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File: 566-02-5549

Citation: 2012 PSLRB 113



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

INDIRA GANGASINGH

Grievor

and

**DEPUTY HEAD
(Canadian Dairy Commission)**

Respondent

Indexed as
Gangasingh v. Canadian Dairy Commission

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Steven B. Katkin, adjudicator

For the Grievor: Sean Bawden, counsel

For the Employer: Christine Langill, counsel

Heard at Ottawa, Ontario,
February 27 to March 2, 2012
and written submissions dated March 7 and 8 and October 12, 2012.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] On March 8, 2011, Indira Gangasingh (“the grievor”) filed a grievance contesting the termination of her employment by her employer, the Canadian Dairy Commission (CDC or “the employer”). The applicable collective agreement is that concluded between the Treasury Board and the Public Service Alliance of Canada (the “union”) for the Program and Administrative Services Group; expiry date June 20, 2011.

II. Summary of the evidence

[2] The parties jointly submitted a book containing 17 documents (Exhibit E-3), and the employer submitted a book containing 20 documents (Exhibit E-1). The parties also submitted the following agreed statement of facts:

Agreed Statement of Facts

...

- 1. At the time of her termination in June 2010, the grievor, Indira Gangasingh, was employed as an Audit Manager (AS-07) at the Canadian Dairy Commission (the CDC).*
- 2. As part of her work as an Audit Manager, Ms. Gangasingh audited companies under the CDC's Special Milk Class Program.*
- 3. Among other companies, one such company under audit was a company known as [A]. Mr. [B] is the President of [A].*
- 4. Between April 19, 2010 - April 30, 2010, Ms. Gangasingh telephoned Mr. [B]. A transcript of this phone call is attached as Schedule “A” to this Statement. Ms. Gangasingh has had opportunity to review the attached transcript and, aside from spelling errors (example: misspelling of “ATIP”), she agrees to the contents of the transcript that this is what she discussed with Mr. [B] by phone between April 19, 2010 - April 30, 2010. The parties have not reached an agreement on whether there were additional phone calls between Ms. Gangasingh and Mr. [B].*
- 5. An investigation into the phone call by Ms. Gangasingh was conducted by Ernst and Young.*
- 6. Ms. Gangasingh was suspended without pay as of June 29, 2010.*
- 7. On July 15, 2010, she filed a grievance and a grievance hearing was held July 27, 2010.*

8. *The grievance, at first level, was denied on August 5, 2010.*
9. *An investigation report was issued by Ernst and Young, dated November 8, 2010.*
10. *By letter dated March 3, 2011, Ms. Gangasingh's employment was terminated retroactive to June 29, 2010.*
11. *On March 8, 2011, Ms. Gangasingh filed a grievance of her termination.*
12. *On June 1, 2011 she made a final level grievance presentation.*
13. *On June 16, 2011, the grievance was denied at final level.*
14. *On June 24, 2011, the matter was referred to adjudication.*

[3] The proceedings of the Public Service Labour Relations Board (“the Board”) and those of its adjudicators are consistent with the open court principle, as described in its “Policy on Openness and Privacy”. Part of that policy is that, in exceptional circumstances, it is appropriate to limit the concept of openness for the protection of the privacy of individuals, including those who are parties or witnesses. In this case, the evidence includes allegations concerning individuals or companies either under audit by the CDC or associated with the audits carried out by it in relation to this matter. None of those individuals or representatives of the companies appeared before me. In order to avoid potential damage to the reputations or commercial interests of those individuals or companies which might result from allegations reported in this decision, and in keeping with the Supreme Court of Canada’s pronouncement in what is known as the *Dagenais/Mentuck* test, in my view privacy protections are appropriate in the circumstances. I have therefore anonymized the names of the individuals and companies concerned. Moreover, the failure to anonymize the names of third parties would be of no benefit to the merits of this decision and further, could potentially harm the long-term interests of the CDC in the promotion of its programs and the willingness of its clients to cooperate with its auditors.

[4] The transcript of the telephone conversation referred to in paragraph 4 of the agreed statement of facts and a compact disc (CD) of the recording of the conversation are on file with the Board.

[5] An order excluding witnesses was requested and granted.

[6] The letter terminating the grievor's employment, dated March 3, 2011 and signed by John Core, then the chief executive officer of the CDC (Exhibit E-3, tab 13), reads as follows:

...

As you are aware, the investigation conducted by Ernst & Young into allegations that you advised a Canadian Dairy Commission (CDC) client on how to avoid or stall a claim against it by the CDC is now complete. This investigation revealed that the allegations against you were founded. In particular, the investigation confirmed that you advised a client of the CDC's Special Milk Class Permit Program on how to stall a claim by the CDC following a compliance audit, advised the client to file an access to information request in order to tie up CDC resources and disclosed advice provided to the CDC by its legal counsel.

In view of the above, your employment with the CDC is terminated for cause by reason of misconduct in accordance with paragraph 12(1)(c) of the Financial Administration Act. The termination of your employment is effective on the date of your suspension from your duties June 29, 2010.

In reaching my decision to terminate your employment, I have carefully considered your employment history with the CDC and all of the evidence including the transcript of your telephone conversation with the CDC client at issue, the investigation report provided by Ernst & Young dated November 8th, 2010, the transcript of your interview with Ernst & Young on October 8, 2010 and the memo provided by your lawyer, Mr. Sean Bawden, to the Ernst & Young investigator, Mr. Greg McEvoy dated October 7, 2010, I have concluded that your actions constitute wilful and premeditated misconduct, and are very serious violations of the standards of conduct of any employment relationship. Your actions have severed the bond of trust essential between an employer and employee. In addition, you have also placed yourself in a position of conflict of interest and you have breached your duty of loyalty to the CDC contrary to the "Values and Ethics Code for the Public Service".

...

[7] Paragraph 12(1)(c) of the *Financial Administration Act*, R.S.C. 1985, c. F-11, reads as follows:

12. (1) Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,

...

(c) establish standards of discipline and set penalties, including termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial penalties....

...

[8] In his opening statement, counsel for the grievor stated that the grievor admitted the actions for which her employment was terminated and that a disciplinary penalty was warranted. Counsel for the grievor submitted that termination was too severe a penalty in the circumstances, as the employer had failed to consider the contextual background of the grievor's actions.

A. For the employer

1. Testimony of John Core

[9] At the relevant time, Mr. Core had been the CDC's chief executive officer for about nine years. He has since left that position. He previously occupied the positions of Chair of the Dairy Farmers of Ontario and of the Dairy Farmers of Canada.

[10] Mr. Core explained that the CDC oversees pricing, policy coordination and marketing for the Canadian dairy sector. The Minister of Agriculture and Agri-Food is responsible for the CDC. He said that the CDC chairs the Canadian Milk Supply Management Committee (CMSMC), which is a national body for policy development and discussions respecting the dairy production and processing sectors. The CMSMC, which meets quarterly, is composed of representatives from provincial dairy organizations. As stated in Exhibit E-1, Tab 7, the Special Milk Class Permit Program (SMCPP) referred to in the letter of termination was created by the CMSMC, which authorized the CDC to carry out the administrative requirements associated with the program. The objective of the program is stated in that exhibit as follows:

...

The main objective of the SMCPP is to provide eligible further processors, distributors and animal feed manufacturers with the means to access Canadian manufactured dairy ingredients, at prices that will allow them to remain competitive in the marketplace....

...

[11] To promote the use of Canadian manufactured dairy products, further processors that hold Special Milk Class Permits are entitled to purchase Canadian dairy products at a reduced price for use in processing their own products. The CDC monitors the use of the milk through a contractual agreement with the permit holders that, among other things, stipulates program audit requirements. As an example, the CDC's agreement with Company A, a further processor (Exhibit E-1, Tab 8), sets out the following at section 4:

...

In order to satisfy the CDC's Program audit requirements, the Further Processor agrees to the following:

4.1 Keep records and corresponding invoices or other appropriate documents that relate to Special Milk Class transactions for a minimum period of 3 years as well as the financial statements and provide copies of said documents to the CDC's Audit Section as required.

...

4.3 Maintain appropriate records that support the utilization of dairy ingredients e.g.: finished product recipes and/or bills of material, inventory records for finished goods and raw materials (dairy ingredient), sales summaries and invoices and/or production records.

4.4 Submit to periodic audits pursuant to the Program which will be conducted by inspectors designated under the Canadian Dairy Commission Act.

4.5 In the event that the Further Processor makes use of a valid Permit to purchase dairy ingredients for use in an activity which was not authorized under the terms of issuance of said Permit, the Further Processor agrees to pay the CDC the difference in price between the Canadian domestic price and the Special Milk Class price....

...

[12] Section 3.1 of that agreement stipulates the reporting requirements as follows:

3.1 The Further Processor is required to strictly adhere to the Special Milk Class Permit reporting procedures the details of which will be communicated by the CDC at the time of permit issuance. The CDC retains the right to suspend or cancel a Special Milk Class Permit where the reporting procedures have not been respected.

[13] Annex A to that agreement, titled “Information Guide for Further Processors,” sets out the eligibility requirements for the SMCPP at section 4. Among them are the following:

...

4.1 The further processed product must be a finished food product intended for sale to retailers and/or to food service/restaurants.

4.2 The dairy products/ingredients purchased under a SMCPP Permit may only be used in the manufacture of an approved further processed product and may not be re-sold.

...

[14] Mr. Core stated that, in monitoring the SMCPP, the first step in the audit process is reconciliation, to verify that the dairy ingredients purchased match the number of products processed. If there is no reconciliation, it is referred to the CDC’s audit section, which will either carry out a desk audit or undertake a field audit of the company concerned. Certain companies may be selected for audit after a risk-based analysis.

[15] Mr. Core emphasized the importance of audits. Since the Special Milk Class Permit holders purchase dairy ingredients from producers at a reduced price, if the ingredients were directed to the retail market without further processing, it would represent an economic gain for the further processor and a loss for the producer. It is therefore essential that the SMCPP be used as intended. Mr. Core stated that the highest level of trust and integrity is expected of CDC auditors, as required by their training and professional designations.

[16] Mr. Core stated that the grievor was involved in auditing Company A. That company was not providing all the documentation concerning Special Milk Class Permit transactions requested by the audit staff. The audit extended to Company C, a non-arm’s-length company related to Company A, which acquired product from and sold the same product as Company A, namely rasmalai, an Indian sweet. In a letter to Mr. B dated March 9, 2010 (Exhibit E-1, Tab 10), Mr. Core requested the sales records of Companies A and C, and advised him that the CDC intended to contact the clients of both companies to validate the transactions. The letter stated that Mr. B had verbally agreed to that procedure, and the CDC was seeking written confirmation. The letter

stated that failing to provide the documentation sought would result in the CDC issuing a claim for \$193 581.47.

[17] On March 24, 2010, Mr. Core received a letter from Company A's legal counsel (Exhibit E-2), which appeared to raise obstacles to the CDC's request for documentation. Mr. Core pointed out a section of the letter in which it was proposed that, instead of the CDC directly contacting the customers of companies A and C, Company A would direct Company C to seek verification from its own customers of the documentation sought by the CDC.

[18] Mr. Core's reply by letter dated April 19, 2010 (Exhibit E-1, Tab 11) proposed that the confirmation of the invoices of the companies' customers be conducted by an independent audit firm. Mr. Core stated that, although that procedure was not common, the CDC wished the file to progress.

[19] In a letter dated May 10, 2010 (Exhibit E-1, Tab 13), counsel for Company A replied to Mr. Core's letter. It alleged that, among other things, Company A's chief competitor, Company D, had instigated the audit of Company A and that it had access to confidential CDC information about Company A. Counsel further alleged that his client, Company A, feared that a third-party independent auditor would share information about Company A with Company D. The letter also stated that an access to information and privacy (ATIP) request would be made to the CDC about its audit process. Mr. Core said that he was concerned by the letter's tone.

[20] In a letter to Company A dated May 27, 2010 and signed by Mark Lalonde, the CDC's Chief of Marketing Programs (Exhibit E-1, Tab 14), the CDC demanded the payment of two claims, totalling \$193 581.52. In a letter addressed to Mr. Core dated June 3, 2010 (Exhibit E-1, Tab 15), Company A's counsel stated that it possessed information that would be in the CDC's best interests to consider and which would form the basis of legal action against the CDC. Mr. Core stated that he had no idea of the information alluded to in the letter. A telephone conference was eventually agreed to. The call took place on June 21, 2010. Mr. Core, Robert Hansis, the CDC's director of audit and the CDC's legal counsel attended on behalf of the employer. Mr. B and his legal counsel also participated. During the call, Mr. B and his legal counsel rejected the CDC's proposal of appointing an independent auditor. Consequently, by letter dated that same day (Exhibit E-1, Tab 16), counsel for the CDC advised Mr. B's legal counsel that Company A's agreement with the CDC was terminated and its Special Milk Class

Permit cancelled, effective immediately. Shortly after, Company A agreed to an independent audit. Mr. Core stated that it provided the required documentation and that the matter was eventually resolved.

[21] Mr. Core stated that during the conference call, Mr. B's legal counsel disclosed that they had a transcript of a telephone call from an individual in the CDC to Mr. B. Mr. Core later learned that that individual was the grievor. A copy of the transcript was provided to the CDC (Exhibit E-3, Tab 7), together with a CD of the recording of the telephone conversation (Exhibit E-4). The CD was played during Mr. Core's testimony. Mr. Core testified that, upon reading the transcript and listening to the CD, he was shocked that a CDC auditor would call a client being audited and counsel him as to how to delay the audit process, launch an ATIP request and disclose CDC solicitor-client privileged information. As the parties stipulated at paragraph 4 of the agreed statement of facts, the call occurred between April 19 and April 30, 2010.

[22] Mr. Core then highlighted several comparisons between the transcript of the telephone conversation and the letter from Company A's legal counsel to the CDC dated May 10, 2010 to demonstrate that Mr. B relayed the grievor's advice to his lawyers.

[23] Mr. Core stated that the grievor's phone call severely damaged the CDC's credibility and the trust in its auditors. He said that the CDC had a well-regarded reputation for integrity, confidentiality and dealing fairly with its clients. He did not know what Mr. B might have said to others about the grievor's call. Mr. Core said that the grievor did not inform him about the phone call before he learned of it from the lawyers. Mr. Core said that his relationship with the grievor had been casual and friendly and that he had respected her abilities as an auditor.

[24] Mr. Core stated that he had an open-door policy and that, if an auditor had concerns with an audit, he would have expected him or her to discuss it with their supervisor or with him. If the auditor wished to go outside the CDC, external disclosure personnel were available, as well as CDC senior directors, with whom the grievor had long-standing relationships. Referring to the CDC organization chart (Exhibit E-6), Mr. Core pointed to Gilles Froment, Senior Director for Policy and Corporate Affairs, and Ceserea Novielli, the CDC's human resources advisor, who reported directly to him. Mr. Core also mentioned Gaetan Paquette, Senior Director for Finance and Operations, who was responsible for the SMCPP.

[25] On June 29, 2010, Mr. Core met with the grievor and gave her a copy of the transcript and the CD of her telephone conversation with Mr. B. In a letter of the same date, Mr. Core placed the grievor on indefinite unpaid suspension, pending an investigation of the matter (Exhibit E-3, Tab 11). By letter dated August 13, 2010 (Exhibit E-3, Tab 12), Mr. Core advised the grievor that the indefinite suspension was being extended and provided certain details about the progress of the investigation, which was being conducted by Ernst & Young. In that letter, Mr. Core stated the following:

...

I must advise you that to date, the investigation process has not revealed any new information that would cause me to revisit my decision to place you on an administrative suspension without pay for the duration of the investigation. I have considered other potential employment opportunities within the Canadian Dairy Commission (CDC); however, due to the nature of the allegations and the relatively small size of the CDC, I do not feel it is possible at this time to assign you alternate duties pending the results of the investigation. Please be assured that as the investigation progresses, I will again reassess this decision.

...

[26] Mr. Core stated that his ability to trust the grievor was seriously compromised. Furthermore, as there were only 62 employees in the CDC, he was unable to place a senior manager such as the grievor in another position within the organization.

[27] The grievor met with the investigators on October 8, 2010 along with her legal counsel and provided a statement (Exhibit E-3, Tab 9). Ernst & Young issued its investigation report on November 8, 2010 (Exhibit E-3, Tab 8).

[28] Mr. Core stated that the employer terminated the grievor's employment for the reasons set out in the letter of termination. When referred to the phrase "... your actions constitute wilful and premeditated misconduct...", Mr. Core said that the grievor's actions were premeditated because she initiated the call to Mr. B. He said that her conduct was wilful because it severed the bond of trust between employer and employee.

[29] Mr. Core was referred to a section of the transcript of the grievor's statement to investigators in which she recounts racist remarks about persons of her ethnic

background, which Mr. Hansis allegedly made during a senior managers' meeting and which he reported at a meeting of the CDC's audit team that she attended. That section of the transcript refers to Mr. Hansis stating that the CDC's chairperson had agreed with the racist remark. Mr. Core testified that the CDC's chairperson does not attend CDC senior managers' meetings. He stated that he, Mr. Paquette, Mr. Froment, Mr. Hansis and Danie Cousineau, Secretary to the CDC attend those meetings. Mr. Core stated that he attended all senior managers' meetings and that he could not recall any of the racist comments alleged by the grievor.

[30] Asked by counsel for the employer whether the grievor had raised the issue of racist comments before, Mr. Core replied that she had not before the letter of indefinite suspension was issued. He said that, when he gave her that letter, she made an oblique reference similar to that in the transcript of her statement. Mr. Core stated that if an employee had an issue with racism, he expected them to come to him. If they were uncomfortable with that, among other available options was an internal disclosure process through human resources to Agriculture Canada.

[31] Mr. Core was referred to an email dated April 15, 2011 from the grievor to a union representative (Exhibit E-1, Tab 19) on which Mr. Core was copied and that states in part as follows:

...

Since John Core is making the final decision on a grievance on himself, nothing will change. Therefore, it will go to civil litigation. I will be suing CDC for wrongful dismissal and also, personally, John Core and Cesarea Novielli for their personal involvement in this matter.

...

[32] Mr. Core said that he was shocked that he would be sued for his involvement. He consulted with lawyers, but no action ensued.

[33] Mr. Core identified a memo he issued to all employees on December 9, 2003, inviting them to a presentation of the *Value and Ethics Code for the Public Service*, attached to which is a copy of the presentation (Exhibit E-1, Tab 3).

[34] In cross-examination, Mr. Core said that, in his nine years with the CDC, he never had reservations about the grievor's integrity and reliability. He was surprised by

the transcript and CD. He acknowledged that there was no indication that the grievor received bribes or that she solicited benefits from Company A.

[35] Mr. Core said that the CDC prides itself on its reputation and on how it is perceived. He said that Special Milk Class Permit holders are contractually bound to the audit claim process. He stated that the CDC strives to ensure that the information it possesses justifies any audit claim. CDC audit reports are not available to the public, and they do not refer to individual companies. A final audit claim issued to a permit holder would have the assurance from the auditors that it was valid claim, subject to the auditors receiving further information. Mr. Core stated that he is not involved in the selection of companies to audit. He said that some audits are compliance audits, some are random audits, and some are risk assessment audits. Mr. Core stated that the CDC owes permit holders a duty of good faith and presumes that they comply with their permit conditions. He said that the purpose of an audit is to verify that the dairy ingredients purchased by a permit holder at a special price are in fact being used in the products that they produce.

[36] When asked where in the audit manager's work description (Exhibit E-1, Tab 18) it is stated that the duties include looking for fraud, Mr. Core replied that it was included in the activity of ensuring compliance. He stated that if, in the course of an audit, a Special Milk Class Permit holder was found non-compliant, one of the causes might be fraud, which he would expect the auditors to pursue. Asked about the fact that Company A was audited twice in the same fiscal year, Mr. Core replied that, although he was not personally aware of the details, the audits might have been a desk and a field audit.

[37] When referred to his request for written confirmation of the CDC's agreement with Company A for third-party verification set out in his letter dated March 9, 2010 (Exhibit E-1, Tab 10), Mr. Core stated that he never received such confirmation.

[38] Mr. Core said that he was aware of the amount of the claim against Company A but not of its composition. Nothing indicated to him that the claim was unjustified. Following the suspension of its Special Milk Class Permit, Company A cooperated. He stated that the audit managers have the ability to determine whether the information provided to them is sufficient to satisfy a claim. Mr. Core said that his policy directives were that, if the auditors were satisfied, then the claim moved to the CDC's operational side.

[39] Mr. Core said that neither the grievor nor any other CDC employee raised concerns about the Company A audit with him. During a senior managers' meeting, Mr. Hansis mentioned that the audit was being extended as Company A was not providing the documentation sought by the CDC.

[40] Mr. Core asserted that no racist comments were brought to his attention. With respect to the investigation into the grievor's actions, he said that she admitted making the call to Mr. B. and acknowledged that she should not have made it. Mr. Core did not recall the grievor apologizing for her conduct. She cooperated with the investigators but had to postpone her participation due to a family issue.

2. Testimony of Mark Lalonde

[41] Mr. Lalonde has been employed by the CDC since 1983 and has been its chief of marketing programs since 2003. As such, he oversees the administration of the SMCPP. Mr. Lalonde has 12 employees in his section.

[42] Questioned as to how Company A was referred for audit, Mr. Lalonde explained that a Special Milk Class Permit holder's use of dairy ingredients might increase or decrease or it might experience a problem reporting on the use of the ingredients. He stated that, as there had been a sudden increase in Company A's use of liquid whole milk that could not be reconciled with the documentation provided, it was referred to the CDC's audit section in May 2008.

[43] Mr. Lalonde explained that, normally, a Special Milk Class Permit holder's use of dairy ingredients increases gradually. On occasion, when a permit holder introduces a new product, more dairy ingredients are used. If Mr. Lalonde's section is unable to reconcile the end use of the dairy ingredients with the permit holder's recipes, then the matter is referred for audit.

[44] Mr. Lalonde was referred to a section of the transcript of the grievor's statement to the investigators at which she stated that Mr. Lalonde had told her and a colleague that the owner of Company D had called the CDC and had alleged that Company A was making illegal use of dairy ingredients purchased under the SMCPP. Company D alleged that Company A was using liquid whole milk to make a cheese that it then sold at a very low price. Mr. Lalonde said that the owner of Company D called him in

May 2009 and stated that it did not understand how Company A could sell cheese at such a low price for the given market area.

[45] Mr. Lalonde said that Company D had participated in the SMCPP for a number of years. He stated that the CDC occasionally receives tips from Special Milk Class Permit holders as well as from dairy processors. Mr. Lalonde said that, when such tips are received, the CDC verifies whether the company is in the SMCPP and uses dairy ingredients. Once the initial verification is completed, the CDC checks for any discrepancies in the permit holder's documentation. If some appear, then the matter is referred to the audit section. Mr. Lalonde said that any such information provided to the CDC remains confidential, in conformity with the permit holders' agreement.

[46] Mr. Lalonde was referred to the letter of claim dated May 27, 2010, which he sent to Company A. He stated that the claim was largely due to Company A's use of liquid whole milk. He had no recollection of the grievor telling him that the Company A audit was not properly carried out. Mr. Lalonde said that he had a good working relationship with the grievor and that their offices were in the same hallway, approximately 18 to 21 metres apart.

[47] In cross-examination, Mr. Lalonde said that, before referring a matter to the audit section, it is reviewed for several months. Once referred, it is then up to the audit section to determine whether to continue with an audit. Mr. Lalonde said that, between May 2008 and May 2009, the audit group was very busy, as there was a backlog of referrals. He said that he told the grievor and her colleague, Hossein Behzadi, an audit manager, about the call from Company D. He acknowledged that he may have told them that they may want to begin working on it sooner rather than later. Mr. Lalonde said that Company D had been audited previously and that it would have been aware of the compliance requirements.

[48] In re-examination, Mr. Lalonde said that CDC advertising such as Exhibit G-1 consists of testimonials from companies under different CDC programs. As an example, Mr. Lalonde said that the previous year's advertisement for the SMCPP featured a cheesecake manufacturer.

3. Testimony of Robert Hansis

[49] Mr. Hansis is Director of Audit and Evaluation for the CDC and has held that position for 21 years. He holds an MBA and the professional designations of Certified General Accountant (CGA) and Certified Fraud Examiner (CFE). His duties include carrying out internal and external audits and evaluating different CDC programs. In 2003, Mr. Core designated Mr. Hansis as the manager responsible for public service values and ethics within the CDC.

[50] On December 10, 2003, Mr. Hansis made a presentation to CDC employees (Exhibit E-1, Tab 3) on the newly released *Values and Ethics Code for the Public Service* prepared by the Treasury Board (Exhibit E-3, Tab 4). He stated that, according to the CDC's records, the grievor attended the presentation, during which the *Values and Ethics Code for the Public Service* was distributed to all CDC staff. Mr. Hansis said that the CDC adopted its own *Code of Ethics and Professional Conduct* ("the Code") effective October 27, 2004 (Exhibit E-1, Tab 1) and that the grievor and another CDC auditor had worked on drafting it (Exhibit E-7). The Code was available to employees on the CDC intranet. Mr. Hansis said that the grievor held the professional designations of Chartered Accountant (CA) and CGA. He referred to an extract from the CGA Association of Canada's *Code of Ethical Principles and Rules of Conduct* dated December 2011 and available on its website (Exhibit E-1, Tab 5) and to an extract from the *Rules of Professional Conduct* of the Institute of Chartered Accountants of Ontario dated February 2009 (Exhibit E-1, Tab 6).

[51] Mr. Hansis stated that the grievor began her employment with the CDC in 2001 as an audit manager reporting to him and supervising two to three auditors. He said that the CDC audit section was composed of two audit managers, namely, the grievor and Mr. Behzadi, and five auditors. The grievor's duties included managing an audit team, dealing with companies being audited, completing audit reports and submitting those reports to him for review. She was also expected to become involved if an audit resulted in a claim. Mr. Hansis said that the grievor and the other auditors enjoyed a significant degree of autonomy and independence, as he did not participate in field audits. He had a high level of trust that the auditors would get the job done and do the right thing. He learned of what occurred on a field audit only when the auditors returned and were debriefed.

[52] As for the audit of Company A, Mr. Hansis said that the grievor worked on it initially and that Mr. Behzadi took it over later as a matter of convenience. He said that the CDC was experiencing difficulties with Company A's records.

[53] Mr. Hansis stated that the value of claims from SMCPP audits was approximately \$500 000 annually, with some major files having claims of up to \$1 million. The CDC carries out the assurance program for the dairy industry, which funds the SMCPP.

[54] Mr. Hansis stated that he held staff meetings with the auditors every 1.5 to 2 months, at which they discussed the files being worked on by each auditor and the difficult cases. That exchange of information was treated as highly confidential. He said that, if a company was given notice of an audit too far in advance, there was a risk that it might fabricate records to provide the information sought by the CDC. Mr. Hansis stated that he did not expect the CDC's auditors to disclose information to a client being audited.

[55] As part of his duties, Mr. Hansis attended the CDC senior managers' meetings. He referred to the minutes of the senior managers' meetings of March 8, March 25 and April 12 and 13, 2010, at which the issue about Company A's audit was discussed (Exhibit E-1, Tab 17).

[56] Mr. Hansis was referred to the section of the transcript of the grievor's statement to the investigators in which she alleged that he had made racist remarks at a senior managers' meeting that he repeated to the auditors in her presence and that the CDC chairperson had also made racist comments. Mr. Hansis stated that he did not make those comments and that the chairperson does not attend senior managers' meetings. He further stated that he had no recollection of the grievor coming to him about such comments.

[57] Mr. Hansis asserted that the grievor never told him that she had called Mr. B or that she had had concerns about how the Company A audit was being handled. He stated that, if an auditor had problems with a file, he expected that they would inform him.

[58] Asked about his relationship with the grievor, Mr. Hansis said that it was professional most of the time, although they had had disputes about some issues. He said that the grievor had difficulties with her staff at times. Coming from a

production-oriented background, she was tough on staff. Although she obtained results, staff did not appreciate being treated in that manner. Mr. Hansis said that he had participated in a conflict resolution of an issue between the grievor and an employee through the Office of Conflict Resolution of Agriculture and Agri-Food Canada.

[59] In cross-examination, Mr. Hansis said that he had been the grievor's supervisor during her CDC career. He became aware of her telephone call to Mr. B only after she had been suspended. His reaction was one of shock, as he did not expect that conduct from a professional accountant. Mr. Hansis never expected that conduct from the grievor, as he had never had any reason to question her loyalty to the CDC. Asked whether he had questioned the grievor's honesty, Mr. Hansis replied in the affirmative. He said that the CDC had paid for the grievor's French language courses and that it later discovered that she was not attending them.

[60] Mr. Hansis said that part of his duties as the manager responsible for the CDC's values and ethics was to protect public respect and confidence in the CDC. His responsibilities include preparing audit reports presented to him and ultimately to the marketing group. Although those reports are not shared with the subject of the audit, the CDC follows up with a letter to that subject as to how to correct deficiencies found by the auditors.

[61] Mr. Hansis said that a summary audit report is made to the industry approximately every two months, including the amounts of the claims. Asked for the industry's reaction if a zero claim amount is reported, Mr. Hansis said that that would be unusual, as there are 1300 companies in the SMCPP. He said that there has never been a year of zero claims.

[62] When describing the SMCPP audit process, Mr. Hansis said that some audits are referred from the marketing group, some are initiated by auditors' risk assessments, done by searching the CDC databases, and others are random. He said that Company A's audit was referred by the marketing group and was to occur in early 2009. For the product that the marketing group was verifying, they found that Company A was using more milk than other companies producing the same product.

[63] Mr. Hansis said that he was unaware of the telephone call from the president of Company D to Mr. Lalonde. In his experience, the CDC has received similar calls over

the years, and auditors must be open to such calls and verify the facts. He said that the SMCPP audits are done primarily to ensure compliance with the contracts between the further processors and the CDC. The CDC operates on good faith. When asked whether the CDC operates with a presumption of compliance, Mr. Hansis replied that, when his section carries out a risk-based audit, any company selected has a higher risk of not being compliant, as generally it has done something to bring it to the CDC's attention for audit.

[64] When asked about the duty owed Special Milk Class Permit holders to ensure that the CDC acts correctly, Mr. Hansis stated that Company A did not cooperate with the CDC, to the point that a claim was issued. The primary issue was Company A's use of its related entity, Company C. There were also concerns with some of Company A's transactions. When the CDC checked with certain companies with which Company A claimed to do business, those companies said that they had never dealt with Company A.

[65] On the matter of the CDC approaching third-party purchasers of Company A's products, Mr. Hansis said that such an approach was conventional and that it had been done before. When the audit process does not work, alternative approaches must be considered.

[66] Mr. Hansis said that the grievor initially began Company A's audit and that it was later transferred to Mr. Behzadi. Mr. Hansis was referred to an audit checklist for further processors (Exhibit G-2), which he believed Mr. Behzadi had prepared. He acknowledged reviewing the document and said that it was not a "cookbook" for CDC audits, as he expects auditors to use some judgment. Furthermore, many of the steps in the checklist depend on the audited company having a strong accounting system.

[67] Counsel for the grievor referred Mr. Hansis to section 4 of the audit checklist, titled "Audit Program - FP Sales," and asked where the obtaining of third-party records was indicated. Mr. Hansis acknowledged that it was not listed and added that, as the CDC did not receive assurance from Company A's accounting records, it investigated further. Mr. Hansis personally reviewed the audit file and found that: there was no proper sales system, there were no computer-generated invoices, and there were no proper accounts receivable records, as there were no sales records. Mr. Hansis said that the auditors attempted to trace subsequent payments. Those were recorded in round amounts, Company A's production records were manual and the invoices

exceeded the amount of product produced. Mr. Hansis said that issues with Company A continued after the first audit. The auditors attempted to obtain the invoices for the transactions between Companies A and C, as they amounted to 50% of Company A's transactions for one year.

[68] Mr. Hansis was then referred to step XIV of section 4 of the audit checklist, which reads as follows:

XIV. For High Risk auditees, validate with Books of Account: Select a sample of sales invoices and trace them (total \$ amount) to the Cash Receipts Journal and Accounts Receivable sub-ledger (or client payment history). Note: consider accounts receivables procedures from step IX (i.e. end-client payment terms and payment history).

[69] Mr. Hansis said that the text was self-explanatory. The auditors were to confirm that invoices were paid and that the sums were deposited into the company's bank account. If matters were not right, the auditors would inform the company that they were not achieving assurance. The auditors were uncertain of the source of Company A's revenues. Mr. Hansis acknowledged that inter-company sales are not prohibited but that, from an auditor's point of view, they do not provide assurance.

[70] Asked about the CDC's source of knowledge of the product produced by Company A, Mr. Hansis said that the CDC used their databases to obtain the recipes used by other Special Milk Class Permit holders producing the same product. During the first audit, the recipe was discussed with Company A. It realized that it did not conform to the standards of other companies. When confronted, Company A told the CDC that it had been mistaken and that it decided to reduce its milk usage to the standard of other companies.

[71] It was put to Mr. Hansis that in January 2010, the grievor had expressed concerns with the audit process for Company A. He replied that she said that the CDC had to exercise caution, as it might be sued if a claim were sent to Company A. Mr. Hansis told the grievor that the CDC was not concerned about being sued, as Company A was not in compliance with its agreement with the CDC. When the grievor said that the CDC did not have sufficient evidence to make a claim against Company A, Mr. Hansis disagreed. He said that the company had to prove that it was using the dairy ingredients and that Special Milk Class Permit holders are required to keep appropriate accounting records for the eligible use of dairy ingredients. Mr. Hansis said that the

CDC tries to help companies obtain assurance from the CDC auditors, but that it failed in the case of Company A.

[72] Questioned as to whether he recalled the grievor asking him to speak to the CDC's legal counsel about the audit of Company A, Mr. Hansis said that he had spoken with legal counsel regularly about issues with Company A.

[73] Mr. Hansis denied making the racist comment as alleged by the grievor.

[74] In re-examination, on the matter of the grievor's supervision of staff, Mr. Hansis stated that one employee was severely affected by reporting to the grievor. She was removed from supervising this employee by a letter from Mr. Hansis dated March 6, 2009 (Exhibit E-8). That letter set out unacceptable elements of the grievor's conduct towards staff and directives to correct her behaviour.

[75] Mr. Hansis stated that, as a result of the grievor's conduct in relation to Company A, he could no longer trust her as a member of the CDC audit team.

4. Testimony of Vanessa Lecavalier

[76] Vanessa Lecavalier has been employed by the CDC as an auditor since May 2009. She participated in an SMCPP audit of Company E.

[77] She said that while the audit program did not explicitly state that retail stores should be visited as part of an audit, it is done when the auditors cannot obtain assurance from a company's accounting system.

[78] When referred to the transcript of the grievor's statement to the investigators about racist comments allegedly made by Mr. Hansis, Ms. Lecavalier said that she could not recall such a statement being made. She asserted that the grievor never approached her about such comments or spoke to her about the Company A audit. Ms. Lecavalier's office is across the hall from the grievor's office.

[79] In cross-examination, Ms. Lecavalier said that she had both the grievor and Mr. Behzadi as managers. She never had concerns about working with the grievor or about how she issued instructions. Ms. Lecavalier said that the grievor supported her professional development, particularly for her accounting designation.

[80] Ms. Lecavalier stated that she never heard Mr. Hansis or the CDC's chairperson make the alleged racist comments.

5. Testimony of Hossein Behzadi

[81] Mr. Behzadi has been an audit manager with the CDC since 1999. Under the SMCPP, companies may be audited as a result of random selection, referral or risk assessment. Approximately 40 to 45 audits are performed annually.

[82] Mr. Behzadi said that Indian sweets were relatively new to the SMCPP. The concern with Company A was referred by the CDC's finance and operations group, as Company A's milk usage had increased dramatically. Both he and the grievor worked on Company A's file. By a cordial agreement, the file was transferred to him, as he wished to delve further into it, and the grievor no longer wanted to work on the file. In addition, the grievor was on vacation for the month of June 2009.

[83] In a letter dated January 28, 2010 addressed to Company A and signed by Mr. Behzadi, the CDC issued a claim of \$193 581.47 for October 1, 2006 to September 30, 2009 (Exhibit E-9). The letter stated that the claim was "... calculated based on the price difference of the net unreconciled quantity of dairy ingredients purchased during the audit period." After listing the details of the claim, the letter informed Company A that, for the CDC to accept the sales, written confirmation from each of Company A's clients would be required.

[84] Mr. Behzadi said that two field audits of Company A were conducted. He and the grievor did the first one in May 2009. He, the grievor, and auditors Marcus Chiang and Peggy Ritchie conducted the second in August 2009. Mr. Behzadi said that they did not obtain adequate documentation in the first audit, as Company A only provided sales invoices.

[85] While on a field audit in Toronto with the grievor, Mr. Behzadi decided to verify three third-party companies for which Company A had provided sales invoices. The first location was abandoned and boarded up. At the second location, the owner told Mr. Behzadi that, as she did not have refrigerated facilities, she did not purchase rasmalai. At the third location, the owners did not have an invoice. They called Company A to verify the sale and said that a mistake had been made. They then created an invoice. Mr. Behzadi said that the three companies were distributors and

further processors. When none of them provided confirmation of sales from Company A, Mr. Behzadi checked retail stores. He said that he saw some products of Company A's competitors on the shelves but none of Company A's products. Mr. Behzadi said that Company A did not have sales reports and that a company with its volume would keep a sales or an accounts receivable module in its accounting software. If a company such as Company A does not cooperate with the CDC's auditors, the auditors will take additional steps, commonly known as third-party verification. Mr. Behzadi said that that is done only in high-risk cases and that it is a common procedure in chartered accountancy firms.

[86] As for the audit checklist, Mr. Behzadi said that he had developed it a number of years ago as a guideline for auditors and that he improved it regularly.

[87] Mr. Behzadi was aware that Company A had some difficulties with the Canadian Food Inspection Agency (CFIA), as it was trying to be a CFIA-compliant processor. With respect to the tip from Company D, he said that such tips are investigated to determine their accuracy.

[88] Mr. Behzadi said that, in June 2009, he worked on the Company A file with Ms. Ritchie.

[89] Mr. Behzadi said that the grievor never told him that she had called Company A in April 2010; nor had she told him that she would initiate such a contact. He was shocked at reading the transcript of the call and stated it was not standard auditing procedure. Mr. Behzadi was referred to a section of the transcript in which the grievor said, "But for Hussein [*sic*] and Bob, they don't care... They go home and don't think about your livelihood." Mr. Behzadi said that that comment was unfair, as they care about many of the SMCPP companies, especially the smaller ones, so that they have a chance to compete in the marketplace. When performing a first audit, companies are given a fair chance to provide documentation.

[90] Mr. Behzadi said that the CDC's auditors never counsel companies to make ATIP requests. Once the summary of audit results has been reviewed by the director of audit and sent to the client, the auditors have no further contact. They never call companies to tell them what their lawyers should include in letters to the CDC or to seek damages. Mr. Behzadi reiterated his shock at the grievor's actions, as he had trusted

her and had previously had a good working relationship with her. After that incident, he did not think that he could work on audits with her.

[91] Mr. Behzadi said that his office was 20 to 30 metres from that of the grievor and that she never approached him about racist comments.

[92] Mr. Behzadi stated that, if he had problems with an audit, he would go to Mr. Core. Resources were also available at the Office of Integrity at Agriculture Canada. Mr. Behzadi recalled a presentation about values and ethics given in 2005 or 2006, which included a presentation specifically on integrity and that was accessible on the employer's intranet. He could not recall whether the grievor was present at the presentation.

[93] In cross-examination, Mr. Behzadi was first referred to the letter of January 28, 2010 addressed to Company A that he signed. He said that he asked the company to provide its purchases made under the program, as the CDC was trying to confirm Company A's milk usage. Mr. Behzadi explained that companies are given six months after the year-end to reconcile their year-end records. He said that the CDC's finance and operations group reconciles the purchases of all Special Milk Class Permit holders on a monthly basis.

[94] As for audits in Vancouver, Mr. Behzadi said that, normally, they wait until five or six audits are pending before travelling there. He said that the Company A audit was given a higher priority because of the tip received from Company D. He said that both audit managers went to Vancouver, as is the CDC's practice for high-risk cases. Mr. Behzadi said that Company A was considered high risk because it was buying pound butter, a tip was received that it was not making a certain product, and it was both a processor and a further processor, which added to the risk.

[95] Mr. Behzadi said that the first Vancouver audit occurred in May 2009 and that the Toronto trip occurred in July 2009. The Toronto trip was for auditing other companies. However, his initiative was to carry out third-party verifications of companies related to the Company A file. When the grievor asked him why he was doing that, he said that Company A's total sales did not reconcile with the sales it reported to the CDC, its sales were greater than its production, it had duplicate invoices and it was not numbering invoices sequentially. There were many irregularities in the file. Mr. Behzadi said that the grievor told him that the companies

he was verifying were small and were run by new immigrants. Mr. Behzadi said that the location of one of the companies was boarded up and that, at the second company, the owner's daughter was Canadian born and raised.

[96] When asked whether he had told the grievor that, when people see the maple leaf on his card, they talk, Mr. Behzadi replied that, when he presents his government identification, people indeed talk. When asked whether he had told the grievor that he knew that the company was cheating and that he would have to find a "smoking gun," Mr. Behzadi acknowledged that he often used that expression, as did the grievor.

[97] Mr. Behzadi was then referred to the letter dated March 9, 2010 from Mr. Core to Company A (Exhibit E-1, Tab 10) in which it is stated that Mr. B and Mr. Hansis had a telephone discussion on March 2, 2010. Mr. Behzadi said that he participated in that discussion and that Mr. B said that his competitors had instigated the audit.

[98] Mr. Behzadi acknowledged that the CDC did not seek Company A's permission to verify third-party records and that the CDC did not alert the company that third parties would be visited. He said that, in his 13 years at the CDC, third-party verification was done seven times and that the companies being audited were not alerted.

[99] Asked why he was shocked after reading the transcript of the grievor's call to Mr. B, Mr. Behzadi said that it was wrong and out of line for her to approach a client that way. He acknowledged that he had never previously had reason to question the grievor's loyalty or integrity.

[100] Mr. Behzadi said that, when he saw that the grievor did not wish to pursue the Company A file, he took it over. He said that the transfer was cordial and that he had transferred files to the grievor in the past. He said that the primary concern was that Company A maintained that it did not have documents. Mr. Behzadi was of the view that, for a company of that size, dealing with hundreds of companies as a distributor, it was not possible that the company did not have a sales module in its accounting software.

[101] The second audit of Company A, in August 2009, was scheduled to take place from a Tuesday to a Friday. On the Thursday, a meeting was held involving Mr. B, Ms. Ritchie and Mr. Behzadi. During the meeting, Mr. Behzadi informed Mr. B that the

CDC would make a claim of about \$60 000. He said that Mr. B agreed to that amount and therefore Mr. Behzadi was surprised by the later resistance from Company A. Mr. Behzadi said that, although that resistance was before the audit work was completed, the liquid whole milk usage was already evident from the reconciliation and the numbers in the CDC's system. He asserted that it was common procedure to convey such information at that stage. He stated that, for high-risk companies, it was common procedure to provide an audit claim before the audit ended.

[102] Mr. Behzadi acknowledged that, either between the two audits or after the second audit, he called Company D, seeking information about the recipe for the production of rasmalai, as there were different recipes in the CDC database. Company A claimed that 6 litres of milk were required to produce 1 kilogram of rasmalai. Company D informed him that if rasmalai were made manually, 5.5 to 6 litres of milk would be required to produce 1 kilogram of the product. However, if canned rasmalai imported from India were used, then only 2 litres of milk were necessary to produce 1 kilogram of rasmalai. Mr. Behzadi said that Company D alleged that Company A was using canned rasmalai. Mr. Behzadi said that he told the grievor about his telephone discussion with Company D but that he did not recall if she raised any concerns.

6. Testimony of Cesarea Novielli

[103] Ms. Novielli was the CDC's human resources advisor and occupied that position from 2007 to 2011. She had previously held the same position with the Canada Border Services Agency.

[104] Ms. Novielli first learned of the grievor's telephone call to Mr. B at a meeting on June 25, 2010, attended by Mr. Core and the CDC's legal counsel. She was present at the meeting of June 29, 2010 attended by the grievor, her union representative and Mr. Core. At that meeting, the grievor was given a copy of the transcript of the telephone call and of the CD.

[105] Ms. Novielli stated that the grievor acknowledged that her actions were wrong and that she knew that she took a chance by calling the client. The grievor said that she had concerns with the audit of Company A and that she felt that the client was not fairly treated. The grievor said that senior management had made improper remarks about East Indians. Ms. Novielli said that the grievor never approached her about such

remarks and that their working relationship was professional and courteous. The investigation report was provided to the grievor and her legal counsel.

[106] Ms. Novielli said that the grievor's employment was terminated because her actions represented a serious breach of trust between employer and employee. Ms. Novielli said that the CDC considered other positions for the grievor within the organization without client contact, including the finance section and the policy and economics sections. She met with the head of the CDC's information technology section about limiting the grievor's access to the CDC's computer system and databases, but no meaningful work could be provided to the grievor with such limited access.

[107] Ms. Novielli stated that, upon beginning her employment with the CDC, the grievor signed a "Solemn Affirmation of Office and Secrecy" (Exhibit E-1, Tab 4), which reads as follows:

I solemnly and sincerely affirm that I will faithfully and honestly fulfill the duties that devolve on me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter that comes to my knowledge by reason of such employment.

...

[108] With respect to the email from the grievor threatening legal action against her, Ms. Novielli said her reaction was one of shock. However, she was never sued.

[109] In cross-examination, Ms. Novielli acknowledged that she had no reason to question the grievor's honesty or loyalty before her phone call to Mr. B. She had no information that the grievor did not cooperate with the investigation or that she had received bribes or benefits.

[110] Asked about her recollection that during the meeting of June 29, 2010 the grievor acknowledged that she should not have made the telephone call to Mr. B, Ms. Novielli replied that she had taken notes of the meeting, which she reviewed before the hearing.

[111] With respect to the alleged discriminatory comments, Ms. Novielli did not recall Mr. Hansis making such remarks.

B. For the grievor**1. Testimony of the grievor**

[112] The grievor has been employed as an audit manager by the CDC since 2001. Her previous employment history included several years as a tax auditor and audit manager with the Ontario government. In addition to her professional designations of CA and CGA, the grievor holds three university degrees, an honours bachelor of arts, a bachelor of commerce and a master's degree in management studies.

[113] The grievor stated that she began by carrying out internal audits for the CDC but that later she performed mainly Special Milk Class Permit audits with the guidance of Mr. Behzadi, whom she acknowledged was more knowledgeable in that area. She said that, during her CDC career, the audit section carried out 40 to 45 audits annually.

[114] The grievor acknowledged that calling Mr. B was wrong and harmful to the CDC. She stated that she should have discussed her concerns with Mr. Core and took full responsibility for her conduct. The grievor said that she apologized to Mr. Core on June 29, 2010.

[115] The grievor stated that in May 2009 she was in Mr. Behzadi's office when Mr. Lalonde entered and told them that he had just completed a telephone discussion with Company D. That company alleged that Company A was working with Company E by buying milk under the SMCPP and shipping it to Company E for making paneer, a form of Indian cheese, as Company A did not have a production facility. Mr. Lalonde told them that an audit should be carried out as soon as possible. As there was no time to build an audit team, the grievor and Mr. Behzadi decided to act immediately.

[116] The grievor said that it was normal for Mr. Lalonde's group to refer matters for audit and that it did not strike her as unusual to audit Company A. She contacted Mr. B during the first two weeks of May 2009 and informed him that his company had been selected for audit and that a plant visit would be made. The grievor requested detailed records, including a sample of the company's sales. Mr. B told the grievor that, although their production facility could be visited, the plant was shut down, as his brother, who was in charge of production, was attending a training course.

[117] The grievor and Mr. Behzadi travelled to Company A's plant in British Columbia, and as Mr. B had not yet arrived, they made a visual inspection from their

vehicle, where they observed drums of ghee. On Mr. B's arrival, he gave them a tour of his factory, where they saw small amounts of rasmalai, ghee and paneer. Mr. B told them that they had recently begun to produce rasmalai.

[118] They then went to Company A's administrative offices. At that location, there was also a large warehouse belonging to Company C, containing dry goods imported from India. Mr. B printed out a sample of Company A's sales. The grievor said that it was on an Excel spreadsheet, without automatic sequential invoices. According to the grievor, that was no reason for concern in the case of a small company. The grievor said that Mr. B told them that he had never heard of Company E.

[119] On her return to Ottawa, the grievor gave Company A's documents to Ms. Ritchie for reconciliation and analysis and the grievor's later review. The grievor informed Mr. Lalonde that Company A indeed existed. The grievor stated that the only matter that might have been of concern to the CDC was the inter-company sales between Company A and Company C. The grievor said that Mr. Behzadi was no longer involved with the file and that she took vacation for the entire month of June 2009. On her return, Mr. Behzadi told the grievor that there were problems with the Company A file. She said that she would review it.

[120] In July 2009, the grievor, Mr. Behzadi and Mr. Chiang travelled to Toronto to perform audits. On a day when they had completed their work early and had returned to their car, Mr. Behzadi produced three Company A invoices for sales from October 1, 2007 to September 30, 2008 and said that he wanted to check on those users of Company A's products. The grievor told Mr. Behzadi that she disagreed with his method. She felt that the new immigrants operating those small businesses would communicate with everyone in their community after such a visit. Although she had no qualms about enforcement for wrongdoing, the SMCPP, a voluntary program, had the objective of having such companies buy dairy products, not of punishing them.

[121] Mr. Behzadi proceeded to the location of the first company, which the grievor said was boarded up. At the second location, Mr. Behzadi spoke to a woman who said that the company bought ghee and not rasmalai. The grievor said the third location was an East Indian company, which she knew bought rasmalai. She did not want to enter the premises. She said that Mr. Behzadi stated that when they saw the maple leaf on his business card, they would talk. The grievor said that Mr. Behzadi and Mr. Chiang entered the company's premises. Mr. Behzadi then called the grievor to accompany

them, which she did. The grievor said they were seated in a boardroom and the company's owner was visibly nervous. She said that he took the invoice, which was for 60 cases of rasmalai, and left them for 30 minutes. On his return, he told them that his accounting system was old and that the invoice was two years old. The grievor said that she was not happy with the manner in which the meeting was conducted. The group completed its assigned audits of other companies and returned to Ottawa.

[122] The grievor stated that she did not raise her concerns with Mr. Behzadi's approach with anyone at the CDC. Mr. Behzadi informed Mr. Hansis of his findings, who said that Ms. Ritchie's analysis of the Company A file disclosed problems with inter-company sales between Company A and Company C. Mr. Hansis said that a full-scale audit of Company A would be carried out based on the analysis and the sales. The grievor said that she had no difficulty with that decision. She said that a full-scale audit meant that it would be performed by the two audit managers and two auditors over a four-day period.

[123] The grievor said that it was decided that the second Company A audit would be done in August 2009. In the first week of that August, Mr. Behzadi told the grievor that he had had a lengthy telephone discussion with the president of Company D, during which they discussed Company A. Mr. Behzadi said that Company D had a lower recipe factor for rasmalai than did Company A. Company D alleged that Company A was smuggling butter in tin cans labelled as margarine and that several East Indian food companies were committing fraud. Mr. Behzadi gave Mr. Chiang a list of East Indian companies to verify whether they were in the SMCPP. Mr. Behzadi told the grievor that Company D offered to assist the CDC by buying rasmalai from Company A and providing the CDC with the invoices.

[124] The grievor said that she did not feel right about the situation as, from an audit point of view, such information is confidential. She did not like that Company D was urging the CDC to go after its competitors. The grievor said that she told Mr. Behzadi about her concerns, but she did not tell anyone else. She stated that the only person she could have told was Mr. Hansis, but she never thought about approaching him. She considered Mr. Behzadi the senior audit manager and looked up to him because of his greater knowledge.

[125] The team for the field audit of Company A in Vancouver included the grievor, Mr. Behzadi, Ms. Ritchie and Mr. Chiang. The audit took place over four days from

Tuesday to Friday at the company's administrative offices. As the plant tour was scheduled for that Friday, Ms. Ritchie agreed to stay behind while the other team members returned to Ottawa.

[126] The grievor said that Company A provided them with several documents that they had requested and undertook to send others to the CDC's offices, which the grievor said was normal. On the Thursday afternoon, the grievor assisted Mr. Chiang in photocopying bank statements in another area of the office. On her return, she noticed that everyone was tense. She shook Mr. B's hand and the audit team left. The grievor said that, as soon as they stepped outside, Ms. Ritchie kept saying, "Did you see how Mr. B was shaking?" Ms. Ritchie said that Mr. Behzadi had told Mr. B that the CDC would be issuing a claim for approximately \$183 000. On their return to the hotel, the grievor waited until she and Mr. Behzadi were alone and said, "You gave him the claim and the plant tour is tomorrow."

[127] The grievor reacted because what had occurred did not follow normal procedure. In her experience, a claim is not issued before an audit is completed. Usually, the auditors return to their office, review the documents and telephone the client with preliminary results. Any claim is usually issued at year-end. The grievor said that knowing that the referral for audit arose from Company D, a competitor, should have been cause for caution. She disagreed with the method used with Company A, thought it was wrong and had never seen that done in her nine years with the CDC.

[128] On the following Monday at the CDC's offices, Ms. Ritchie told her colleagues that, during the tour of Company A's plant, Mr. B's brother had told her that he was aware that Company D was behind the audit and that Company D had told the CFIA, the Department of Foreign Affairs and International Trade and British Columbia auditors that Company A was engaged in illegal activities. She reported that Mr. B's brother said that he had been so informed by a CFIA inspector.

[129] In September 2009, while on a field audit of Company E in Calgary with Mr. Behzadi and Ms. Lecavalier, Mr. Behzadi asked the grievor to transfer the Company A file to him. The grievor said that she agreed with his request, as she felt that she had already lost control of that file. She said that she was still considered a member of the Company A audit team and that Mr. Hansis requested that she support the audit claim.

[130] The grievor said that she told Mr. Hansis in December 2009 that she disagreed with third-party verification for small companies and with the decision to disallow the inter-company sales between Company A and Company C. She told Mr. Hansis that the CDC could suspend Company A's Special Milk Class Permit or send it a management letter. The grievor asked Mr. Hansis to raise the matter with the CDC's in-house counsel. Mr. Hansis replied that he had a meeting scheduled with the legal counsel that week, who was retiring at week's end. After the meeting, Mr. Hansis told the grievor that the legal counsel had disagreed with the procedures taken in the file. The grievor said that Mr. Hansis told her that, as a lawyer, the legal counsel was cautious, but that "I still drive the bus."

[131] The grievor stated that, following her conversation with Mr. Hansis, she did not raise her concerns with anyone else. She participated in meetings about Company A's file and said that Mr. Behzadi and Mr. Hansis were persuaded that Company A was involved in fraudulent activity. The grievor said that, in one discussion with Mr. Behzadi, he told her that Mr. Hansis was under pressure from within the CDC to find some large frauds.

[132] The grievor said that, although she did not maintain that Company A was innocent, in her view, the audit evidence at that point was insufficient to support a claim of fraud. She expressed the view that third-party verifications generally do not support claims of fraud, especially when small companies operated by new immigrants are concerned. For the Company A file, she said that that was the difference between her approach and that of Mr. Behzadi. The grievor acknowledged that another auditor might have taken a different approach.

[133] The grievor then described the events leading to her telephone call to Mr. B. She said that, in January 2010, she received a telephone call from Mr. B. He said that he had received a letter from the CDC stating that he had to agree to third-party verification (Exhibit E-9). He told the grievor that he had sent documentation to Ms. Ritchie but that he had received no further communication from the CDC. He complained that, when the auditors asked questions of third parties, his business would be ruined. The grievor told Mr. B that she was no longer the manager on his file and suggested that he contact Mr. Behzadi, who was in charge of the file. The grievor said that Mr. B refused and stated that Mr. Behzadi was working with Company D. The grievor then suggested that he call Mr. Hansis or Mr. Core. The grievor said that she

did not send any documentation to Mr. B confirming their conversation. The grievor said that, following the telephone call, she told Mr. Behzadi that Mr. B was upset at the third-party verification. She said that he replied, "I've got broad shoulders." The grievor stated that she did not discuss her conversation with Mr. B with anyone else.

[134] In March 2010, the grievor received a telephone call from Mr. B. He said that he had received another letter from the CDC requesting third-party verification of Company A's clients (Exhibit E-1, Tab 10). Mr. B again expressed concern as to the effect on his business if the auditors were to contact third parties. Mr. B sought the grievor's assistance, but she told him that she did not control the file. The grievor said that she told Mr. B to seek legal advice and that she would keep in touch with him. The grievor said that she felt that she was being emotionally drawn into Company A's situation.

[135] The grievor stated that she had learned through Mr. Hansis or Mr. Behzadi that Company A had threatened legal action against the CDC. She said that she told Mr. Behzadi that the CDC did not have sufficient audit evidence to support a claim against Company A. The grievor said that Mr. Behzadi replied that the CDC would not go to court and that it was just a game. The grievor said that, in a discussion with Mr. Behzadi about Company A about two weeks later, Mr. Behzadi said they had to find a smoking gun. When the grievor told him that she did not like the direction the audit was taking, Mr. Behzadi replied, "Excuse my language. I'll reduce the claim. I just want Mr. B to s*** in his pants for a while." The grievor said that she did not feel comfortable emotionally as her perception was that the audits of Company A and Company E were self-serving with respect to the CDC's interests.

[136] In April 2010, the grievor told Ms. Ritchie that she did not like the direction that the Company A audit was taking and that she was thinking of speaking to Mr. Core. The grievor said that Ms. Ritchie replied that it was of no use, since she had spoken with him for a lengthy period, and she never heard back from him or from Mr. Hansis. The grievor still thought that she would meet with Mr. Core about Company A and Company E.

[137] The grievor then described a meeting about Company E that she attended with Mr. Hansis, Mr. Behzadi and Ms. Lecavalier. Mr. Hansis said that a senior managers' meeting had gone very well, as he had reported finding three large frauds. He said that he told them, "I'm not into racial profiling, but East Indians are a bunch of cheaters."

The grievor said that, at that point, she lowered her head into her file. Mr. Hansis then touched her shoulder and said, "Listen to the best part; the CDC's chairperson piped up, 'Yes, I live out there. I know they're all a bunch of cheaters and liars'." The grievor said that she asked whether Mr. Core had been present and whether he had said anything. Mr. Hansis said that Mr. Core had been there and that he had laughed along with the others. The grievor stated that she did not tell anyone about the incident. She felt that things could be improved in the audit section. She was determined to have someone review Company A's file.

[138] In the same period, April 2010, Mr. Lalonde met with the grievor and told her that Company D's president was urging the CDC to audit Company F, a maker of rasmalai. The issue was the same as that concerning Company A, namely, the use of the Special Milk Class Permit. The grievor was assigned that file.

[139] Mr. Hansis informed the grievor that Company A would receive a legal letter from the CDC. She considered whether she could take any action but did not want to go to Mr. Core, because she thought of the meeting at which everyone had laughed at comments about East Indians. At that point, she called Mr. B.

[140] The grievor stated that, when she heard the CD of her telephone conversation, she was shocked. She agreed with the reactions of the employer's witnesses. The grievor said that her intentions were good, in that she wanted to tell Mr. B to wait while she could work on having Company A's file reviewed. She thought that she could fix things. She advised him to stall, and to persuade him, she told Mr. B that the CDC would not proceed with legal action.

[141] When asked why she had not availed herself of other available options, the grievor replied that she did not see herself as part of Agriculture Canada but as part of the CDC. She added that she never thought of going outside the CDC. She said that she told no one at the CDC about her discussion with Mr. B and that she told Mr. B to tell no one as well because she did not want to get into trouble. The grievor said that she had been conflicted, in that Company A might have been guilty of fraud, but that innocent people could have been hurt in a drive to find fraud. She felt that Company D was indirectly urging the CDC to eliminate its competitors. The grievor said that, when she audited Company F with Mr. Behzadi, all was in order. She said that the president of Company F told them that he knew that Company D had sent them to audit his company.

[142] When asked why the public service should trust her when her colleagues no longer did, the grievor said that, although her actions were wrong and had harmed the CDC, she would never repeat what she had done. She realizes that she should have had more faith in the system and expressed her concerns to Mr. Core instead of attempting to deal with the matter on her own.

[143] The grievor expressed regret for sending the email to her union representative with copies to Mr. Core and Ms. Novielli (Exhibit E-1, Tab 19). She said that, on the day on which her employment was terminated, she agreed that Mr. Core would inform CDC staff that she was on leave pending the investigation of Company A's file. A few days later, when she called an administrative assistant at the CDC about the employee assistance plan, she was told that no one at the CDC was supposed to speak to or to have contact with her. If she did call, staff was instructed to take notes of the conversation and to refer it to Ms. Novielli. The grievor said that she was angry and that she wrote the email while in that state of mind.

[144] The grievor said that, as her feelings of anger persisted, she discussed it with her analyst, who recommended that she seek closure by calling Mr. B and telling him how she felt about his role in the termination of her employment. She did so and achieved closure.

[145] When asked by her counsel about what she felt would be an appropriate penalty, the grievor suggested demotion or loss of pay.

[146] In cross-examination, the grievor acknowledged that she was familiar with the *Values and Ethics Code for the Public Service* (Exhibit E-3, Tab 4) and that she had attended training on it in December 2003. She further acknowledged helping draft the CDC's *Code*, a copy of which was attached to a letter addressed to her by Mr. Hansis dated March 6, 2009 (Exhibit E-8), which she admitted receiving. The grievor also acknowledged that, as indicated on her training summary (Exhibit E-12), in December 2006 she had attended a two-day workshop on communications and conflict resolution. The grievor recognized her signature on the Solemn Affirmation of Office and Secrecy. When referred to the CDC *Conflict of Interest and Post-Employment Policy* (Exhibit E-1, Tab 2), the grievor stated she had never seen it. She admitted that she had access to the employer's Intranet.

[147] The grievor acknowledged that it was not standard audit procedure for her to telephone the president of a company being audited by the CDC and counsel him to inform his legal counsel of different methods to obstruct the audit; counsel him to the damage to his company's reputation and loss of business; counsel him to intimidate the CDC; provide CDC solicitor-client privileged information to him; make comments to him about colleagues; counsel him to make an ATIP request and suggest keywords for that request; tell him to not disclose the fact that she had called him or give her name to anyone; or withhold the fact that she contacted the company from her supervisor and colleagues. The grievor stated that contacting Company A when she was no longer in charge of the audit file was not only contrary to standard audit procedure, but also completely wrong. She admitted that she did not research the repercussions of disclosing solicitor-client privileged information to third parties.

[148] The grievor was referred to the section of the transcript of her telephone discussion with Mr. B at which she counselled him to file an ATIP request through his legal counsel, the effect of which would be to tie up five months of the CDC's time and that of its corporate secretary. The grievor asserted that she had made up that information, that she had never been involved in an ATIP request and that she had no idea of the time required for such a process. The grievor maintained that she had not planned to make those comments and that she had no motive for doing so. The grievor said that Company A's audit file was transferred to Mr. Behzadi in September 2009.

[149] The grievor said that, after receiving a call from Mr. B on January 22, 2010 complaining about a letter he had received from the CDC about third-party verification, she informed Mr. Behzadi of the call on that same day or the next day. The grievor stated that Mr. B called her office telephone, as he did not have her cellular phone number.

[150] Asked whether she had completed a conflict of interest form about her dealing with Company A, the grievor replied that she did not, as she was unaware that such a form existed at the CDC.

[151] As for the comments allegedly made about East Indians, the grievor said that she did not approach Ms. Novielli or Mr. Core with her concerns. She mentioned it to them at the meeting in June 2010. She acknowledged that she did not request minutes of the senior managers' meeting to verify whether the CDC's chairperson attended.

[152] Asked why she did not contact her union representative about her concerns with third-party verification, the grievor said that she did not have a list of the representatives. She said that she was not aware of the Public Service Integrity Officer and that she did not contact her professional organizations about her concerns with the audit.

[153] As for her contacting the CDC following her suspension, the grievor said that the suspension letter stipulated that she was to call Ms. Novielli about work-related matters and that she was not to discuss the investigation with anyone. She called about a personal matter and was not informed that she was prohibited from speaking with anyone at the CDC. She acknowledged that she did not call Ms. Novielli or Mr. Core to clarify whether she could contact anyone at the CDC.

[154] When asked whether she had retracted the statements made in her email, copies of which she sent to Ms. Novielli and Mr. Core, the grievor said that she had not and that she had forgotten about the email. The grievor acknowledged that she did not contact the employer before calling Mr. B after her termination and had never thought to because she had considered it a personal matter.

[155] In re-examination, the grievor stated that, since her termination, she has been unsuccessful in finding employment. Despite her efforts, she has never been called for an interview. She further stated that she never perceived that she was in a conflict of interest with Company A and reiterated that she was unaware of conflict of interest forms at the CDC.

2. Testimony of Peggy Ritchie

[156] Ms. Ritchie retired from the CDC in June 2011 after 28 years of service. She had been an auditor from 1995 to 2011 and had previously occupied the position of Assistant Director of the CDC's marketing section.

[157] Ms. Ritchie said that, when she first heard the CD of the grievor's discussion with Mr. B, her impression was that the grievor had made a silly mistake. Ms. Ritchie's view of the grievor as a manager was that she was fair and professional.

[158] Ms. Ritchie said that she had been assigned the Company A file. She had prepared the file and attempted to reconcile it before the first field audit, which took place in May 2009. She said that the grievor and Mr. Behzadi returned from the audit

with incomplete documentation from Company A. As Company A's sales could not be substantiated, a second field audit was required. Ms. Ritchie participated in the second audit with the grievor, Mr. Behzadi and Mr. Chiang.

[159] On the second or third day of the second field audit, while at the company's administrative offices, the auditors discussed the file with Mr. B and his wife and informed them that they had not provided sufficient documentation to the auditors. Ms. Ritchie said that, at one point, Mr. B's wife took the grievor and Mr. Chiang out of the office to give them documentation, leaving Ms. Ritchie in the office with Mr. Behzadi and Mr. B. Ms. Ritchie stated that Mr. Behzadi informed Mr. B that the CDC would issue a substantial claim against Company A. Ms. Ritchie said that the audit had not yet been completed. According to her, during such a field audit the CDC auditors would show the company being audited the documentation they possessed and would indicate the CDC's course of action to the company. The company would be told of the possibility of a claim unless there was substantiation. In Company A's case, Ms. Ritchie said that there was no substantiation. Ms. Ritchie described the discussion between Mr. Behzadi and Mr. B as polite and cordial. The only matter she thought odd was that the claim against Company A would be substantial. She did not recall whether the amount of the claim was mentioned. Ms. Ritchie said that she and Mr. Behzadi told the grievor and Mr. Chiang what had happened during the discussion with Mr. B, but she did not recall what was said.

[160] After the meeting, Ms. Ritchie said that the group went to several stores in Burnaby to which Mr. B said he had sold rasmalai and looked for the product on the shelves. Ms. Ritchie found that somewhat unusual, as it was unlikely that the product would be on shelves if it were sold several months earlier. Ms. Ritchie said that she had participated in many field audits and had never seen that done.

[161] Although the other auditors returned to Ottawa on the Friday, Ms. Ritchie spent most of that day touring the plant with Mr. B's brother. During her conversations with him, Mr. B's brother told Ms. Ritchie that his company had been the subject of several Agriculture Canada inspections on highly technical matters concerning the plant's machinery. He expressed the view that the only way the inspector would have known about the issues was through a knowledgeable person feeding information about the company to Agriculture Canada. He said that he had been told by an inspector that Company D was providing such information to Agriculture Canada. Ms. Ritchie said

that she had no reason to doubt those comments but did not confirm them. She said that, after her return to Ottawa, she informed the grievor, Mr. Behzadi, Mr. Chiang and Mr. Hansis about the comments.

[162] Ms. Ritchie said that Company A presented numerous excuses for not providing documentation requested by the auditors in a timely fashion. She referred to the excuses as “bull****” and said that Company A was not the first company to indulge in that practice. When Company A provided some documentation, Ms. Ritchie said that her group assumed that the documents were manufactured, as they were too perfect. The documents showed that 50% of Company A’s sales were to Company C, and thence to customers. Ms. Ritchie said that she did not think that Mr. B was being untruthful but that she did not have the experience of Mr. Behzadi and the grievor.

[163] Ms. Ritchie stated that, in her experience, the Company A file was handled differently from any other file. Her impression was that the file had to be completed because Company A was cheating. Some things were properly done by Company A while no explanations were provided for those aspects not properly done. She could not state that the CDC was out to get Company A, but it seemed to her that it was. Ms. Ritchie said that she had never before had such a voluminous audit file. She said that, usually, following an audit, a letter summarizing the auditors’ findings is sent to the company being audited to provide it with an opportunity to refute or explain the findings. Ms. Ritchie did not think that Company A was given such an opportunity. Ms. Ritchie said that the usual timeline for an audit file was four to five months from beginning to end. For Company A, it was being completed when she retired from the CDC in June 2011.

[164] When asked about comments about East Indians allegedly made during a senior managers’ meeting, Ms. Ritchie said that she heard about them third-hand, but that she could not recall who had told her. She heard that the CDC’s chairperson made the comments and did not know whether Mr. Hansis had made similar comments. She did not discuss such comments with a supervisor.

[165] With respect to her discussion with Mr. Core, Ms. Ritchie said that it solely concerned her request for a compressed workweek and not Company A. She stated that the grievor told her that she was thinking of speaking to Mr. Core about the Company A file, and Ms. Ritchie encouraged her to.

[166] In cross-examination, Ms. Ritchie acknowledged that the issue with Company A would probably have ended had the company provided all the requested documentation. She said that, although she had telephone discussions with both Mr. B and his brother, she never would have called them to tell them to take legal action against the CDC.

C. Employer's reply evidence

[167] Mr. Behzadi asserted that he never shared information about Company A with the president of Company D. He stated that, after the first audit of Company A in May 2009, he did not think that fraud was involved. During the audit in Toronto, when he visited the stores to which Company A claimed it had sold product, he became suspicious when none of Company A's products were on the shelves.

[168] Mr. Behzadi said that Company A was of average size, with 12 to 15 employees, three of whom were involved in processing, and that it had a warehouse area of 120 000 square feet. He stated that the audit of Company A was not fraud or claim driven. It was an unusual audit because Company A did not provide the proper documentation at the outset. As for third-party verification, Mr. Behzadi said that that methodology had previously been used at the CDC in a case of fraud, about three to four years earlier. Mr. Behzadi stated that the onus is on the company to prove the use of a product under the SMCPP.

[169] Mr. Core stated that the effect of cancelling a processor's Special Milk Class Permit is that a fresh application must be made under the SMCPP. If a permit is suspended, it remains so until the issue is resolved. Mr. Core said that, if a company's permit is suspended or cancelled and the company is not interested in reapplying for it, the only method for the CDC to collect the amount owing is through legal action. He stated that it is important for the CDC to recover amounts owing, as they belong to the dairy farmers of Canada.

[170] Mr. Core stated that his meeting with Ms. Ritchie was not about the Company A file but rather was about her request for a compressed workweek and a discussion about her early retirement. He said that there was no reason that the grievor could not have discussed her concerns directly with him.

[171] Mr. Core said that he had not been aware that the grievor called Mr. B after her termination. He would have expected that an employee whose employment had been terminated would no longer contact a company under audit.

[172] In cross-examination, Mr. Core agreed that suspending a company's Special Milk Class Permit does not preclude the CDC from pursuing a claim against it.

III. Summary of the arguments

A. For the employer

[173] The employer emphasized a number of issues that arose from the transcript of the telephone call from the grievor to Mr. B. The grievor did not merely counsel Mr. B to stall the audit but coached him about information that he should convey to his legal counsel. It included taking legal action against the CDC for damages to Company A's reputation and loss of business and disclosing solicitor-client privileged information and confidential information about Company D. The employer also argued that the grievor coached Mr. B to lie about the CDC's offer of an independent auditing firm and that she made disparaging comments about her colleagues, Mr. Hansis and Mr. Behzadi. The grievor told Mr. B to not mention her name to his legal counsel or to anyone else. The grievor admitted to her misconduct in cross-examination by agreeing that none of what she did followed standard auditing procedure.

[174] Counsel for the employer pointed out that the grievor had not informed anyone at the CDC of her telephone call to Mr. B and that the employer had learned of the call only at the end of June 2010 through Mr. B's legal counsel. The grievor admitted that she had initiated the telephone call only when she was shown the transcript. The employer submitted that neither Mr. Core nor Ms. Novielli recalled the grievor apologizing for her misconduct.

[175] The employer submitted that the grievor acknowledged receiving a copy of the *Values and Ethics Code for the Public Service* and participating in the drafting of the CDC's *Code* (Exhibit E-1, Tab 1). The employer referred to the section of the CDC's *Code* titled "Conduct as Employees of the CDC," which reads as follows:

The second set of principles acknowledges that the reputation of the CDC as an organization, as well as its value to government and the dairy industry, are built on the work and behaviour of its employees. Each employee has a

responsibility to safeguard and enhance the reputation, public value and working environment of the CDC. Employees will act with integrity, honor their commitments and accept accountability for their actions. Employees should discuss with their manager before undertaking any action that might pose a risk to the reputation, performance or well-being of the organization. Employees will treat others with respect, fairness and tolerance in all circumstances.

[176] The employer stated that the grievor acknowledged attending Mr. Hansis' presentation in December 2003 on values and ethics. The employer referred to the PowerPoint document (Exhibit E-1, Tab 3) that he presented. In the section titled "Implications of Conflict of Interest" on page 7, the following is stated:

- *Avoiding conflicts of interest (real or apparent)*
- *Goes beyond financial transactions and economic benefit*
- *Maintains public confidence in objectivity of government*

[177] On page 8 of the PowerPoint document, titled "Specific Duties of Public Servants," the following is found:

- *Should not step out of official roles to assist private entities or persons in dealings with government that results in preferential treatment.*

[178] The employer then dealt with the appropriateness of the disciplinary penalty. It submitted that termination was the only appropriate disciplinary response to the grievor's misconduct. When it discussed the factors to be considered when assessing a disciplinary penalty, the employer relied on *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62. The employer argued that the fact that the grievor did not gain monetarily from her misconduct or that she cooperated with the Ernst & Young investigation were not the sole factors to be considered, as on June 29, 2010, she realized that she had been caught.

[179] The employer submitted that the grievor's misconduct was aggravated by several factors. The first was the nature of the misconduct, which was essentially as outlined earlier in this decision. The employer added that the grievor never retracted the email threatening legal action against Mr. Core and Ms. Novielli, that she called Mr. B after her termination without informing the CDC, and that she failed to appreciate why she should have informed the CDC.

[180] The second aggravating factor submitted by the employer was that the grievor's telephone call to Mr. B was premeditated. The employer argued that, during that call, the grievor referred to events that occurred before the Company A audit file was opened, i.e., Company D's call to the CDC.

[181] The employer also submitted that the grievor failed to avail herself of other avenues open to her to express her concerns, namely, her union representatives, Mr. Core or Ms. Novielli, the Public Service Integrity Officer, the Canadian Human Rights Commission, or her professional governing bodies.

[182] The third aggravating factor submitted by the employer was what it termed the significant effect that the grievor's actions had. It referred to the escalating tone of the correspondence between the CDC and Company A's legal counsel as described in Mr. Core's testimony. The employer emphasized the similarities between the coaching by the grievor in the transcript of her telephone call to Mr. B and the wording of the letter dated May 10, 2010 from Company A's legal counsel to the CDC (Exhibit E-1, Tab 13). The employer argued that the fact that the issue with Company A was eventually resolved does not make the grievor's actions any less egregious.

[183] The fourth aggravating factor cited by the employer was the grievor's breach of the trust placed in her as an auditor. The employer pointed out that she held two professional accountancy designations, had acknowledged her signature on the Solemn Affirmation of Office and Secrecy (Exhibit E-1, Tab 4), and, as an audit manager, had supervised other auditors. The grievor enjoyed a high level of autonomy and handled files involving significant amounts of money. Furthermore, she participated in the drafting of the CDC's *Code*. The employer argued that the grievor was in a position of trust and that she abused that trust. The employer stated that the CDC is a small organization and that the employer's witnesses had testified that they no longer trusted her.

[184] The fifth aggravating factor cited by the employer was the grievor's failure to take responsibility for her conduct. The employer argued that she downplayed her actions, and stated that she simply stalled for time and that she blamed others by alleging that they did not conform to normal procedures. As for Mr. Lalonde, the grievor stated that he acted on information received from Company D. The employer said that, although that was true, Mr. Lalonde had noted that Company A's sudden increase in its use of liquid whole milk could not be reconciled with the documentation

that it had provided to the CDC. The employer added that the evidence showed that the CDC does not ignore information gained through tips, once the necessary verifications are made.

[185] The employer said that, although the grievor testified that Mr. Behzadi was more senior and knowledgeable than she was, she disagreed with his third-party verifications. The employer argued that, if a company does not provide the required information, alternate methods of verifying the information must be explored. The employer highlighted Ms. Lecavalier's testimony that, while on a field audit of Company E, the auditors visited certain stores for verification purposes. The employer pointed out that the grievor confirmed in her testimony that, as of September 2009, Company A's file had been transferred to Mr. Behzadi, and that she did not inform him of her call to Mr. B.

[186] With respect to the racist comments about East Indians allegedly made by the CDC's chairperson at a senior managers' meeting, the employer stressed that, according to the evidence, the CDC's chairperson did not attend those meetings. The testimony from the employer's witnesses was that they never heard such comments, and both Ms. Novielli and Mr. Core stated that they first heard of them in June 2010, when the grievor raised them. Ms. Ritchie testified that she heard about such comments only third-hand. The employer pointed out that the grievor did not mention such comments in her telephone discussion with Mr. B and that she did not bring them to the attention of Mr. Core or use any of the other avenues open to her.

[187] The employer turned to the grievor's testimony about her conversation with Ms. Ritchie, in which Ms. Ritchie told her that there was no use talking with Mr. Core about her concerns with the Company A audit, as Ms. Ritchie had had such a discussion with him, without result. The employer submitted that the grievor's testimony was contradicted by her own witness, Ms. Ritchie, and by Mr. Core, who both testified that their discussion was about Ms. Ritchie's request for a compressed workweek.

[188] The employer argued that the grievor's post-termination email to her union representative, with copies to Mr. Core and Ms. Novielli (Exhibit E-1, Tab 19), which she never retracted, indicates that the grievor does not feel remorse for her actions. The employer submitted that the grievor's call to Mr. B after her termination demonstrates a lack of understanding of the impropriety of contacting the same company that led to

her breach of trust. In support of its argument that the grievor failed to take responsibility for her actions, the employer cited the following cases: *Armstrong v. Treasury Board (Public Works and Government Services Canada)*, 2000 PSSRB 29, at para 177 and 182; *Brazeau*, at para 180 and 188; and *Morrow v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 43, at para 195.

[189] The employer submitted that the CDC is entrusted by the dairy industry of Canada to audit SMCPP permit holders to ensure that the program is not abused. The grievor's actions went to the core of her responsibility as an auditor and constituted a fundamental breach of trust and a conflict of interest. The employer stressed that the grievor admitted to her misconduct only after being confronted with the transcript of the telephone conversation. The employer argued that the grievor had many options available to her if she had ethical concerns about the audit process but that she failed to avail herself of them. The employer submitted that it would be detrimental to the CDC to reinstate the grievor in view of her colleagues' distrust of her. In support of the termination of the grievor's employment, the employer cited *Narayan v. Canada Revenue Agency*, 2009 PSLRB 40, at para 250, and *Way v. Canada Revenue Agency*, 2008 PSLRB 39, at para 101.

B. For the grievor

[190] Counsel for the grievor referred to the two-step analysis to be carried out by adjudicators in matters of discipline. The first step is determining whether the employer established the facts upon which it relied when sanctioning the grievor, and if so, whether the penalty it imposed was appropriate. Counsel for the grievor conceded that the employer had established the key facts and that, *prima facie*, her telephone call to Mr. B warranted termination. However, in my assessment of the appropriateness of the penalty, counsel for the grievor submitted that I must consider two elements, which are the mitigating factors and the context in which her actions took place.

[191] With respect to mitigating factors, the grievor referred me to the following list of factors set out in *Canadian Broadcasting Corp. v. Canadian Union of Public Employees (Sgrignuoli Grievance)* (1979), 23 L.A.C. (2d) 227, at page 230:

... I have examined all authorities cited, and I believe that the following summary accurately reflects their significance. The older cases generally (but not inevitably) treated theft or

dishonesty as an offence which warranted automatic discharge; more recent cases, especially those decided by arbitrators subscribing to the theory of "corrective discipline", do not treat dishonesty as per se grounds for discharge; and various mitigating factors have been identified as justifying the substitution of a lesser penalty for discharge in such cases. Such factors include:

- (1) bona fide confusion or mistake by the grievor as to whether he was entitled to do the act complained of;*
- (2) the grievor's inability, due to drunkenness or emotional problems, to appreciate the wrongfulness of his act;*
- (3) the impulsive or non-premeditated nature of the act;*
- (4) the relatively trivial nature of the harm done;*
- (5) the frank acknowledgement of his misconduct by the grievor;*
- (6) the existence of a sympathetic, personal motive for dishonesty, such as family need, rather than hardened criminality;*
- (7) the past record of the grievor;*
- (8) the grievor's future prospects for likely good behaviour, and*
- (9) the economic impact of discharge in view of the grievor's age, personal circumstances, etc.*

But these factors, while helpful, are not components of a mathematical equation whose computation will yield an easy solution. Rather, they are but special circumstances of general considerations which bear upon the employee's future prospects for acceptable behaviour, which is the essence of the whole corrective approach to discipline. How well or badly the grievor had behaved in the past is some indication of his likely future behaviour. How aggravated or trivial was the offence is some clue to the risks the employer is being asked to run if the grievor is reinstated in employment. And how seriously the discharge will affect the grievor is at least one (but not the only) measure of whether a reasonable balance is struck between the other two considerations.

[192] As for the grievor's frank acknowledgement of her conduct, her counsel submitted that the grievor did not come forward to the employer because she assumed that her telephone conversation with Mr. B would never be disclosed. However, once confronted with the transcript and the CD, she acknowledged that she had called Mr. B. Counsel for the grievor argued that the grievor could have denied that it was her voice on the CD, as on page 8 of the transcript, Mr. B refers to her as "Andrea." The grievor further submitted that she acknowledged her conduct as stupid and reckless and that she cooperated with the investigation.

[193] With respect to her record, the grievor, who had been an audit manager for nine years, submitted that both Mr. Core and Ms. Novielli testified that, before the incident, they had had no issue with her loyalty to the CDC. The grievor submitted that she had been candid about her record, namely, the letter dated March 6, 2009 and addressed to her by Mr. Hansis concerning her supervision of staff (Exhibit E-8). The grievor stated that her management style was not among the reasons cited by the employer for terminating her employment.

[194] Dealing with the impulsive or non-premeditated nature of her act, the grievor argued that her telephone call to Mr. B was not orchestrated, that she did not know what she would say and that she was just talking. She also submitted that she had not considered the consequences of her actions.

[195] With respect to the existence of a sympathetic personal motive for dishonesty, the grievor submitted that her action was driven by her concern that the CDC would get into difficulty. Counsel for the grievor referred to the letter dated March 24, 2010 from Company A's legal counsel to the CDC (Exhibit E-2), which predated the grievor's telephone call to Mr. B. Counsel for the grievor submitted that some of the wording in that letter is similar to the words used by the grievor set out in the transcript of the telephone discussion. The grievor argued that, if Company D was in fact involved in the audit of Company A, then it goes to the heart of her *bona fide* concern for the direction the audit was taking. The grievor submitted that the objective of her call to Mr. B was that she needed time to fix things and to have someone else review Company A's file.

[196] As for the grievor's future prospects for likely good behaviour, she submitted that the employer pointed to her email dated April 15, 2011 (Exhibit E-1, Tab 19) in support of its position against her reinstatement. The grievor argued that, at that date, she was no longer a CDC employee and was not involved in the employer's litigation with Company A. The grievor submitted that she subsequently was made aware that she could not initiate an action for wrongful termination. She acknowledged that her email contained hurtful comments about her union representative, Ms. Novielli and Mr. Core. Counsel for the grievor stated that the grievor should have spoken to Mr. Core, that she wished to perform good work and that she would not repeat the same actions.

[197] With respect to the economic impact of the termination of the grievor's employment, she stated that she has not been employed since her termination and that her applications for positions have not led to interviews. The grievor submitted that, if her termination is upheld, she might never work again.

[198] Counsel for the grievor next turned to the context surrounding the grievor's actions, and referred me to the test stated by the Supreme Court of Canada in the common law context in *McKinley v. BC Tel*, 2001 SCC 38, at para 48, which reads as follows:

... I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

[199] The grievor submitted that Company A's file was treated differently than any other. She referred to Ms. Ritchie's testimony that, in her 16 years as an auditor, she had never seen an audit file conducted as was that of Company A. The grievor asked why, if in May 2009, Mr. Behzadi did not believe there was a problem with Company A's file, he conducted third-party verifications of its clients in July 2009. Furthermore, if the CDC has the power to conduct third-party verifications, why did Mr. Core request written confirmation of the procedure from Company A in his letter dated March 9, 2010 (Exhibit E-1, Tab 10)? Counsel for the grievor pointed out that the grievor had not seen that letter. The grievor submitted that she did not want a decision about the audit to be made by a judge but rather within the confines of the CDC.

[200] The grievor submitted that an issue is raised by Company D's involvement in the audit process. She referred to Ms. Ritchie's testimony that, during her tour of Company A's plant, Mr. B's brother told her that he had been informed by a CFIA inspector that the inspection had been prompted by information from Company D. The grievor said that that allegation was confirmed by the inclusion of Company A in the CFIA's record of licence suspensions for January to March 2011 (Exhibit E-1, Tab 20). The grievor submitted that the inclusion of Company D in the CDC's

promotional material was also of concern. The grievor stated that, when Mr. Behzadi contacted the president of Company D about the recipe factor for rasmalai, it could easily be inferred that Mr. Behzadi was calling about Company A, as Company D had initially contacted the CDC, alleging irregular practices by Company A.

[201] With respect to the grievor's telephone call to Mr. B, counsel for the grievor submitted that she did not divulge any information unknown to Company A or its legal counsel. Counsel for the grievor argued that the grievor telling Mr. B on page 1 of the transcript that the CDC did not want to go to court was known. The grievor counselling that Company A should exaggerate the damage to its reputation and stall the audit process could have been advice given to Company A by its legal counsel. Counsel for the grievor submitted that there is no evidence that the sole reason that Company A's legal counsel sought an ATIP request was that the grievor suggested it. Counsel submitted that it could have been due to the diligence of Company A's legal counsel.

[202] Counsel for the grievor argued that the circumstances did not warrant the termination of the grievor's employment and that the grievor was willing to accept a demotion or unpaid suspension. With respect to the employer's submission that its lack of trust in the grievor precludes her reinstatement, her counsel argued that the CDC has changed since her termination; another individual replaced Mr. Core as chief executive officer, Ms. Novielli has left the CDC and Ms. Ritchie has retired. Counsel for the grievor requested that the grievance be allowed and that discipline short of termination be substituted.

C. Employer's rebuttal

[203] The employer reiterated that it was not normal audit practice to counsel stalling the audit process and exaggerating damages.

[204] With respect to Mr. Behzadi contacting the president of Company D, the employer submitted that it was for specialized information and that he divulged no information about Company A.

[205] As for Mr. Core seeking written confirmation from Company A for third-party verification, the employer stated that such confirmation was not a requirement for the CDC to carry out such verifications.

[206] The employer stated that the fact that the CFIA temporarily suspended Company A's licence indicates that another government agency had concerns about its operations.

[207] In support of its argument that the email sent by the grievor after her termination was an indication that she should not be reinstated, the employer cited *Lapostolle v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 138, at para 94. In that decision, the adjudicator found that post-termination evidence concerning a correctional officer's continued association with the criminal element demonstrated that he had not reformed and justified the employer's fears about breach of trust.

[208] With respect to the letter to the CDC from Company A's legal counsel dated March 24, 2010 (Exhibit E-2), the employer submitted that there was no confirmation that that letter had been brought to the grievor's attention. The employer emphasized that the letter cited concerns about Company A, which its legal counsel attributed to rumours, and that the letter did not contain any references to Company D. The employer pointed out that Company D was first mentioned by Company A's legal counsel in its letter dated May 10, 2010 (Exhibit E-1, Tab 13), which was subsequent to the grievor's telephone discussion with Mr. B. The employer added that, in its letter to the CDC dated June 3, 2010 (Exhibit E-1, Tab 15), Company A's legal counsel stated that it possessed information that was a "... main source of our client's apprehension over the Commission's audit and related process." The letter also stated that the information would form the basis of Company A's anticipated legal claims against the CDC. The employer pointed out that, in the letter, Company A's legal counsel no longer referred to rumours.

[209] The employer submitted that the evidence did not confirm the grievor's allegation of racist comments made about East Indians.

[210] With respect to the grievor's argument that her reinstatement would be eased due to changes in CDC staff, the employer pointed out that the chairperson was still in position and that Mr. Hansis and Mr. Behzadi remain in the CDC's employ. The employer added that both Mr. Hansis and Mr. Behzadi testified that they no longer trust the grievor. The employer submitted that, as the audit teams travel together, the work situation would be untenable. The employer stated that the CDC had explored other positions for the grievor within the organization, none of which were feasible in such a small agency.

IV. Reasons

[211] The grievor's employment as an audit manager with the CDC was terminated on March 3, 2011, effective the date of her unpaid suspension from her duties pending an investigation on June 29, 2010. The employer's reasons for terminating the grievor's employment were set out in the letter of termination reproduced earlier in this decision, as follows:

...

... In particular, the investigation confirmed that you advised a client of the CDC's Special Milk Class Permit Program on how to stall a claim by the CDC following a compliance audit, advised the client to file an access to information request in order to tie up CDC resources and disclosed advice provided to the CDC by its legal counsel.

...

...[y]our actions constitute wilful and premeditated misconduct, and are very serious violations of the standards of conduct of any employment relationship. Your actions have severed the bond of trust essential between an employer and employee. In addition, you have also placed yourself in a position of conflict of interest and you have breached your duty of loyalty to the CDC contrary to the "Values and Ethics Code for the Public Service".

...

[212] The grievor admitted to the acts for which her employment was terminated. Accordingly, the issue to be determined is whether the penalty of discharge was appropriate in the circumstances.

[213] As a public servant, the grievor was held to the standards set out in the *Values and Ethics Code for the Public Service* (Exhibit E-3, Tab 4), which stipulates at page 11 that it is a policy of the Government of Canada and at page 12 that it forms part of the conditions of employment in the public service. She acknowledged being familiar with that document and receiving training on it in December 2003. The following provisions of the *Values and Ethics Code for the Public Service* are relevant:

Objectives of this Code

The Values and Ethics Code for the Public Service sets forth the values and ethics of public service to guide and support public servants in all their professional activities. It will serve

to maintain and enhance public confidence in the integrity of the Public Service. The Code will also serve to strengthen respect for, and appreciation of, the role played by the Public Service within Canadian democracy.

...

Public Service Values

Public servants shall be guided in their work and their professional conduct by a balanced framework of public service values: democratic, professional, ethical and people values.

...

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

- *Public servants shall perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.*
- *Public servants shall act at all times in a manner that will bear the closest public scrutiny; an obligation that is not fully discharged by simply acting within the law.*

...

Public Servants

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

...

Measures to Prevent Conflict of Interest

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

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

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

...

Public servants also have the following specific duties:

...

c) They should not step out of their official roles to assist private entities or persons in their dealings with the government where this would result in preferential treatment to the entities or persons.

...

Methods of Compliance

...

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

a) avoiding or withdrawing from activities or situations that would place the public servant in real, potential or apparent conflict of interest with his or her official duties

...

Avoidance of Preferential Treatment

...

Public servants should not offer any assistance to entities or persons that have dealings with the government, where this assistance is not part of their official duties, without obtaining prior authorization from their designated superior and complying with the conditions for that authorization.

...

Avenues of Resolution

Public Service Values and Ethics

Any public servant who wants to raise, discuss and clarify issues related to this Code should first talk with his or her manager or contact the senior official designated by the Deputy Head under the provisions of this Code, according to the procedures and conditions established by the Deputy Head.

...

Furthermore, any public servant who believes that he or she is being asked to act in a way that is inconsistent with the values and ethics set out in Chapter 1 of this Code can report the matter in confidence and without fear of reprisal to the Senior Officer, as described above.

If the matter is not appropriately addressed at this level, or the public servant has reason to believe it could not be disclosed in confidence within the organization, it may then be referred to the Public Service Integrity Officer, in accordance with the Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace.

...

[214] On page 11 of the *Values and Ethics Code for the Public Service*, under the heading “Overall Responsibility of all Public Servants,” the following is stated:

...

In addition to the stipulations outlined in this Code, public servants are also required to observe any specific conduct requirements contained in the statutes governing their particular department or organization and their profession, where applicable....

...

[215] As a holder of both CGA and CA designations, the grievor presumably was aware of the rules of conduct of her professional governing bodies concerning confidentiality, namely, the *Code of Ethical Principles and Rules of Conduct* of the Certified General Accountants Association of Canada (Exhibit E-1, Tab 5) and the *Rules of Professional Conduct* of the Institute of Chartered Accountants of Ontario (Exhibit E-1, Tab 6).

[216] Furthermore, the grievor participated in drafting the CDC's *Code*, a section of which was cited by the employer and is reproduced earlier in this decision. Section 6 of the *Code*, titled "Informing Management," reads as follows:

Employees will inform Management before proceeding with any actions (such as those involving potential conflicts of interest) that, in their judgment, might pose a risk to the CDC's reputation. The Director of Audit is the delegated authority on this code and should be consulted as required.

[217] The grievor testified that she had never seen the CDC's *Conflict of Interest and Post-Employment Policy* (Exhibit E-1, Tab 2). However, that document replicates in its entirety chapter 2 of the *Values and Ethics Code for the Public Service*, titled "Conflict of Interest Measures," of which the grievor was aware.

[218] In *Brazeau*, the adjudicator stated the following:

...

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

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

...

[219] In my view, that applies all the more so to the grievor. As an audit manager with the CDC, who supervised other CDC auditors, she was held to a rigorous standard of ethical conduct. The grievor occupied a sensitive position, as the dairy industry of Canada entrusted the CDC with the responsibility of monitoring the SMCPP permit holders. Furthermore, Mr. Hansis testified that CDC auditors have a significant degree

of autonomy and independence and that he had a high level of trust in them in the performance of their duties.

[220] Although the evidence is that the grievor neither sought nor received a financial benefit from Mr. B, that is not a required factor for a finding of conflict of interest. As stated as follows at page 20 of the *Values and Ethics Code for the Public Service*:

...

... Conflict of interest does not relate exclusively to matters concerning financial transactions and the transfer of economic benefit. While financial activity is important, it is not the sole source of potential conflict of interest situations.

...

[221] I find that, by initiating the telephone call to Mr. B, the owner of a company under a CDC audit, and counselling him as she did, the grievor placed herself in a position of conflict of interest, thereby contravening the *Values and Ethics Code of the Public Service* and the CDC's *Conflict of Interest and Post-Employment Policy*.

[222] The grievor argued that she acted on impulse when she called Mr. B and that she was just talking. That position is not supported by the evidence. The grievor testified that she felt that the audit procedure concerning Company A was flawed and that she tried to find ways of delaying the process so that she could fix things. She did so even though, as of September 2009, she was no longer the audit manager in charge of Company A's file, as it had been transferred to Mr. Behzadi.

[223] Furthermore, the transcript of the telephone conversation supports the employer's position that it was premeditated. The following excerpt is from page 1 of the transcript, at the beginning of the telephone conversation. The initials "UF" indicate "Unidentified Female," which the agreed statement of facts stipulated was the grievor:

UF *Hi, I just wanted to touch base with you because I think there is supposed to be a legal letter going out to you.*

B *Yeah, it already came in yesterday.*

UF *Oh it did. Okay ... could you tell me what it says? Because all I know is that Bob said to me*

[Company A] *has to meet a lawyer, we are sending a letter out. Could you tell me what it says?*

...

B *... Actually it says because we were not very happy with the auditing system with CDC because of their problem. They would agree how about if we hire some private auditors from BC to audit this account – can you, can you please allow us to have [Company C] invoices with us. Or something like that. Can you ask your client, they have sent it to our lawyer asking for ...*

...

UF *Listen, did it give you a deadline?*

B *It is the end of this month or something...*

UF *Okay, ... do you have a pencil?*

B *Yeah, yeah.*

F *Okay. Can I tell you what I think?*

B *Yeah, yeah please.*

...

[224] The grievor then began advising Mr. B on how to stall the audit process. According to the CD, the conversation lasted for more than 13 minutes. The following excerpts from pages 3 to 6 of the transcript demonstrate the grievor's advice for delaying the process:

...

UF *You want to ... waste time, right? You want prolong this. You want to make it look as if we are so inefficient we waste, that CDC you know you want to tire us out, right?*

...

UF *So and the other thing that I want you to speak to your lawyer is, there is something called ATIT that we are really afraid of. It is A-T-I-T.*

...

UF *It is called Access To Information.*

UF *And ask your lawyer ...*

...

UF *To ... demand to for the Act. The ATIT Act, the Government Act. It is an Act that you want [every] document from CDC with word [Company A].*

...

UF *Because many times when somebody wants to ... sue us. They want to know what secret information we have. But because we are Government we have to give you whatever we records we have on you ...*

...

UF *Any emails, any documents, any minutes. And our ... minutes would talk about [Company D] and [Company A].*

B *Very nice, very nice.*

UF *It is called ATIT. Have you ever heard of it?*

B *No, no I don't...*

...

UF *So what you do, what your doing is killing, you are wasting time because now our corporate secretary will have to, like our department [h]as to go and find everything with the word [Company A].*

...

UF *And every email, every note, every file, every memo, every single thing.*

B *I got it. That is a big thing.*

UF *... [I]t will only take you[r] lawyer like 5 minutes to send that form.*

...

UF *And that will tie up us for like 5 months.*

...

UF *... Just a simple little form but it is the most powerful thing that the public has.*

...

UF *And it will keep us so busy*

...

UF *And use the word ... ghee, ras mallai, Cadare.*

B [Paneer] *Yeah.*

UF *Indian Sweets, Ethnic Foods, and ... [Company A].*

...

UF *And even [Company D]. Say [Company D].*

...

UF *Because there are so many documents that we have with those words ... [I]t will take like two or three months.*

...

UF *For us to gather this information. They might.*

...

UF *Come back and say some are confidential or something but at least it ties us up.*

...

[Emphasis in the original]

[sic throughout]

[225] The transcript is replete with the grievor's advice to Mr. B on delaying the audit process and exaggerating damages to his business to scare the CDC. The grievor also advised Mr. B to refuse the CDC's proposal of an independent firm of auditors set out in its letter of April 19, 2010 (Exhibit E-1, Tab 11) by asserting that Company D had discussed Company A's business and were in cahoots with the auditors.

[226] With respect to the disclosure of solicitor-client privileged information, on page 2 of the transcript, the grievor told Mr. B that the CDC did not want to go to court. On page 8 of the transcript, the grievor informed Mr. B of the following:

...

UF *You know like stall. That is the whole thing because ... it is tying up our legal time and our Commissioners time. And after a few months he is going to get so tired. In fact, right now the lawyer mentioned to Bob that ... can't we*

*... just meet with [Company A] and come up with a deal.
Like close this file. It means that they want to do that.*

B I got your point....

...

[sic throughout]

[227] Counsel for the grievor argued that the grievor did not disclose any information to Mr. B that was not known to him or his legal counsel. That is pure speculation, as neither Mr. B nor his legal counsel testified. Furthermore, the employer's stated reasons for terminating the grievor's employment were not predicated upon Mr. B acting on her advice but rather upon the advice and information she proffered during the telephone conversation, which she initiated. In any event, having carefully reviewed and compared the transcript of the telephone conversation with the letter from Company A's legal counsel to the CDC dated May 10, 2010 (Exhibit E-1, Tab 13), I conclude that the letter was based on, and was the result of, the grievor's conversation with Mr. B. It was the first correspondence from Company A's legal counsel to specifically mention Company D and allege that it influenced the CDC's audit process. The letter also states that an ATIP request would be forthcoming. By contrast, the previous letter from Company A's legal counsel to the CDC dated March 24, 2010 (Exhibit E-2) refers to unsubstantiated rumours about Company A and is concerned primarily with the CDC's intention to carry out third-party verification. The following excerpt from the May 10, 2010 letter is telling:

...

...[O]ur client has concerns about circumstances that underlie the investigation and audit the CDC has embarked on ... Stated simply, our client has grounds to believe that its chief competitor, [Company D] has been and continues to be involved in this process. Our client specifically apprehends that his competitor was the impetus to the process embarked on, has wrongly influenced any decision(s) subsequently taken by the CDC and, further, that [Company D] has been and will continue to be in receipt of confidential information about our client that the CDC has in its possession.

Our client believes these concerns are well founded and are based on reliable information.

...

These concerns understandably impact on our client's confidence in the existing CDC audit process and on our

client's ability to safely continue with this process. This includes your recent proposal to have a third party auditor. For instance, our client reasonably fears that any third party auditor may also share information with our client's competitors.

...

[Emphasis added]

[228] The grievor submitted as a mitigating factor that, even though she did not inform the employer of her conversation with Mr. B because she assumed that it would not become known, she acknowledged her participation when confronted. In my view, there is little merit in the grievor acknowledging her misconduct only when confronted with the transcript about two months after the telephone call. Furthermore, the argument that the grievor could have denied that it was her voice on the CD because the name "Andrea" appears in the transcript has no basis in the evidence. In her testimony, the grievor stated that, when confronted with the transcript and the CD in June 2010, she admitted that she had called Mr. B. Furthermore, when the CD was played during the hearing, I pointed out several transcription errors to the parties, who agreed with my corrections. There is no doubt that the name "Andrea" should have been transcribed as "Indira." Indeed, six lines above the name "Andrea" on page 8 of the transcript, the grievor's name is correctly transcribed as "Indira."

[229] Counsel for the grievor submitted that, in my appreciation of the context of the grievor's actions, I must consider that the Company A audit did not proceed according to the CDC's usual practice. Counsel referred to the grievor's testimony, in which she expressed her unease with the audit method to Mr. Behzadi and Mr. Hansis. Counsel for the grievor also pointed to Ms. Ritchie's testimony, in which she stated that considering her 16 years of experience as a CDC auditor, Company A's file was handled differently than any other file.

[230] The evidence shows that Mr. Behzadi and the grievor had differing approaches about the method of auditing Company A. The grievor was especially concerned about third-party verification and visits to retail stores. I note that Ms. Lecavalier testified that the CDC carries out visits to retail stores when the auditors cannot obtain assurance from a company's accounting system. Furthermore, the grievor testified that another auditor might favour an approach different from her's. It must also be recalled that, as of September 2009, Company A's audit file was transferred to Mr. Behzadi. Indeed, the grievor testified that she had told Mr. B in earlier telephone calls initiated

by him that she was no longer in charge of the file. In addition, the grievor acknowledged that she did not maintain that the CDC's claim against Company A was not valid. In my view, the grievor's disagreement with the audit method does not excuse her conduct. The grievor testified that she was determined to have Company A's file reviewed. Avenues were open to her to register her concerns within the CDC or externally, through the Public Service Integrity Officer or her professional governing bodies. As the grievor acknowledged, she should have expressed her concerns with the audit to Mr. Core.

[231] The racist comments about East Indians allegedly made by the CDC chairperson at a senior managers' meeting are not supported by the evidence. Both Mr. Core and Mr. Hansis testified that the chairperson did not attend such meetings. The minutes of the CDC senior managers' meetings of March 8, March 25, and April 12 and 13, 2010 at which the audit of Company A was discussed (Exhibit E-1, Tab 17), do not indicate the chairperson among those present. Ms. Ritchie's testimony on the point was inconclusive. Ms. Lecavalier testified that she never heard such comments from the chairperson or Mr. Hansis. Mr. Core stated that such comments were never brought to his attention. Mr. Hansis denied making such comments. The grievor acknowledged that she did not bring the matter to the attention of Mr. Core or Ms. Novielli and that she did not pursue any other avenue open to her. In any event, even if such comments had been made, in my view they would not have provided justification for the grievor's actions.

[232] The mitigating factors that I consider relevant are the economic impact of the grievor's termination, her nine years of unblemished service with the CDC and the fact that it was an isolated incident. Although she acknowledged responsibility for her actions, she did so only when confronted with the transcript. In my view, the mitigating factors do not outweigh the nature of the grievor's misconduct.

[233] As stated in the *Values and Ethics Code for the Public Service*, a public servant must act in a manner that "... will bear the closest public scrutiny ...". As an audit manager with the CDC, the agency entrusted by the dairy industry of Canada to monitor the SMCPP, the grievor occupied a position of trust and leadership. She enjoyed a high degree of autonomy and the confidence of her employer. Her actions placed her in a conflict of interest with the duty she owed the CDC and violated the CDC's codes of conduct of which she was aware, as well as her Solemn Affirmation of

Office and Secrecy. By counselling a company under audit on methods to delay or impede the audit process, the grievor was in direct contradiction with the very nature of her duties as an auditor, which, as provided in the audit manager's job description (Exhibit E-1, Tab 18), includes the requirement for independence and objectivity.

[234] I would also add that the grievor's failure to even attempt to address her concerns within the CDC by using other avenues for redress, and her call to Mr. B after her termination, are factors which buttress the employer's conclusion that it can no trust her.

[235] Based on all of the evidence, in my view, the grievor's actions irreparably severed the bond of trust essential to the relationship between her and the CDC. Although her actions were an isolated incident, I conclude that her conduct was so egregious as to strike a fatal blow to the employment relationship.

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

(The Order appears on the next page)

V. Order

[237] The grievance is dismissed.

October 17, 2012.

**Steven B. Katkin,
adjudicator**