Leblanc to set the record straight. Mr. Baril informed him that he could not meet with either one. He advised Mr. Tipple that he had prepared a media plan, but Mr. Tipple did not receive a copy of it. In reviewing the evidence, I find that there was no media plan; albeit, there were media lines that Mr. Tipple originally agreed to. However, they were only one liners with little substance that did not address the fact that Mr. Tipple did not miss any scheduled meetings during the UK trip. When further articles about Mr. Tipple were published on August 16, 17 and 18, 2006 in *The Globe and Mail*, PWGSC still did not have any media plan. Mr. Marshall testified that the Minister's office had control over the media lines. Again, I have no evidence of any communication or media plan.

[267] Mr. Marshall agreed that, had PWGSC advised Mr. Leblanc on August 10, 2006, that Mr. Tipple attended all scheduled meetings relating to real property, it might have protected his reputation. One could conclude that the reason PWGSC and the Minister's office refused to respond to Mr. Tipple's request was that they had no media plan. In fact, Mr. Marshall testified that, although it was the Minister's office that controlled the media plan, he never saw it.

[268] On August 17, 2006, *The Globe and Mail* published another article indicating that opposition MPs would be asking the special advisors to appear before a House of Commons Committee in September 2006 to provide a full report on their trip to the UK. Mr. Tipple testified that he was looking forward to that appearance to explain his side of the story.

[269] Mr. Marshall testified he had no idea how Messrs. Evanik and Trépanier obtained the draft of Mr. Tipple's trip report; however, Mr. Tipple had to request an investigation into its leak. The evidence shows that neither Mr. Evanik nor

Mr. Trépanier reported that they were in receipt of the draft. We also know that at the same time Ms. Thorsteinson leaked the draft to Ms. Dickson and that it somehow ended up with *The Globe and Mail.* Mr. Read also knew about a distinct dissemination of the draft, but he as well did not report it.

[270] During cross-examination, when Mr. Marshall was referred to Mr. Desmarais' investigation report on the leak of Mr. Tipple's draft trip report to *The Globe and Mail,* he stated that he was on vacation when the newspaper obtained a copy of the draft and that the investigation was completed after he left PWGSC. When counsel for Mr. Tipple referred him to certain paragraphs in the investigation report, Mr. Marshall stated that he had probably been informed of the investigation when he returned from vacation. I find it hard to believe that, during his conversations with Ms. Aloïsi, who was in contact with him on a regular basis while he was on vacation, he was not advised of the investigation, especially since it concerned his special advisor and senior PWGSC staff. I find it improbable that Mr. Marshall did not immediately order an investigation and that he be kept personally informed of any developments. For Mr. Marshall to shrug it off and state that he may have been informed of the leak after his return from vacation leads me to believe that he was less than forthright in his testimony about these events. As the DM, Mr. Marshall's duty was to provide leadership to PWGSC following the negative publicity from the sponsorship scandal. Now, within his tenure, the makings of another scandal had begun. Mr. Tipple testified that in the past confidential documents that he had been working on for the Minister and the PCO had been leaked to the media. Now there was another leak to the media, and the questions asked by the media were, as the old adage states, "opening up a can of worms."

[271] The evidence shows that on August 22, 2006 Mr. Minto was tasked with investigating the UK trip. Counsel for the respondent stated that Mr. Marshall commissioned the Minto Report and agreed that it exonerated Mr. Tipple from any wrongdoing. Even had Mr. Marshall wanted to terminate Mr. Tipple's employment for wrongdoing, the Minto Report prevented him from doing so. Mr. Marshall's decision to commission Mr. Minto to conduct an investigation was made after he sent the letters of apology. In my opinion, Mr. Marshall did so to validate that Mr. Tipple cancelled meetings and displayed inappropriate behaviour. The evidence is that the Minto Report exonerated Mr. Tipple from any wrongdoing while in the UK, and I believe that Mr. Marshall did not expect that result.

[272] On Friday, August 25, 2006, Mr. Marshall met with the Minister, at which time the Minister asked him if the "experiment" — the hiring of the special advisors — was on the right track. According to Mr. Marshall, the Minister did not pressure him to terminate their employment. However, he explained how the meeting crystallized his thinking and, after reflecting on it over the weekend, he decided to terminate Mr. Tipple's employment. He testified that he made that decision because The Way Forward was ahead of schedule, Mr. Tipple had delivered his key commitments, there was no major initiatives left for him to lead and PWGSC could not absorb further changes. As well, he was confident that Mr. McGrath could assume the further work required for The Way Forward.

[273] On Monday, August 28, 2006, Mr. Marshall informed the Minister that he had decided to terminate the special advisors' employment. However, Ms. Lorenzato testified that, on August 24, 2006, Mr. Marshall requested that she meet with Ms. Aloïsi to discuss options to terminate Mr. Tipple's employment. The options that she was asked to explore were the discontinuance of work, a rejection on probation and an interchange with another government department or agency. Ms. Lorenzato testified that she did not support the decision to abolish Mr. Tipple's position and transfer his duties to Mr. McGrath. She also testified that at no time was any analysis done or were discussions held to identify what initiatives remained to be led and who would assume responsibility for them after August 31, 2006. As well, she stated that they did not specifically discuss a layoff but rather a termination of employment.

[274] Mr. Marshall was also asked in cross-examination to explain the "Memorandum to the Deputy Minister" that he approved on September 1, 2006, to realign the business transformation functions within PWGSC. He stated that he decided to change the organizational structure in one day since, as the DM, he had the authority. Both he and Ms. Lorenzato testified that no review or analysis was conducted before August 31, 2006 in respect of any organizational changes. Mr. Marshall never discussed the organizational changes with Mr. McGrath or Mr. Tipple.

[275] During Mr. Marshall's cross-examination, for the purposes of clarity, I asked him if The Way Forward initiatives that Mr. Tipple was leading before August 31, 2006 were discontinued and not pursued by PWGSC. He replied that that was correct. However, following the filing of Exhibit G-6 and thorough questioning by counsel for Mr. Tipple, Mr. Marshall agreed that work continued on the implementation of the majority of

those initiatives. Counsel for the respondent conceded that Mr. Tipple had a number of ongoing initiatives that continued after August 31, 2006.

[276] Mr. Marshall also testified that he decided to integrate Mr. Tipple's functions with those of Mr. McGrath and that Ms. Orange would be available to assist him. However, he later agreed with counsel for Mr. Tipple that some of Mr. Tipple's duties (the Real Estate Study) were completed by Mr. Homma.

[277] At no time before August 31, 2006 was Mr. Tipple informed that his specified period of appointment would end earlier than specified in his letter of offer and that his duties would be integrated with those of Mr. McGrath. There was no reorganization study, no analysis and no evidence of meetings or discussions on this matter. In fact, I have been provided with no evidence that Mr. Marshall ever discussed the reorganization of the Real Property Branch with Mr. McGrath or advised him that he was to assume Mr. Tipple's duties.

[278] Mr. Marshall testified that he abolished Mr. Tipple's position and that it was not recreated. However, he did not mention that, less than eight months later, a position for an associate assistant DM, Real Property Branch, was created at PWGSC. If not identical, it was very similar to Mr. Tipple's position of Special Advisor, and the incumbent of that position worked on a number of The Way Forward initiatives.

[279] Mr. Marshall testified that Mr. Tipple was "one of his boys." If that were true, then why was he not upfront and honest with him?

[280] After a thorough review of all the documentary evidence presented at the hearing and of the testimonies, and keeping in mind the criteria to assess the credibility of witnesses as noted in *Faryna* and *McDougall*, I find, on a balance of probabilities, Mr. Marshall's testimony not credible particularly, but not exclusively, in light of his inability — or perhaps unwillingness — to recall many important events. It was only when prodded by Mr. Tipple's counsel that he reluctantly acknowledged the events and stated that he was aware of emails exchanged and other relevant documents.

[281] On the other hand, I found Mr. Tipple to be a very credible witness who testified in a forthright and open manner. He was never evasive and responded clearly and accurately to all questions posed by both counsel.

[282] As I noted earlier, the briefing note that Ms. Aloïsi prepared on August 21, 2006 for Mr. Marshall's meeting with the Minister was never produced even though Mr. Marshall and counsel for the respondent agreed that they would provide a copy to Mr. Tipple and his counsel. That was not the first time that the respondent failed to produce documents, and I have to draw a negative inference from that fact.

[283] Although during the course of the hearing on numerous occasions counsel for the respondent stated that Ms. Aloïsi would be called to testify, she was not. Had Ms. Aloïsi been called to testify by the respondent, she could have explained why she felt that Mr. Tipple's role as special advisor had not been working out. As well, she could have explained why she had not advised Mr. Marshall that she had added the issue of cancelled meetings in the key messages of the media lines. Had Ms. Aloïsi been called to testify by the respondent, she could have clarified the context of her conversations with Mr. Marshall and PWGSC's communication plan following the articles that appeared in *The Globe and Mail.* She could have also commented on the briefing note that she prepared on August 21, 2006 for Mr. Marshall's meeting with the Minister. Considering Ms. Aloïsi's involvement in this case, I am drawing from her failure to testify an inference that her testimony would have played against the respondent's case.

[284] Considering the evidence as a whole, I am not satisfied on a balance of probabilities that there was a bona fide reorganization of the Real Property Branch. I am convinced that the contrived discontinuance of Mr. Tipple's functions was to justify Mr. Marshall's decision to terminate Mr. Tipple's employment for other reasons.

[285] As stated in *Rinaldi*, an adjudicator has jurisdiction to hear and decide a grievance contesting a layoff if he or she believes that the layoff was not a bona fide termination but was disguised by a contrived reliance on the *PSEA*. Mr. Tipple has discharged his onus by satisfying me that, on a balance of probabilities, the conditions required to lay him off under subsection 64(1) of the *PSEA* were not present at the relevant time and that therefore his employment cannot have been terminated under the *PSEA*. Therefore, I dismiss the respondent's claim that Mr. Tipple was laid off under subsection 64(1) of the *PSEA* and its objection to an adjudicator's jurisdiction in this case. Mr. Tipple has a grievance properly referred to adjudication. As he was an employee within the core public administration and his termination of employment,

not done under the *PSEA*, was a sham or a camouflage, I find that I hold jurisdiction over this grievance under subparagraph 209(1)(*c*)(i) of the *PSLRA*.

[286] Having found that the respondent was not justified in terminating Mr. Tipple's employment, I will now turn to the issue of remedy.

B. <u>Remedies</u>

[287] I have concluded that Mr. Tipple's termination of employment from his EX-05 position with PWGSC as of the close of business on September 29, 2006 was not made under the *PSEA* but was a sham or a camouflage. The respondent was not justified in terminating his specified-term appointment.

[288] The jurisprudence is very clear that, once an employee's specified-term appointment has expired, as in this case, an adjudicator does not have the authority to appoint the employee to another position in the public service. That authority rests solely with the PSC.

[289] However, under the *PSLRA* an adjudicator has broad remedial powers in cases of termination without justification. Subsection 228(2) provides for those remedial powers as follows:

> *228. (2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances*

[290] Mr. Tipple seeks the following corrective action:

> a. *an order reinstating him to his position as Special Advisor to the Deputy Minister, Real Property Business Transformation at Public Works and Government Services Canada (at the EX-05 level), with reimbursement of the salary and other benefits he would have received prior to the date of reinstatement.*
>
> b. *in the alternative, in lieu of an order reinstating him to his former position:*
>
> I. [*sic*] *damages for loss of past and future salary in the amount of $726,923.08;*
>
> ii. *damages for loss of past and future bonus, in the amount of $109,038.46 (being approximately 15% of his salary);*

> *iii. damages for loss of employee benefits (including health, dental, life insurance, etc.), in the amount of $109,038.46 (being approximately 15% of his salary);*
>
> *c. relocation and moving expenses in the amount of $10,000.00;*
>
> *d. damages for PWGSC's breach of its duty of good faith owed to Mr. Tipple and PWGSC's obligation to protect and to not damage Mr. Tipple's reputation, in the amount of $250,000.00;*
>
> *e. punitive damages arising from PWGSC's unfair, disingenuous, reckless, capricious, arbitrary, and high-handed conduct, which has caused Mr. Tipple stress, anxiety, damage to his reputation, and disruption to his personal life, in the amount of $250,000.00;*
>
> *f. interest on the foregoing amounts;*
>
> *g. full indemnification for his legal costs in pursuing his Grievance and the within Adjudication.*

[291] In response, the respondent submitted the following:

> . . .
>
> *. . . assuming this Tribunal finds it has jurisdiction to hear the merits of this grievance, and assuming this Tribunal finds the Employer liable, damages are properly restricted to the balance of the Grievor's term employment reduced by evidence of failure to mitigate. There is no basis on the facts of this case to award the Grievor anything akin to punitive damages.*
>
> . . .

[292] I will now address each of Mr. Tipple's claims.

1. <u>Damages for lost wages, performance bonus and employee benefits</u>

[293] On August 31, 2006, Mr. Tipple was given one month's pay, in lieu of the notice referred to in the Treasury Board *Term Employment Policy*, for August 31, 2006 to September 29, 2006.

[294] As a result of Mr. Tipple's unlawful termination, he lost $360 000.00 per annum in wages, including any statutory increases that may have occurred, from the termination of his employment to the end of his specified-term appointment, which is the period from September 30, 2006 to October 6, 2008. However, I note that

Mr. Tipple is not claiming the full amount of that loss but that he has decided to limit his claim for lost wages to $726 923.08. I find that that amount shall be used for the purpose of calculating damages for lost wages.

[295] Since both parties have agreed that Mr. Tipple had a duty to mitigate his damages, I do not need to address whether that common law duty applies under the *PSLRA* to an employee who has been unlawfully terminated.

[296] Mr. Tipple gave extensive evidence that he was unable to secure meaningful employment, despite his endeavours to market his skills with 15 executive recruiters and 37 consulting firms, or to create any significant business opportunities between the termination of his employment and the end of his specified-term appointment. It is my view that Mr. Tipple diligently pursued opportunities with recruiters and consulting firms in an effort to mitigate his loss of employment with PWGSC.

[297] The evidence further shows that Mr. Tipple had no income from September 30, 2006 to the end of 2007 and that, in 2008, he earned $38 172.00 from Solus Financial Corporation. On the basis of the evidence before me, I am satisfied that Mr. Tipple earned no other income between the termination of his employment and the remainder of his specified-term appointment. Therefore, his damages for lost wages are reduced by $38 172.00, to $688 751.08.

[298] The evidence also reveals that Mr. Marshall, despite terminating Mr. Tipple's employment, considered him an excellent and valued employee, and that, on June 27, 2006, he signed Mr. Tipple's Performance Agreement, covering the period from October 11, 2005 to March 31, 2006. Mr. Tipple's Performance Agreement demonstrated that he had surpassed all his objectives in The Way Forward initiative, and as such, Mr. Marshall approved a performance bonus of $25 655.00 for that period, representing 15 percent of Mr. Tipple's salary up to March 31, 2006.

[299] From April 1, 2006 to his termination, Mr. Tipple continued his efforts on The Way Forward, as demonstrated in the Flash Reports, and I heard no evidence that Mr. Tipple did not continue to perform at a surpassed level in the delivery of his key commitments and objectives in The Way Forward. As such, I am satisfied that, on a balance of probabilities, Mr. Tipple continued to perform his duties at the surpassed level until his termination and that he would have continued to meet the surpassed level afterward, entitling him to a 15 percent performance bonus for the period from

April 1, 2006 to October 6, 2008. Again, I note that Mr. Tipple is not claiming the full amount of that loss but that he has decided to limit his claim for a lost performance bonus to $109 038.46. Therefore, I find that he is entitled to damages for the loss of performance bonus in the amount of $109 038.46.

[300] Mr. Tipple further claims damages for a loss of employee benefits. His letter of offer indicates that he was entitled to them.

[301] For some time now, private-sector arbitrators have been finding that an award of damages is appropriate compensation for the loss of non-tangible employee benefits. While it is difficult to calculate the specific value of lost employee benefits, it is important that they be taken into account in establishing fair compensation in cases of unlawful termination.

[302] Decision makers have been compensating for the loss of non-tangible employee benefits by awarding damages in amounts ranging from 13 to 20 percent of an employee's salary. The parties in this case did not agree to a percentage representing the value of Mr. Tipple's employee benefits. However, Mr. Tipple asked me to use a 15 percent factor in calculating his loss.

[303] In cases like *De Havilland Inc. v. Canadian Auto Workers, Local 112* (1999), 83 L.A.C. (4th) 157, *Metropolitan Toronto (Municipality) v. Canadian Union of Public Employees, Local 79* (2001), 99 L.A.C. (4th) 1, and *NAV Canada v. International Brotherhood of Electrical Workers, Local 2228* (2004), 131 L.A.C. (4th) 429, a 15 percent factor has been used to compensate for the loss of employee benefits. As I do not believe that a lower percentage represents a fair value of employee benefits in the public service, I find that the 15 percent factor claimed by Mr. Tipple is reasonable to compensate for the loss of the employee benefits that he would have received if not for his unlawful termination. Therefore, I find that Mr. Tipple is entitled to a 15 percent premium, calculated on the basis of his claim for lost wages in the amount of $726 923.08, to compensate him for the loss of his employee benefits between the termination of his employment and the remainder of his specified-term appointment. The 15 percent amounts to $109 038.46.

[304] Mr. Tipple also claimed interest at the Bank of Canada rate from October 1, 2006 to October 6, 2008, in relation to damages for lost wages, performance bonus and employee benefits.

[305] An adjudicator's jurisdiction to award interest in a termination case is specified at paragraph 226(1)(*i*) of the *PSLRA*, which reads as follows:

> *226. (1) An adjudicator may, in relation to any matter referred to adjudication,*
>
> ...
>
> *(i) award interest in the case of grievances involving termination, demotion, suspension or financial penalty at a rate and for a period that the adjudicator considers appropriate ....*

[306] The power of an adjudicator to award interest in a grievance involving termination was confirmed in *Nantel v. Canada (Attorney General)*, 2008 FCA 351, where the Federal Court of Appeal stated the following at paragraphs 6 and 7:

> *[6] ... Indeed, the PSLRA provides at paragraph 226(1)(i) that the adjudicator may "award interest in the case of grievances involving termination, demotion, suspension or financial penalty [emphasis added] at a rate and for a period that the adjudicator considers appropriate".*
>
> *[7] When* [paragraph 226(1)(*i*) of the *PSLRA*] *is considered in light of the consistent line of case law that Justice Pinard relies on in his reasons, which has interpreted the PSSRA, without exception, in the same way for over 30 years, it demonstrates unequivocally that Parliament was indeed aware of the state of the law under the PSSRA, and that as of April 1, 2005, it chose to waive the benefit of the common law rule in the specific cases provided at paragraph 226(1)(i)...*

[307] In *Canada (Attorney General) v. Morgan* (1991), [1992] 2 F.C. 401 (C.A.), the majority of the Federal Court of Appeal determined that compensation is owed as of the occurrence of the wrongful action. The majority further found that, where interest is awarded as compensation, it is appropriate to "... adopt the Canada Savings Bonds rate and make it applicable to the amount of compensation year after year until payment." Finally, the majority found that "... [c]ompound interest is warranted if, but only if, it can be deduced from the evidence or the circumstances of the case that it was required to cover the loss. ..."

[308] In this case, the respondent's unlawful termination of Mr. Tipple's employment occurred as of the close of business on September 29, 2006. I note that Mr. Tipple is not claiming interest up to the date of this decision for damages for lost wages,

performance bonus and employee benefits, but that he has decided to limit his claim to the period from October 1, 2006 to October 6, 2008. Therefore, in accordance with *Morgan*, I find that he is entitled to interest on damages for lost wages, performance bonus and employee benefits at the applicable Canada Savings Bonds rate, year after year, from October 1, 2006 to October 6, 2008.

[309] The posted Canada Savings Bonds rate applicable as of October 1, 2006 is 2.75 percent per annum, which amounts to $24 937.77 in interest on damages for lost wages, performance bonus and employee benefits for the period from October 1, 2006 to September 30, 2007. The posted Canada Savings Bonds rate applicable as of October 1, 2007 is 3.10 percent per annum, which amounts to $28 884.74 in interest for the period from October 1, 2007 to September 30, 2008. The posted Canada Savings Bonds rate applicable as of October 1, 2008 is 2.45 percent per annum, which amounts to $386.89 in interest for the period from October 1 to 6, 2008. Therefore, I find that Mr. Tipple is entitled to $54 209.40 in interest on damages for lost wages, performance bonus and employee benefits.

2. <u>Reimbursement of relocation and moving expenses</u>

[310] Mr. Tipple claimed $10 000.00 for moving expenses to relocate his family from Toronto to Ottawa in March 2006. The letter of offer indicates that Mr. Tipple was entitled to relocation expenses consistent with the *Integrated Relocation Directive* that was in effect from April 1, 2005 to March 31, 2009.

[311] I believe Mr. Tipple's testimony that he relocated his family from Toronto to Ottawa because of Mr. Marshall's representations that The Way Forward would most likely take three to five years to complete. Had Mr. Tipple submitted a relocation and moving expenses claim to PWGSC for reimbursement, and had PWGSC denied that claim, he would have been allowed to pursue the issue by way of an individual grievance under subsection 208(1) of the *PSLRA*. Subsection 208(1) provides as follows:

> ***208.*** *(1) . . . an employee is entitled to present an individual grievance if he or she feels aggrieved*
>
> *(a) by the interpretation or application, in respect of the employee, of*
>
> *(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the*

> *employer, that deals with terms and conditions of employment, or*
>
> *(ii) a provision of a collective agreement or an arbitral award; or*
>
> *(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.*

[312] However, because he was a senior executive, had Mr. Tipple presented an individual grievance claiming the reimbursement of relocation and moving expenses, and had he not obtained satisfaction through the grievance process, he would not have been allowed to refer his grievance to adjudication,. Subsection 209(1) of the *PSLRA* entitles employees to refer grievances to adjudication relating to their terms or conditions of employment if those terms or conditions form part of their collective agreements or arbitral awards. Subsection 209(2) subjects that right to the approval and representation of their bargaining agents. Subsections 209(1) and (2) read as follows:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> *(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> *(*c*) in the case of an employee in the core public administration,*
>
> *(i) demotion or termination under paragraph 12(1)(*d*) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or*
>
> *(ii) deployment under the* Public Service Employment Act *without the employee's consent where consent is required; or*
>
> *(*d*) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*

> *(2) Before referring an individual grievance related to matters referred to in paragraph (1)(*a*), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*

[313] As Mr. Tipple is not represented by a bargaining agent, and as he was not part of a bargaining unit covered by a collective agreement or arbitral award, he cannot refer any dispute to adjudication arising from his relocation from Toronto to Ottawa. Therefore, I have no jurisdiction under the *PSLRA* to entertain his $10 000.00 claim for relocation and moving expenses.

3. <u>Damages for psychological injury</u>

[314] Mr. Tipple, as part of his requested corrective action, seeks damages in the amount of $250 000.00 "... arising from PWGSC's unfair, disingenuous, reckless, capricious, arbitrary, and high-handed conduct. . . ."

[315] In *Wallace*, the majority of the Supreme Court of Canada clearly stated as follows at paragraphs 95 and 98 that an obligation of good faith and fair dealing in the manner of termination forms part of the employment relationship:

> [95] *The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In* Machtinger, supra, *it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal . . . .*
>
> . . .
>
> [98] *The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. . . .*

[316] In *Keays*, the majority of the Supreme Court of Canada confirmed that obligation of good faith and fair dealing in the manner of termination and wrote the following at paragraphs 58 to 60:

> *[58] ... In* Wallace, *the Court held employers "to an obligation of good faith and fair dealing in the manner of dismissal" (para. 95) and created the expectation that, in the course of dismissal, employers would be "candid, reasonable, honest and forthright with their employees" (para. 98). At least since that time, then, there has been expectation ... that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. As aforementioned, this Court recognized as much in* Fidler *itself, where we noted that the principle in* Hadley *"explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law" (para. 54).*
>
> *[59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the* Hadley *principle.... The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded ... through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in* Wallace, *at paras. 99-100).*
>
> *[60] ... It is important to emphasize here that the fundamental nature of damages for conduct in dismissal must be retained. This means that the award of damages for psychological injury in this context is still intended to be compensatory....*

[317] As I have already found, in this case the respondent misrepresented its reason for the termination of Mr. Tipple's employment. The evidence clearly shows that Mr. Tipple was not laid off because of a lack of work or the discontinuance of a

function but that his termination was disguised by a contrived reliance on the *PSEA* and that it was a sham or a camouflage.

[318] Mr. Marshall testified that Mr. Tipple was "one of his boys," a valued and excellent employee. When Mr. Marshall hired Mr. Tipple for a three-year term, he led Mr. Tipple to believe that The Way Forward would last between five and seven years. Mr. Tipple relocated his family to Ottawa in March 2006 on the basis of those representations.

[319] In May 2006, Mr. Marshall approved Mr. Tipple's business trip to the UK and in June 2006 approved payment of his membership fees to the National Club in Toronto. On June 27, 2006, Mr. Marshall signed Mr. Tipple's "surpassed" rating on his Performance Agreement, and Mr. Tipple received a 15 percent performance bonus as a result. Mr. Tipple had no indication at that time of the upcoming termination of his employment, although Mr. Marshall allegedly had musings to that effect.

[320] In July 2006, Mr. Marshall assured Mr. Tipple not to worry about the press coverage about the UK trip. From July 12 to 17, 2006, Mr. Marshall met with Mr. Tipple on several occasions and, again, gave him no indication that he was considering terminating Mr. Tipple's employment or that he had approved sending letters of apology to Mr. Saint-Jacques and to the UK agencies.

[321] On August 25, 2006, Mr. Marshall met with Mr. Minto and was advised that Mr. Tipple had used his time in the UK in an appropriate manner. Mr. Marshall never shared the results of the Minto Report with Mr. Tipple and once again gave no indication of terminating his employment.

[322] On August 31, 2006, Mr. Tipple was given his letter of termination. Mr. Marshall advised him that there was nothing to discuss as his decision was final and that Mr. Tipple was to leave the premises immediately.

[323] As the evidence reveals, Mr. Marshall acted in a disingenuous and callous manner in terminating Mr. Tipple's employment. The evidence shows that Mr. Marshall had lulled Mr. Tipple into a false sense of security. I find that such conduct was unfair or was in bad faith by being untruthful, misleading and unduly insensitive to Mr. Tipple. One might even wonder how Mr. Tipple would have been treated had Mr. Marshall not considered him as "one of his boys."

[324] Further, on September 1, 2006, Ms. Lorenzato retrieved from Mr. Tipple all PWGSC property in his possession and allowed him to retrieve his personal effects from his office. Mr. Tipple stated that he was shocked by his termination and that it felt more like a firing than a layoff.

[325] In these circumstances, it is without any hesitation that I find that the respondent was not candid, reasonable, honest and forthright with Mr. Tipple in how it terminated his employment and that it failed in its duty of good faith and fair dealing on that occasion.

[326] Mr. Tipple testified that his unlawful termination has been very stressful and that it has affected both his and his family's mental and physical health. Mr. Tipple explained that, as a result of his unlawful termination, he has suffered from a lack of confidence, hurt feelings, low self esteem, humiliation, stress, anxiety and a feeling of betrayal. Mr. Tipple testified that this ordeal has been very emotional and traumatic and that it has affected his personal mental and physical health.

[327] I am satisfied that Mr. Tipple has met the test found in *Keays* and that the respondent's failure of its obligation of good faith and fair dealing in the manner of termination caused him psychological injury that was in the contemplation of the parties. Therefore, I find that Mr. Tipple is entitled to damages for psychological injury.

[328] In determining the amount of compensation to award, I must take into account Mr. Tipple's position within the executive community. It is true that Mr. Tipple did not adduce medical evidence of a specific condition or treatment administered as the result of his termination. However, I accept that, had Mr. Tipple adduced such evidence, it would likely have affected his ability to successfully market his senior executive skills with potential employers and business relations. In such circumstances, and without specific evidence justifying a larger award, I find that an amount of $125 000.00 reasonably compensates Mr. Tipple for loss of dignity, hurt feelings and humiliation resulting from the manner of his termination. Therefore, I find that Mr. Tipple is entitled to damages for psychological injury in the amount of $125 000.00. For the same reasons as those already expressed for damages for lost wages, performance bonus and employee benefits, I find that Mr. Tipple is entitled to interest in relation to damages for psychological injury at the applicable Canada Savings Bonds rate, year after year, from October 1, 2006 to October 6, 2008.

[329] The posted Canada Savings Bonds rate applicable as of October 1, 2006 is 2.75 percent per annum, which amounts to $3437.50 in interest on damages for psychological injury for the period from October 1, 2006 to September 30, 2007. The posted Canada Savings Bonds rate applicable as of October 1, 2007 is 3.10 percent per annum, which amounts to $3981.56 in interest for the period from October 1, 2007 to September 30, 2008. The posted Canada Savings Bonds rate applicable as of October 1, 2008 is 2.45 percent per annum, which amounts to $53.33 in interest for the period from October 1 to 6, 2008. Therefore, I find that Mr. Tipple is entitled to $7472.39 in interest on damages for psychological injury.

4. <u>Damages for loss of reputation</u>

[330] Mr. Tipple, as part of his corrective action, is seeking damages in the amount of $250 000.00 for loss of reputation.

[331] In assessing Mr. Tipple's claim, I must keep in mind that his reputation may have been affected not only by the PWGSC's handling of the situation but also by comments made in the House of Commons by the Parliamentary Secretary to the Minister and by the media coverage. Therefore, my analysis will focus only on how PWGSC handled the situation.

[332] On July 12, 2006, Mr. Tipple advised Mr. Marshall that he did not miss or cancel any scheduled meetings dealing with real-property issues while he was in the UK. Despite this fact, on July 17, 2006, Ms. Aloïsi, on behalf of Mr. Marshall, sent letters of apology to Mr. Saint-Jacques and to the UK agencies involved for meetings that Mr. Tipple had allegedly missed. The letter sent to the NAO specifically apologized for Mr. Tipple's behaviour. The media later requested copies of those letters.

[333] At some point between August 2 and 9, 2006, Mr. Leblanc obtained a copy of Mr. Tipple's draft UK trip report. It was not the first time that an internal document prepared by Mr. Tipple suspiciously ended up in the hands of the media.

[334] On August 9, 2006, Mr. Tipple became aware that Mr. Marshall had sent letters of apology and that Mr. Leblanc had obtained a copy of his draft UK trip report. That same day, Mr. Baril asked Mr. Tipple to comment on a draft of key messages that he had prepared for an interview relating to the UK trip that was requested by Mr. Leblanc. Mr. Tipple provided his comments and advised Mr. Baril that he had not missed any scheduled meetings and asked him to inquire into how Mr. Leblanc had

obtained a copy of his trip report. Mr. Baril agreed and informed Mr. Tipple that he would get back to him. He did not. Later that same day, Mr. Anderson replied that he would provide Mr. Tipple with copies of email exchanges with Mr. Leblanc and media reports (a synopsis of conversations with Mr. Leblanc). Mr. Tipple was not provided with those email exchanges or media reports. Mr. Tipple asked Mr. Baril if he could attend the interview with Mr. Leblanc; however, Mr. Loiselle refused the request.

[335] On August 10, 2006, Mr. Tipple requested that the leak of his draft UK trip report to the media be investigated by PWGSC. The Desmarais Report later found as follows:

> *In summary, Ms Thorsteinson was the only PWGSC employee identified during the investigation to have provided a copy of the trip report to Catherine Dickson a person outside the department. Catherine Dickson . . . admit*[ted] *to having had any communication with the journalist, Daniel Leblanc. Evidence was not uncovered which would link Ms. Thorsteinson directly to the delivery of the trip report to the journalist, however she did provide a copy of the document to Ms. Dickson . . . .*

[336] On August 15, 2006, Mr. Leblanc contacted Mr. Tipple's assistant. Mr. Tipple asked Mr. Baril if he could speak with Mr. Leblanc. He was advised that all calls from reporters had to be handled by PWGSC's Media Relations Branch. Mr. Tipple asked Mr. Baril for the media plan, which he stated that he possessed. However, Mr. Trépanier instructed Mr. Anderson not to respond to Mr. Tipple's request. Mr. Tipple also asked Mr. Baril if he could meet with the Minister to explain his side of the story. Again, his request was denied.

[337] On August 16, 2006, Mr. Tipple emailed Mr. Marshall, stating that his reputation was being tarnished.

[338] On August 17, 2006, Mr. Tipple emailed Messrs. Trépanier and Loiselle and Ms. Aloïsi and again requested the media plan. The media plan was not provided. Later that day, Mr. Tipple requested a meeting with the Communications Branch to develop a proactive approach to protect his reputation. Mr. Trépanier replied that Mr. Tipple had approved the media lines, and as such, PWGSC had conveyed its response to Mr. Leblanc in clear terms. Mr. Trépanier also advised Mr. Tipple that the newspaper article raised issues relevant to the Government of Canada, that the Minister was accountable for PWGSC's actions and that the Minister had the ultimate responsibility

for communications. Mr. Trépanier also stated that the communications strategy chosen was the best option to communicate the position of the Government of Canada and that, as the situation evolved, the approach would be continually re-evaluated. He advised Mr. Tipple that he would be kept informed of developments. Mr. Tipple was not advised of any re-evaluation of the strategy or any developments.

[339] Mr. Tipple stated that he felt hopeless as he was not permitted to defend himself, he never received any media plan, media reports, email exchanges or the communications strategy, and he was not being kept informed. He also stated that, although he approved the original media lines, they dealt with the original enquiry by Mr. Leblanc. However, numerous newspaper articles were subsequently published with new allegations that were tarnishing his reputation, and he was not being protected by PWGSC. Mr. Tipple testified that Mr. Baril's comments to the media after the August 15, 2006, *Globe and Mail* article were misleading and that they did not specify that he had not cancelled any scheduled meetings in the UK.

[340] On August 22, 2006, Mr. Marshall met with Mr. Minto and directed him to investigate the UK trip. On August 25, 2006, Mr. Minto advised Mr. Marshall that Mr. Tipple had used his time in a productive manner. As argued by counsel for the respondent, the Minto Report exonerated Mr. Tipple from any wrongdoing.

[341] On September 18, 2006, Ms. Lorenzato prepared the suggested response and background for the Minister, and Mr. Trépanier approved them. The suggested response and background were used by the Parliamentary Secretary to the Minister for his response to Ms. Nash in Question Period in the House of Commons on November 9, 2006, and read as follows: ". . . the Canadian High Commission in London advised us that three of the meetings were not attended. Letters of apology were forwarded to U.K. officials. . . ." The Parliamentary Secretary to the Minister was not provided with a background and suggested responses that were specific to Mr. Tipple. Had he been, his unfortunate response to Ms. Nash's question would hopefully have been accurate. The Minto Report established that Mr. Tipple was exonerated from any wrongdoing and that he had attended all meetings related to his portfolio while in the UK.

[342] In the circumstances of this case, I find that, once PWGSC told Mr. Tipple that it was handling external communications, and especially after Mr. Tipple had expressed

concerns about his reputation being tarnished and had been directed not to speak to the media, the respondent had an obligation to protect Mr. Tipple's reputation.

[343] Mr. Marshall testified that it was PWGSC's policy not to fight a war of words with the media over an event and that, if the event reported in the media was of major significance, the Minister's office developed the media and communications strategy. I agree with Mr. Marshall that the media reports on events in a way that it thinks will interest the public. However, it was incumbent on PWGSC not only to protect its own interests and reputation but also to protect those of Mr. Tipple. An employer that decides to provide information to the media, in circumstances where the reputation of one of its employee is at stake, has an obligation to provide information that is both relevant and accurate. At a minimum, the respondent had an obligation to ensure that Mr. Tipple was informed of the communications strategy that it chose to employ.

[344] It is safe to say that the respondent was in damage control. PWGSC had recently been subjected to intense media coverage over the sponsorship scandal, and Mr. Marshall was to lead PWGSC and its employees out of the fallout from that scandal.

[345] I was provided with no evidence that demonstrated that the respondent ever had any concrete media plan or communications strategy. I saw no evidence that it shared the Minto Report with the media or that it included the report's findings in the suggested response or background documents used by the Parliamentary Secretary to the Minister. Mr. Tipple did agree to the first draft of the media lines; however, as the situation escalated and his reputation was being tarnished, no revised strategy appeared. Mr. Tipple was entitled to have his reputation protected by the respondent. He was not afforded that right.

[346] I believe that PWGSC knew that not providing relevant and accurate information to the media would result in a failure to protect Mr. Tipple's reputation. Mr. Marshall testified that Ms. Aloïsi had informed him that Mr. Tipple considered that his reputation was being tarnished and that he was expecting PWGSC to protect him. Also, on August 16, 2006, Mr. Tipple directly informed Mr. Marshall by email that his reputation was being tarnished. Further, Mr. Marshall admitted in his testimony that the leak of the draft UK trip report may have damaged Mr. Tipple's reputation and that such damage could have been minimized by informing Mr. Leblanc that Mr. Tipple did attend all meetings relating to his portfolio.

[347] The communications strategy used by the respondent was self-serving and had only one specific goal: to protect its own interests by ensuring there would be no scandal that would embarrass either itself or the Government of Canada. Unfortunately, this was done at the expense of Mr. Tipple's reputation. Mr. Tipple's 23-year unblemished reputation as a senior executive was tarnished in a 6-week period. He now can find some solace in this decision that recognizes that his reputation was sacrificed to salvage that of PWGSC.

[348] The most troubling aspect of the respondent's conduct is that, despite Mr. Tipple's requests that PWGSC protect his reputation, it failed both when the first article was published by *The Globe and Mail* and subsequently. PWGSC did nothing to minimize the damage caused to Mr. Tipple's reputation. In fact, Mr. Marshall worsened the situation by unlawfully terminating Mr. Tipple's employment in an atmosphere of scandal. Therefore, I find that the respondent failed in its obligation to protect Mr. Tipple's reputation.

[349] Damages can be awarded where a party incurs a loss as a result of the actions of another. In assessing the amount of damages to which Mr. Tipple is entitled for loss of reputation, I must, once again, take into account his position within the executive community and recognize the impact of his damaged reputation on his ability to successfully market his senior executive skills with potential employers and business relations. In the circumstances of this case, I have no reservations in accepting that Mr. Tipple is entitled to his claim of $250 000.00. For the same reasons as those already expressed for damages for lost wages, performance bonus and employee benefits, I find that Mr. Tipple is entitled to interest on damages for loss of reputation at the applicable Canada Savings Bonds rate, year after year, from October 1, 2006 to October 6, 2008.

[350] The posted Canada Savings Bonds rate applicable as of October 1, 2006 is 2.75 percent per annum, which amounts to $6875.00 in interest on damages for loss of reputation for the period from October 1, 2006 to September 30, 2007. The posted Canada Savings Bonds rate applicable as of October 1, 2007 is 3.10 percent per annum, which amounts to $7963.13 in interest for the period from October 1, 2007 to September 30, 2008. The posted Canada Savings Bonds rate applicable as of October 1, 2008 is 2.45 percent per annum, which amounts to $106.66 in interest for

the period from October 1 to 6, 2008. Therefore, I find that Mr. Tipple is entitled to $14 944.79 in interest on damages for loss of reputation.

5. Damages for obstruction of process

[351] Mr. Tipple also requested full indemnification for his legal costs in pursuing his grievance up to and including adjudication.

[352] In *Canada (Attorney General) v. Mowat*, 2009 FCA 309, the Federal Court of Appeal held that the Canadian Human Rights Tribunal had no authority to make an award of costs under the provisions of the *Canadian Human Rights Act*. At paragraphs 80, 81, 94 and 95, the Court wrote as follows:

. . .

> *[80] In the specific context of human rights legislation, the matter of costs was discussed in* Ontario (Liquor Control Board) v. Ontario (Ontario Human Rights Commission) *(1988), 25 O.A.C. 161, 27 O.A.C. 246 (addendum) (Div. Ct.). The court concluded as follows:*
>
> > *There is no inherent jurisdiction in a court, nor in any other statutory body, to award costs...The Board of Inquiry is created by the Ontario Human Rights Code [citation omitted]. As a statutory body it can only have jurisdiction to award costs if such jurisdiction is expressly given to it either by the Code or some other act...The power of the Board of Inquiry under s. 40(1) to make "restitution including monetary compensation" is not an express provision for the award of costs to complainants under the Code. The rule of liberal interpretation to carry out the objects of the Code to, as far as possible, remedy the effects of and prevent discrimination do not apply to procedural matters or the question of costs.*
>
> *[81] Similarly, in* Moncton v. Buggie and N.B. Human Rights Commission *(1985), 21 D.L.R. (4th) 266; 65 N.B.R. (2d) 210 (C.A.) (*Buggie*), leave to appeal dismissed, [1986] S.C.C.A. No. 21, the New Brunswick Court of Appeal concluded that although paragraph 21(1)(c) of the New Brunswick Act provided the Commission the power to "issue whatever order it deems necessary to carry into effect the recommendation of the Board", such power did not carry with it the power to award costs against a party.*

. . .

> *[94] I also agree with the observation of Heald J. in* NEB Reference *that there is an additional reason for not invoking the doctrine of necessary implication. At paragraph 14, he opined that the Parliament of Canada and the provincial legislatures have demonstrated their ability in various pieces of legislation to explicitly confer on tribunals a general power to award costs. "From this I think it possible to infer that in the absence of an express statutory provision conferring the power to award costs, such power should not be implied." Notably, express provision is made for witness fees (s. 50(6)) and the awarding of interest (s. 53(4)).*
>
> *[95] I return to where I began. The quest is to determine whether Parliament intended to endow the Tribunal with the authority to award costs to a successful complainant. For the reasons given, I conclude that Parliament did not intend to grant, and did not grant, to the Tribunal the power to award costs. To conclude that the Tribunal may award legal costs under the guise of "expenses incurred by the victim as a result of the discriminatory practice" would be to introduce indirectly into the Act a power which Parliament did not intend it to have.*

. . .

[353] The *PSLRA* contains no express statutory provision allowing an adjudicator to award costs to a successful grievor. While subsection 228(2) of the *PSLRA* gives an adjudicator broad remedial powers justifying making the order that he or she considers appropriate in the circumstances, the Federal Court of Appeal reminded us in *Mowat* that the wording of a similar provision in the New Brunswick *Human Rights Act*, R.S.N.B. 1973, c. H-11, did not provide the authority to award legal costs: *Moncton (City) v. Buggie* (1985), 21 D.L.R. (4th) 266 (N.B.C.A.). That said, I am of the view that an adjudicator has the power to compensate the loss incurred by a party in the pursuance of a grievance where that loss occurs as a result of the other party's actions.

[354] In this case, five disclosure orders were issued pursuant to the power vested in an adjudicator by paragraph 226(1)(*e*) of the *PSLRA*, which states as follows:

> ***226.** (1) An adjudicator may, in relation to any matter referred to adjudication,*

. . .

> *(e) compel, at any stage of a proceeding, any person to produce the documents and things that may be relevant . . . .*

[355] The respondent's continued failure to fully disclose relevant documentation, in a timely matter and in compliance with the disclosure orders, considerably and unduly lengthened the hearing, led to numerous letters from Mr. Tipple's counsel requiring the respondent's compliance with the disclosure orders, and led to numerous case management conferences. I have no doubt that Mr. Tipple incurred additional legal costs that were directly attributable to the respondent's non-compliance with the disclosure orders.

[356] In light of the evidence before me, I find that, on a balance of probabilities, Mr. Tipple incurred additional legal costs caused by the respondent's continued failure to comply with the disclosure orders issued in this case and that the respondent is liable for those additional costs. To determine the value of damages for obstruction of process, Mr. Tipple's counsel will provide the respondent's counsel, by July 30, 2010, a detailed statement of all reasonable steps taken on Mr. Tipple's behalf as a result of the respondent's continued failure to comply with the disclosure orders issued in this case. The parties will then meet with a view to agreeing on the value of damages for obstruction of process that the respondent owes Mr. Tipple. I will remain seized of this issue should the parties not be able to agree on the value of damages for obstruction of process. The hearing will reconvene for only that purpose on October 5, 2010, if necessary.

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

(The Order appears on the next page)

VI. Order

[358] The objection to an adjudicator's jurisdiction to hear this grievance is dismissed, and I declare that Mr. Tipple's grievance was properly referred to adjudication.

[359] I further declare that the termination of Mr. Tipple's employment was not effected under the *PSEA* but that it was a sham or a camouflage and that the deputy head was not justified in terminating Mr. Tipple's employment.

[360] I further declare that I have no jurisdiction under the *PSLRA* to entertain Mr. Tipple's $10 000.00 claim for relocation and moving expenses from Toronto to Ottawa.

[361] I order the deputy head to pay Mr. Tipple the following amounts, by August 16, 2010:

• Damages for lost wages	$688 751.08
• Damages for lost performance bonus	$109 038.46
• Damages for lost employee benefits	$109 038.46
• Interest on damages for lost wages, performance bonus and employee benefits	$54 209.40
• Damages for psychological injury	$125 000.00
• Interest on damages for psychological injury	$7472.39
• Damages for loss of reputation	$250 000.00
• Interest on damages for loss of reputation	$14 944.79
TOTAL	**$1 358 454.58**

[362] I further declare that Mr. Tipple incurred additional legal costs caused by the deputy head's continued failure to comply with the disclosure orders issued in this case and that the deputy head is liable for those additional costs. To determine the value of damages for obstruction of process, I order Mr. Tipple's counsel to provide

the deputy head's counsel, by July 30, 2010, a detailed statement of all reasonable steps taken on Mr. Tipple's behalf as a result of the deputy head's continued failure to comply with the disclosure orders issued in this case. I further order the parties to meet with a view to agreeing on the value of damages for obstruction of process that the deputy head owes Mr. Tipple. I remain seized of this issue should the parties not agree on the value of damages for obstruction of process. The hearing will reconvene only for that purpose on October 5, 2010, if necessary.

July 16, 2010.

D.R. Quigley,
adjudicator