**Files:** 166-2-28527 to 28533

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

**Guy Bouthillette, Pierre Chartrand, Serge Clairoux, Jacques Duval, Benoit Guay, Gaston Lampron, Jacques Morneau**

Grievors

and

**Treasury Board**
**(Revenue Canada - Customs, Excise and Taxation)**

Employer

***Before:*** Évelyne Henry, Deputy Chairperson

***For the Grievors:*** Luc Quesnel,
Professional Institute of the Public Service of Canada

***For the Employer:*** Stéphane Arcelin, Counsel

Heard at Montréal, Québec,
on October 26 to 30, 1998.

The case involves seven grievances, filed under the collective agreement for the Auditing group (AU) (Code 204/88), with respect to the application of Article 13 of the collective agreement.

The parties agree that the grievance procedure was followed correctly and that the adjudicator has jurisdiction to decide the questions before her.

Exhibits S1 to S31 were filed in evidence by the grievors with the employer's consent. It was agreed that the employer's witness, Georges H. Cloutier, would be heard before the witnesses for the grievors because he was not available on October 28 and 29, 1998, and that this procedure would be followed without prejudice to the burden on the grievors to prove that article 13 of the collective agreement was not respected.

The evidence

For the employer

Mr. Clouthier has been the Director, Tax Services Office of Revenue Canada in Laval since January 5, 1987. He is a certified accountant and holds an accounting degree from Laval University. He acquired extensive experience in the private and public sectors before joining Revenue Canada in 1970, where he has held positions as an auditor, section head and supervisor, Director of Regional Operations and assistant to the Assistant Deputy Minister for the Quebec Region for all tax programs, including audit.

During his 11 years as Director, Tax Services, Revenue Canada in Laval, Mr. Clouthier has had to respond to requests from employees concerning conflicts of interest. The witness explained that Revenue Canada manages a self-assessment program in which the public's trust is very important; the organization depends on the image of trust that its employees project, an image that must be safe in any investigation of their conduct. It is imperative that personal assets, affairs and interests do not conflict with the interests of the employer, to whom employees owe their loyalty and their service. The judgment of employees is very important, as are their conduct and attitude. The grievors are all accounting and tax specialists. Their

knowledge of the information held by the department, of taxpayers, of legislation and of interpretations varies from individual to individual, but it is available to them.

Mr. Clouthier explained that there are real and obvious conflicts of interest, there are apparent conflicts where perception plays a role, and there are potential conflicts that might arise where "opportunity makes the thief". The decisions in the cases that gave rise to the grievances were not made by Mr. Clouthier, who did, however, decide the case of an employee who made a similar request to that of the complainants. It was an employee who wanted to be a member of a board of directors for a caisse populaire. Mr. Clouthier approved the employee's request.

Mr. Clouthier testified that he had seen a shift over the years on the question of conflict of interest, with the most marked changes occurring in 1995 when more explicit directions were given and permission was given to taken new factors into consideration. In the past, real estate brokerage was completely excluded, but since then, the guidelines have been applied with some flexibility and the examples that are given are not restrictive. These guidelines were the subject of consultation between the employer and the bargaining agents for the purpose of developing harmonious relations of partnership and dialogue as part of the unification of the administration of customs and taxation under a single deputy minister.

According to Mr. Clouthier, auditors have knowledge of information relating to systems and the Act, some of which is not in the public domain, such as legal opinions from the Department of Justice, which are not given to taxpayer representatives. Auditors have privileged access to this information but they must restrict their access to the information they need to know for their work. If an auditor accesses information that he does not require for his work, then he is subject to disciplinary action. Verification by the employer of information which employees have accessed inappropriately is done through a survey and there is a risk that employees could make use of such information without being detected.

Employees are reminded once a year that they may not access information that they do not need for the purposes of their work. These reminders are given during training courses and by notices on their computer screens, as shown in Exhibit S25, which is a paper copy of the message.

Mr. Quesnel objected to Mr. Clouthier explaining the position taken by the employer in each of the grievances. I allowed the witness to state, in a general manner, how management deals with the questions raised in the grievors' requests.

With respect to Exhibits S2 to S4, Mr. Clouthier stated that if the request were submitted to him, he would not approve it because Mr. Bouthillette is asking to act as a paid tax advisor. In his opinion, an auditor is an accounting and tax expert. To the general public, Mr. Bouthillette would be perceived as having an advantage over other tax advisors because of his position with the Department. He would be in an apparent conflict of interest. If he were to act as the advisor to a taxpayer charged with fraud, or who received a very high assessment based on the information Mr. Bouthillette allegedly provided and which turned out to be contrary to that subsequently issued by the Department, Mr. Bouthillette would be in a real conflict. His interests as a tax advisor are different from those of the Department. His judgment might be influenced by his personal interests, which would not necessarily be those of the public service. The most striking example would be a case of fraud: such cases receive considerable media attention and the chance that the media would get hold of this information is a real danger. The concept of loyalty in the decision-making process is also very important. As an employee, one has an obligation of loyalty to one's employer. When a person receives compensation for providing tax advice, that person must be loyal to the client paying him for the service. In Mr. Bouthillette's case, he might find himself in a position of having to re-evaluate his allegiance in the event of a conflict between the interests of his clients and those of the Department: it is impossible to serve two masters.

The witness then referred to the third paragraph on page 22 of Exhibit S23, "Conflict of Interest and Post-Employment Code for the Public Service - Treasury Board of Canada and Supplementary Guidelines on Conflict of Interest for Employees of Revenue Canada - Revenue Canada", which reads as follows:

> - *Section 80(e) of the Financial Administration Act requires employees who act in any office or job connected with collecting, managing, or disbursing money and who are aware of violation of this Act, or of any revenue law, to report any fraud. Otherwise, they are subject to a significant penalty.*

The witness added that, if Mr. Bouthillette advertised himself as a tax advisor, he would be perceived as having an advantage because of the knowledge on the interpretation and application of the *Income Tax Act* that he had acquired as an auditor. This would also be an apparent conflict of interest.

As for Pierre Chartrand's request and Exhibits S5 to S7, Mr. Clouthier stated that a T1 return is an official departmental document and, as in the previous case, there would be a real and apparent conflict of interest since Mr. Chartrand's tax and accounting knowledge would be seen as an advantage for potential clients and a disadvantage for his competitors who prepare T1s for compensation. The conflict would be real whether it was T1s or TP1s because the same type of information is required in both cases and the provincial and federal departments share information to broaden their knowledge.

As for the request of Serge Clairoux, Exhibits S8 to S10, the witness referred us to pages 20 and 21 of Exhibit 23. He stated that the item is not restrictive and that the conflict can arise from the fact that Mr. Clairoux is an accounting and tax expert and that, in the event of financial difficulties, his partners might blame him for not being able to get around the Act. These same persons might encourage him not to declare all of the business's revenue. How would he be perceived since he cannot contravene section 80(e) of the *Financial Administration Act*, which requires him to report any violation of this Act or of any revenue law? The conflict of interest might be apparent if his interpretation of the legislation is different from that of the Department.

As for Exhibits S11 to S13, in which Mr. Duval is requesting to be able to prepare financial statements, Mr. Clouthier testified that financial statements are on the same basis as preparing tax returns; they involve the accurate recording of all transactions between clients and suppliers. Even disregarding the grievor's obligation of loyalty to the employer, the perception of the public, clients, suppliers, counsel and accountants might be that of a conflict. It is possible that some people or some clients might not want to be invoiced or would request false invoices; under these circumstances, the grievor could find himself involved in devious activities without even being aware of it. Should he discover the existence of such activities, he would be required to report the fraud.

As for Benoit Guay's request, Exhibits S14 to S16, to "do accounting, to keep the books, to prepare financial statements and tax returns for a business in which I own less than 50%", Mr. Clouthier testified that the conflict in this case is to do accounting, to keep the books and to prepare financial statements and tax returns for a company in which he does not have control. His status is more that of an employee. Those who do have control are clearly Mr. Guay's bosses, as Revenue Canada is, and all of the risks mentioned earlier apply in this case. At page 21 of Exhibit S23, examples are given with respect to the concept of control or a relationship of subordination. This could undermine the trust that the public places in the tax system.

With respect to Exhibits S17 to S19, in which Mr. Lampron wants to prepare provincial and federal T2s, the witness stated that the T2 return is the corporate tax return, while the T1 is the personal tax return. What applies to the T1, applies to the T2. Once again, Mr. Lampron is a tax and accounting specialist and T2s include all of the financial statements and accounting information relating to a business. All of the implications mentioned earlier could be here.

As for Exhibits S20 to S22, in which Mr. Morneau asks to be allowed to offer his services as a real estate agent, Mr. Clouthier referred us to Exhibit E1, which contains the conflict of interest guidelines for delegated managers. The witness stated that there is a difference between appraisal in the residential and commercial real estate sectors. He also distinguished between the type of client, the ability to pay, the need to appraise for mortgage lenders, as well as the source of cash payments. The employer needs to be concerned about the investment because they could come from illegal earnings of Mr. Morneau's clients. As a broker, he could be called upon to appear before the courts, to testify about the source of the funds: he would expose himself to all sorts of situations. There is a potential conflict of interest when such work is done for compensation.

Under cross-examination, the witness stated that Exhibit E-1 is an internal management document that has existed since March 1, 1992. He admitted that the Code of January 1995, following the unification with Customs and Excise, gives managers greater discretion. Exhibit S23 is given to new employees; employees hired since 1992 have received a copy of it and each year they receive a letter warning them

about conflicts of interest and referring them to the Code. The witness described Exhibit S32 as part of the Code that applied to Revenue Canada prior to 1995.

Mr. Clouthier testified that the new Code allows managers to analyse each case individually. Mr. Clouthier described the text and examples given in the last paragraph on page 22 of Exhibit S23 as aids. In his opinion, the two most important criteria are found in the principles defined in paragraph 20, which begins on page 8, and in paragraph 26, on page 10. Paragraph 26 reads as follows:

> *26.*Involvement in outside employment and other activities by employees is not prohibited unless the employment or other activity is such that it is likely to result in a conflict of interest. It is the responsibility of the employee to make a confidential report to the designated official of involvement in an outside activity that could place on the employee demands inconsistent with his or her official duties and responsibilities, or call into question the employee's capacity to perform his or her official duties and responsibilities objectively. The designated official may require that such activity be curtailed, modified, or ceased, when it has been determined that a real or potential conflict of interest exists.*

The witness explained what he meant by "opportunity makes the thief": it is not a question of real risk but of a potential situation. For example, the real estate agent runs the risk of being in a conflict of interest, of being drawn into making a budget with a potential purchaser, of dealing with funds from another country, from gaming or which open the door to potential fraud and which could involve section 80(*e*). The difference between these circumstances and those of an active auditor rests in the type of relationship that exists between an auditor and a taxpayer on the one hand, and between a real estate agent and his client on the other. In response to the question of who decides to launch legal action under section 80(*e*), the witness stated that the Special Investigations Auditor makes a recommendation to the Department of Justice, which makes the decision.

Mr. Clouthier testified that he had approved the request of an employee to sit on the board of directors of a caisse populaire. The employee was not involved in the day-to-day activities and banking transactions, he was responsible for dealing with policies and directives. He sat as a director and shared his responsibilities with others. In that case, the risks were nil, the employee indicating that he would resign if he

perceived there were any risks. The caisse populaire is governed by the Fédération des caisses populaires and a director's job is largely similar to that of a volunteer.

The risk that the witness accepts is the indirect risk inherent in any outside work; however, when the accounting or fiscal management fields are involved, the risks become direct risks and Mr. Clouthier would expect the employee to resign if that were the case. The witness gave as examples of jobs that would not present a risk of conflict the job of a car or shoe salesperson, waiters or waitresses in a restaurant and jobs where there is no appearance of conflict.

Mr. Clouthier further explained that the first concern is fraud and the potential for fraud, the second part relates to the asset base, that is, all of the confidential information in the department. The second concern is the image of the accounting expert who would be providing information or an opinion that is contrary to that of Revenue Canada.

The witness was cross-examined about the work of an auditor, the warning contained in Exhibit S25, the information available and the accessibility of that information; he reiterated the information described above.

For the grievors

Guy Bouthillette has been an auditor for 10 years, employed by Revenue Canada since 1973 and a union representative since 1989.

The witness prepared Exhibits S26 and S27 from the information received from the grievors, who come from four different offices, namely, Montréal, Laval, Montérégie and Sherbrooke. He explained that nine requests were filed on September 30, 1996, copies of which were sent by him to Danielle Vincent, Assistant Deputy Minister, Quebec Region, under cover of Exhibit S28. He met with Ms. Vincent and provided her with additional information on each of the requests. Mr. Bouthillette acted as the representative for all of the grievors. In this capacity, he received copies of the memoranda that Ms. Vincent sent to the managers of the grievors, filed as Exhibit S33. Mr. Bouthillette told Ms. Vincent that if further information was required, he, accompanied by each of the grievors, would provide her with it. However, no meetings were held. He provided additional information on his own case, which

concerned acting as an intermediary between a client and the government. A positive response was later received from Mr. Clouthier concerning the case of Mr. Bégin and negative responses for all of the other cases. He was surprised because he had expected to meet with the delegated managers, who are also the employer's representatives at the second level of the grievance procedure, prior to them issuing their responses.

Mr. Bouthillette received a response from Ms. Vincent (see Exhibit S30) on May 15, 1997, to which he replied by letter dated July 23, 1997 (Exhibit S31) requesting that the grievances be submitted to the second level where he requested a meeting with the manager who would be making the decision. He did meet with a person from Human Resources, to whom he provided a two-part statement.

Mr. Bouthillette stated that:

> [Translation]
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> *Under section 12 of the Financial Administration Act, the Treasury Board is authorized to delegate and Revenue Canada was given the power to establish directives on conflicts of interest under section 50 of the Public Service Terms and Conditions of Employment Regulations. These conditions must be reasonable, clear and unequivocal. We explained to the employer the items in the Conflict of Interest Code that were not very clear. With the exception of article 26 on page 10, the Code is not very clear. We wanted to discuss pages 19 and 20 and sections 1 to 10, which represented examples.*

The witness was interested in sections 1, 2 and 8 of Chapter B of Exhibit S23 and he read:

> ***1. Accounting and bookkeeping on behalf of others***
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> *Doing accounting and bookkeeping for others does not necessarily represent a conflict of interest. However, this depends on the act or acts you administer in your government job. As an example, if you are involved in the auditing activities of the Income Tax, GST or Excise legislation, only certain forms of limited bookkeeping for another person or company, where you are not responsible for the total bookkeeping and accounting function, could be authorized. For instance, you could keep accounts receivable and payable, do cash reconciliation, or do posting or*

*computerized collections for large national department stores, companies or corporations.*

*Even though your duties and responsibilities at Revenue Canada may restrict you in the performance of accounting and bookkeeping on behalf of others, there is no restriction when:*

- *you are the treasurer, accountant, or bookkeeper of a charitable or non-profit organization;*

- *you **(or your spouse**) own at least 50% of the business concerned;*

- *you (**or your spouse**) have direct ownership of at least 25% of a rental property. If the property is owned indirectly, that is, held by a corporate entity, then ownership of shares must be **at least** 50%; or*

- *you are responsible for administering the property of another person, as executor, administrator, trustee, or guardian of an estate, or under a power of attorney. In this case, you are however encouraged to inform your delegated manager of the situation.*

***2. Financial planning, real estate sales, and appraisals***

*Usually, the sale of insurance products such as individual-group life insurance or disability insurance is not a conflict of interest. However, depending on the act or acts you administer, a conflict of interest may arise if you perform activities such as:*

- *mortgage or real estate brokerage;*

- *sales of investment vehicles (e.g. mortgage loans, money market accounts, non-registered investment funds, non-registered guaranteed investment certificates, registered retirement savings plans);*

- *real estate sales; and*

- *real estate appraisal.*

*If you are involved in these kinds of activities, you may be in a situation of real or potential conflict of interest for the following reasons:*

- *When providing financial advice or investment counselling, the salesperson sometimes gives advice with income tax implications. If clients knew that you were an employee of Revenue Canada, they could expect to receive*

*sound tax advice and could regard the situation as an advantage.*

- *Section 80(e) of the Financial Administration Act requires employees who act in any office or job connected with collecting, managing, or disbursing money and who are aware of violation of this Act, or of any revenue law, to report any fraud. Otherwise, they are subject to a significant penalty.*

  *Thus, when you are looking into the financial situation of your clients to figure out the amount of money they could invest, they might well disclose information that they would not have revealed to Revenue Canada. You might have to choose between your loyalty and duty of confidentiality to your clients and your loyalty to the Department, that is, the duty to report income tax evaders.*

- *There could be a problem of public perception of the situation because you, as an employee, could have access to confidential departmental information.*

***8. Preparing and filing departmental documents on behalf of others***

*In the course of your daily duties or as part of a volunteer program, you can prepare and file departmental documents (e.g. tax returns, GST returns) to help clients who are unable to complete these forms independently because of advanced age, language problems, disabilities, illiteracy, or other similar reasons. However, you must neither seek nor receive any compensation, gift, or favour from the client.*

*On your own time, without requesting prior approval, you can prepare and file departmental documents for members of your family and friends if:*

- *you neither seek nor receive any compensation, gift, or favour;*

- *you do not provided any information that a person would not normally receive from a Revenue Canada office; and*

- *the document to be prepared does not relate to a business.*

*You may not under any circumstances prepare or file departmental documents for compensation, gift, or favour.*

Section 8 was amended by Exhibit S24(b). However, many employees received the Code without the addition of the amendment. What was changed was the last

sentence of section 8, and three paragraphs were added in Exhibit S24(b). The amendment is important and was made in July 1996 following the merger of the two departments. When presenting the guidelines, Serge Bastien stated that these were "extraordinary changes, which would bring more flexibility".

Mr. Bouthillette was a member of a union committee that consulted all AU members and submitted a report. He participated in employer-union meetings at which the draft guidelines were discussed. The witness testified that management never returned to the union the requests that had been submitted by the employees, nor did it state whether or not they had been approved. It was through the employees that he was able to determine what types of outside activities were most often approved or denied. He did not find any employee whose request had been approved. The only thing that appeared to have clearly changed was ownership of less than 25% in real property. However, in Mr. Clairoux's case, where the change would appear to apply, the request was not approved by Mr. Gagnon (see Exhibit S9). Before it was clear: employees were not allowed to carry on outside activities, as can be seen from Exhibit S32. The talk had been of greater openness, but the arbitrary denials were still being made. At the fourth level, specific explanations were provided. For example, Mr. Morneau wanted to be a real estate agent dealing exclusively with residential sales. He is not interested in providing financial advice; he wants to sell houses. He would not have two masters to serve. Why would a real estate agent be any different than a pool, rare car, boat or airplane salesperson? The directive does not cover this.

For someone who wants to do the accounting for his building, there is no restriction provided he owns more than 25%. Mr. Clairoux gave this information to Mr. Bouthillette, who passed it on to management. What Mr. Clairoux wants to do is to collect rents, deposit them in the bank, and make cheques out to workers who do repairs. He is a co-owner and wants to know what moneys are coming in and going out. As a citizen, he is required to file his tax return; as an employee, it is would be risky for him to audit it but, in his work, he does not normally audit T1s and this eventuality is unlikely.

It is the same for Benoit Guay, who wanted to do the accounting and bookkeeping, to prepare the financial statements and tax returns for a business in which he would hold less than 50% ownership. In Exhibit S15, the response was:

"Under paragraph 1 of the Guidelines on Conflict of Interest for Employees of Revenue Canada, the fact that you own less than 50% of a business considerably restricts your scope of activity".

The bargaining agent told the employer at the fourth level that the grievor wanted to fill out his own federal and provincial tax returns, not those of the other co-owners.

Jacques Duval wants to prepare financial statements for businesses, without preparing the related T1s and T2s. He only wants to prepare financial statements for small businesses in which someone wants to know if he is making a profit, and is interested in knowing monthly his business' profits and losses. Second, of what value are financial statements, except to obtain credit from a bank. They are also used in the analysis that leads to selling shares and purchasing other businesses. Financial statements can be used for matters unrelated to taxation issues because, if the business is not profitable, the taxpayer is not required to complete a tax return, because he has no income.

Mr. Bouthillette stated that there is no knowledge that could be used to contravene the law unless the person is a defrauder. Mr. Bouthillette could not give fraudulent advice because he is aware of the consequences. The purpose of all of the suggested activities is to earn extra income; none of the grievors have a great many hours to devote to the activities. The activities are not related to their work.

Under section 8 of Chapter B of Exhibit S23, it is possible to prepare tax returns under certain circumstances: if an employee has access to the file of someone he knows, such as a family member, friend, etc. . . then the employee must advise his supervisor accordingly. In the case of the employee in question, he would be required to turn the files over to his supervisor if he were familiar with people concerned.

Mr. Bouthillette explained that Mr. Lampron has two brothers-in-law, each of whom owns a business. He does not want to "become Samson Bélair", he simply wants to provide a service to relatives who own businesses. He would have the same responsibility if the business was his own and he prepared the tax return for it. The businesses have someone else keeping their books. Further, Revenue Canada has

never taken action against an accountant or a lawyer because it is their clients who are responsible for their tax returns.

Mr. Bouthillette stated: [Translation] "In my case, I explained that I wanted to become a government advisor, to be an intermediary between the taxpayer and the various levels of government: provincial, municipal and federal, including Revenue Canada. For example, if someone wanted a grant for research and wanted to know how to apply for it, I would recommend the people to him. I am known in Rosemount through my volunteer activities. I would like to do the same thing for compensation."

The employer replied to the grievance at the fourth level. Mr. Bouthillette stated that he did not have an access number for the information. The only computer access he has is to e-mail. He has never dealt with confidential information other than the files assigned to him. "There is no advantageous information." The service would no longer be confidential. Ms. Gouin took months to respond and did not tell him if he would be permitted to do it or not, or if he would be denied, for example, at the municipal or provincial level, and for other federal departments.

The fourth thing that Mr. Bouthillette mentioned was the treatment given to a former assistant deputy minister, regarding post-employment activities. He referred to Exhibit S34, which was issued following the announcement that a former assistant deputy minister had a new job with Richter, Usher & Weinberg. In the memorandum, it was stated that Treasury Board had authorized a relaxation of the restriction on post-employment activities and the cooperation of directors and operations coordinators was requested.

With respect to Mr. Clouthier's testimony, Mr. Bouthillette stated that he had never received any tips on how to avoid taxes. The honest tips that the grievors might be able to give would be no more likely to advantage a taxpayer than those that an accounting firm might provide would. As for policy concessions, audits are conducted two years in arrears; in '98, the Department is auditing '96. What someone decided to do in '96 has no effect on '98. Mr. Bouthillette was unaware of any policy concession.

Under cross-examination, Mr. Bouthillette clarified that he had about a dozen meetings with Ms. Vincent in which he provided further clarification on the specific

cases. He testified that only his request was incomplete, but that the others were complete, and that there was no hidden agenda to them.

The witness and a union colleague, Jacques Lajoie, met with management on three occasions. He stated that the requests were not hypothetical. The union had conducted a national survey and had received 300 responses and comments from its members concerning the guide. Each of the grievors is a union representative. There were some fifty grievances throughout Quebec and the bargaining agent selected nine representative cases, preferring to select those of his representatives to ensure that the grievances were carried through to the end and to make it easier. According to the witness, Ms. Vincent was content to deal with only nine grievances rather than fifty. The witness knew each of the representatives, their situation and could communicate with each of them easily.

Mr. Bouthillette explained that, in Special Investigations, investigators from Customs and Excise work side-by-side with auditor-investigators from Taxation. They use the same computer systems and can access the same information.

On the question of privileged information, the witness reiterated that there was none, "that the Taxation Manual explains how businesses are to be handled." He indicated that the Department allows taxpayers to consult the "T.O.M." In terms of audit procedures, the witness stated that it is the auditors who decide what procedure to follow. There are procedures on how to enter the data, make reports, etc. There is a great deal of material or forms to be filled in, which are covered by procedures, but the way in which the audit is conducted is determined by each auditor.

As for his own personal case, the witness testified that he wants to act on behalf of taxpayers who are not receiving employment insurance and who, in his view, are entitled to it. These people are knocking on the wrong doors and he would like to help. He explained that the only role of Taxation auditors is to check in the *Employment Insurance Act* to determine if a taxpayer is subject to it and must be assessed, or he verifies whether the companies must pay the employer's share.

The second witness for the union was Jacques Morneau, who is a technical advisor in the Underground Economy Section. Previously, he worked in auditing as such and was responsible for developing the automobile sector, especially clandestine

work. Mr. Morneau confirmed the information about him in Exhibit S26, that is, that he has 13 years of experience with Revenue Canada, that he began as a PM-2 in Collections, that he spent five years in Special Investigations, one year as an auditor and then became a technical advisor. At the time of his testimony, he had been a team leader for six weeks.

Mr. Morneau explained that his request, Exhibit S20, was to sell residential real estate on a part-time basis. Having checked the Code and determined that there was no impediment to this, he expected that he would receive a positive response.

As for access to confidential information, Mr. Morneau stated that he was restricted to those files assigned to him. He was familiar with the expression "policy concession" and thought it was a guide issued by Shawinigan concerning the range of choice in files. He did not have any personal knowledge of information related to policy concession.

Mr. Morneau had read section 2 of Chapter B of the Code (Exhibit S23) at page 21 and considered the expression "you may" as being quite general. He did not see any conflict of interest and expected a positive response. With respect to the letter from Patrice Allard (Exhibit S21), he explained that there had never been any question of providing tax advice, that he simply wanted to sell, to be the intermediary between someone wanting to sell his house and someone looking for one. When he purchased his home, it was the bank that provided the mortgage that verified his ability to pay, not the real estate agent.

His work is completely unrelated to the real estate sector as Mr. Morneau works in the automobile sector. He reported someone he knew outside of work who had been working under the table. He has no intention of committing fraud simply because he is selling houses. Mr. Morneau was "insulted" and "outraged" by Mr. Clouthier's testimony, which compared him to a thief. He lives in St. Hubert and plays hockey on Monday nights; he does not want to get into real estate in a big way.

Under cross-examination, Mr. Morneau stated that he knew that he had to take a special course to become a real estate agent. He waited to take the course until his request was approved. It took three months to receive a response. He had hoped to begin his activities in January 1997.

As for the information he might have on businesses in financial difficulty, Mr. Morneau stated that his integrity was being questioned. If he wanted to be dishonest, he could benefit anyone he wanted since the information already exists.

The third witness, Gaston Lampron, has been a tax auditor for sixteen and a half years and works at Montérégie-South Shore. He began with Collections at the PM-1 level and then moved into audit as an AU.

Mr. Lampron stated that his request (Exhibit S17) was made as a result of the changes to the conflict of interest policy. His brother-in-law and his wife have a business, Groupe Attel Inc. They have an on-site accountant and have to hire someone from outside to prepare the T2s and C17s. In light of the changes to section 8 of Chapter B of Exhibit S23, Mr. Lampron thought that the door had been opened to allow him to do this work. He has another brother-in-law who owns Gaumont et Lemire Enregistré, who had also asked him to fill out the tax returns for his business. Mr. Lampron would have two clients who would each pay him $100.

Mr. Lampron testified that Exhibit S24 came from his office and he believed that his delegated manager would approve his request.

As for the conflict situation, Mr. Lampron stated that if there were ever any irregularity in the files of either of his brothers-in-law, the situation would be no different than if he was preparing the returns without compensation.

Serge Clairoux testified that he worked as an auditor of large companies. He started in June 1981 as a field auditor. The table in Exhibit S26 accurately reflects the profile of his assignments at Revenue Canada.

Mr. Clairoux identified Exhibit S8 as his request and explained that he had planned and still plans to purchase a building with five or six of his friends, on a co-ownership basis. He would purchase a 20% share and do the accounting. This accounting would consist of paying the gas, electricity, taxes and various contractors. He would be in charge of posting these amounts in a book. In terms of income, it would be his responsibility to collect the rent and deposit it in the bank account for the property. At the end of the year, he would total the revenues and expenses, that is, prepare the financial statements, which would then be submitted to the other

co-owners. They would see together whether the amounts balanced and whether they approved them. Mr. Clairoux could include these financial statements in his tax return. He would not prepare the returns for the other co-owners.

Financial statements are a summary of revenues and expenses. If a return must be filed, a copy of the financial statements is attached. Mr. Clairoux explained:

> [Translation]
>
> *I can claim depreciation on my share of the building. The depreciation expenses that I might or might not choose to claim are a matter of fiscal planning. In general, the higher the revenue the more incentive there is to claim. The four or five other co-owners are required to prepare their own tax returns.*

Under cross-examination, Mr. Clairoux explained that the possible partners have been identified and that, in 1997, they identified the income properties on which they wanted to make an offer. They did not make the offer because they had to prepare an agreement on the investment and the tasks that each of them would perform. There have to be clear rules in a co-ownership about who will work, the number of hours and who will do what. In a group, each person has a contribution to make: some do painting or maintenance, others have useful knowledge; his friend is better at electricity and he is good with accounting.

The next witness, Jacques Duval, has been at Revenue Canada since January 5, 1981. He was an EDP auditor for a year and a tax auditor for seven years, and before that he held a variety of positions over a period of 10 years. He began as an assessor, verifying returns of non-incorporated taxpayers. He has been a certified general accountant (CGA) since 1990.

Mr. Duval identified Exhibit S11 as his request. He is certified as an accountant and he would like to use his skills for something other than taxation, that is why he would like to prepare financial statements. He does not want to do accounting or bookkeeping, just financial statements for small businesses, like the corner store.

The witness introduced in evidence Chapter 10 of the manual of the Canadian Institute of Chartered Accountants (CICA) (Exhibit S35). Chapter 10 sets out what is involved in preparing a financial statement. Mr. Duval has software that makes this

quite easy to do; he simply needs to input the figures in an order suggested by the CICA. Financial statements must be signed by the client and the person who prepared them; in his case, he would sign "Jacques Duval, CGA". He would like to start a financial statement business because he thinks there is a large market for it. Some small businesses have to provide financial statements to their banks quarterly, others need them to know how their business is doing. Financial statements are not used as such for the purposes of tax returns; the accountant has to carry out a number of operations to prepare the financial statements submitted to Revenue Canada. He has to add some things and take out others, a process that requires tax expertise. The financial statements that Mr. Duval wants to prepare consist of a statement of income and expenses, the financial picture of a business.

Mr. Duval asked his supervisor to be excused from attending the sessions on the update of the *Income Tax Act* and does not see how preparing financial statements would have anything to do with his present work. He would ensure that he had nothing to do within the context of his job with the companies for which he would prepare financial statements. He found nothing in the Code (Exhibit S23) prohibiting the preparation of financial statements. In general, he does not anticipate preparing "trial balances". Preparing financial statements involves posting figures in the proper places; it does not take much time because the client arrives with his books and the accountant uses a software program to prepare the statement. As a CGA, Mr. Duval is subject to a code of ethics.

Under cross-examination, Mr. Duval mentioned that he had given January 1, 1997 as the start date for his activities because many small businesses align their fiscal year with the calendar year and many small business owners need a statement for January 1. He testified that there are many bookkeepers but not many people able to prepare financial statements. He does not want to prepare audited financial statements, and he cannot be held responsible for the accuracy of the books, because it is the client who signs and who is responsible. If the business were audited by Revenue Canada, Mr. Duval would be in the same position that he would be if he had prepared the financial statements for the family free of charge. He claimed that he would refuse to prepare financial statements for tax purposes. He testified that tax expenses are different from real expenses; he gave as an example the purchase of $1,000 worth of beams, which is a real expense, but which could also be considered as

a capital investment. There would be a note at the bottom of the financial statement indicating that the statements were for accounting purposes not for tax purposes.

Benoit Guay has worked at Revenue Canada since June 1981: as a field auditor from 1981 to 1984, as a special investigator for a year, for a year and a half with Criminal Investigations, from 1985-1986 to 1989 with Special Investigations; he received several promotions and returned to auditing from 1991 to 1994; since late 1994 early 1995, he has been a technical advisor with the Audit Section.

Mr. Guay identified Exhibit S14 as his request and explained that his brother-in-law wanted to start an Internet server business and had approached him to manage the company and do the accounting. He also needed investment capital. Clients pay a monthly fee for the service. The business has been in existence since April 1997, without the witness's involvement, because his brother-in-law had to hire someone from outside. Mr. Guay was not able to invest significant funds, which is why his ownership share would be less than 50%. Initially, he would do the accounting for free but if the business grew and required seven to 10 hours of work per week, then he would ask to be paid. Mr. Guay has already been involved in two projects, the first being the purchase of a building by a joint stock company, in which his spouse and his brother-in-law were owners. Mr. Guay owned 15% and his wife 35%. On that occasion, he submitted a request that was approved.

Mr. Guay likes to do accounting but does not want to prepare tax returns. As treasurer of three baseball associations, he does their accounting. He helps out with Distribution Source de Vie Humanitaire Inc. by overseeing their bookkeeping. He is a baseball coach and the father of five children and in winter, he participates in the activities of his bargaining agent in his spare time. He does not have a great deal of time. In 1995, he submitted a second request that was approved by Mr. Martineau; it concerned a business with two of his brothers in which he held 25% of the shares. They purchased 12 buildings, with 57 tenants, and he does the accounting up to the preparation of the financial statements. He was surprised to learn that the employer no longer had a copy of his first request.

Mr. Guay was a member of the Corporation professionnelle des comptables en management accrédité du Québec (CMA) from 1981 to 1997; his membership was

terminated in February 1997 when he stopped paying his $700 annual membership fee. Mr. Guay explained that he studied accounting at the CEGEP for three years and that he earned two certificates in accounting from the Université du Québec à Montréal in 1979.

Mr. Guay was insulted by Mr. Clouthier's comments and regarded them as an attack on his integrity. When he went into business with his brother in 1995, he made sure that the accounting was done properly so that there would be no fiscal conflict. Mr. Guay's wife does not work, they have five children and he is not prepared to lose his job. His second request, concerning the buildings, was authorized even though his ownership share was only 25%: his level of ownership does not change in any way the fact that he ensures that "the books are properly prepared" for all levels of government. As an active member of his church, Mr. Guay "renders unto Caesar what is Caesar's", but believes he has the same rights as any other taxpayer.

Under cross-examination, Mr. Guay explained that his anticipated ownership in his brother-in-law's server business would be between 15% and 35%, depending on an investment of between $1,000 and $5,000, plus the accounting. They need to request telephone lines and it is possible that, in the end, his ownership could reach 50%, but he doubts it. His brother-in-law rejected his involvement when he learned that he could not do the accounting. Initially, Mr. Guay anticipated spending one or two hours a week on this business because, with his knowledge and the computer, the accounting would be very easy to do. For someone else without the knowledge, it would take longer and be more complicated.

Mr. Guay prepared Exhibit S14 and his director never spoke to him about it before responding to him.

The last of the grievors' witnesses was Pierre Chartrand, who has been with Revenue Canada for eight years; he stated that the table in Exhibit S26 described his duties well. He was an Auditor AU with Customs and Excise in 1990 and in 1995, he moved to Taxation as a Taxation Auditor, AU-3. He recognized Exhibit S5 as his request to Mr. Gagnon to prepare T1s at the provincial and federal level for individuals. His intention was not to compete with accounting firms but to respond to requests from his family and friends and to earn some extra income.

As an AU-3, Mr. Chartrand audits corporations with business in the $15 million to $400 million range. These are joint stock companies. It is possible that Mr. Chartrand might audit some of the shareholders, but it is not within his mandate to audit individuals.

Since 1995, Customs and Excise and Taxation have been a single department. Prior to 1995, Mr. Chartrand was authorized to do tax returns and Customs and Excise employees still retain that permission even though they have access to the same information as Mr. Chartrand, in the same building. Mr. Chartrand has an access code to Customs and Excise, on the same computer system, just as the Customs and Excise employees have a Taxation access code.

Mr. Chartrand planned to do 15 to 20 returns a year, that is, about two to three hours a week during the January to April period, for people whom he knows. He would not be doing corporate returns. The witness considers the second part of Exhibit S24(b) to be an element of flexibility enabling him to perform this activity because, in his case, his work is to audit corporations.

Mr. Chartrand said he had no information or knowledge about policy concessions.

Under cross-examination, Mr. Chartrand explained that his potential clients were all salaried workers or professionals. Provincial and federal returns can be generated by inputting the data into a computer and that is how he planned to operate.

Arguments

For the grievor

Mr. Quesnel pointed out that it is necessary to consider the grievances in the general context of employee and management relations. He noted an important comment by Mr. Clouthier, the only employer witness, which shows the perception that the employer has of its employees. Mr. Clouthier stated that each and every one of the auditors who made requests is an expert in the accounting field and the taxation field. He made a distinction between the two fields. Mr. Quesnel stated that the witnesses for both sides had made distinctions at the conceptual level; there are

significant differences between accounting, bookkeeping, the preparation of financial statements and, more specifically, taxation - and that taxation is a separate and independent field. He pointed out that witness Duval filed Exhibit S35 in support of his arguments and that Mr. Duval's testimony made a distinction between the preparation of financial statements for tax purposes and those for accounting purposes. Witnesses said that the latter exercise was different from preparing financial statements for tax purposes. The annual financial statements of a business require reconciliation with those prepared on a one-time basis for filing with a bank, for example, and in accordance with tax regulations; the standards differ depending on the situation.

Mr. Quesnel invited me to read Exhibit S23 carefully, particularly the sections referred to. It is clear that, throughout Chapter B and on pages 19 and 20 of the Code (Exhibit S23), the focus is not on the key elements of accounting or of taxation. It is only in the continuation of the brochure, from the bottom of page 20 to page 24, that it is reasonably clear that there are several distinct concepts.

Exhibit S23, published by the Treasury Board, which is the employer in this instance, corroborates the analysis done by the witnesses for the grievors, to the effect that there are important distinctions semantically and terminologically. Further, Mr. Duval's testimony is corroborated by Exhibit S35. Still dealing predominantly with context, it is evident from the testimony of Mr. Clouthier and Mr. Bouthillette that auditors are not only accounting experts but are also required to deal with specific files, namely, those of large companies. When Mr. Quesnel asked Mr. Clouthier if these were complex files, Mr. Clouthier confirmed that they were. Moreover, the individuals responsible for deciding on matters relating to the files of large companies are certified professionals, where applicable, and members of a professional association; as such, they are subject to the ethical requirements set out by that organization. According to Mr. Quesnel, these testimonies show that the files being audited are those of large companies, with sales of more than $15,000,000 and which are incorporated. Only rarely do the auditors deal with taxpayers and individuals directly associated with the business being audited, such as shareholders. The employer tried to make a distinction in this regard by presenting increasingly more preposterous hypotheses; its effort was tendentious and shows that there is no distinction from one

corporation to another, and that the benefits accorded to their employees must be audited. This is not how this question should be approached.

Exhibit S23 is definitely useful, but the grievances are clearly presented under the collective agreement. The grievors are entitled to non-discriminatory treatment. If exceptions are to be made, they must be justifiable.

Article 13.01 of the collective agreement, entitled "Restriction on outside employment", reads:

> *13.01 Unless otherwise specified by the Employer as being in an area that could represent a conflict of interest, employees shall not be restricted in engaging in other employment outside the hours they are required to work for the Employer.*

For the grievors, the rule is that they will not be restricted from working outside. Document T4140F (Exhibit S23) covers outside activities on page 10. Is this a document that should be appended to the collective agreement? If the answer is yes, then the Code must be read carefully. How does it deal with this issue? Mr. Quesnel focused on paragraph 26, entitled "Outside Activities". Are the titles binding or simply indicative? Mr. Quesnel claimed that the wording of paragraph 26 prevails over its title. The paragraph reads as follows:

> *26.*Involvement in outside employment and other activities by employees is not prohibited unless the employment or other activity is such that it is likely to result in a conflict of interest. It is the responsibility of the employee to make a confidential report to the designated official of involvement in an outside activity that could place on the employee demands inconsistent with his or her official duties and responsibilities, or call into question the employee's capacity to perform his or her official duties and responsibilities objectively. The designated official may require that such activity be curtailed, modified, or ceased, when it has been determined that a real or potential conflict of interest exists.*

These risks must be real or potential. Does this represent a restriction on activities or on exercising a right? The determination referred to in paragraph 26 must be justifiable. Still in the context, it reiterates that the Code can be considered only as a standard of discipline. Non-compliance with these provisions results in a penalty. We will see later on the nature of that penalty.

In the public service, in *McKendry* (File No. 166-2-674), *Fraser and Skinner* (File Nos. 166-2-25464 and 25465) and *Coté* (File Nos. 166-2-19604, 19605 and 20866), it was a question of disciplinary action. The conflict of interest standard, the guidelines, the supplementary guidelines for Revenue Canada, as set out in Exhibit S32, had been broken. Mr. Quesnel pointed out that no one had contravened the conflict of interest standard in this case. However, that does not prevent us from looking at decisions that show that contravening these standards can give rise to disciplinary measures as harsh as termination of employment.

Mr. Quesnel invited me to read article 50 of the Treasury Board Policy on the Terms and Conditions of Employment. The criteria set out in standards of this type must be clear, even crystal clear. They must be unequivocal. Why? In principle, disciplinary standards are distributed to employees who are required to have them at hand. The grievors are the primary persons impacted in this case; because of their duties with Revenue Canada, they are the ones who are best informed and it is they who must exercise their judgment. They are required to disclose their activities and they must not ask their managers to respond to whimsical requests. The consequence of all that, if we look at paragraph 26, or Exhibit S24 and S24(b) in particular, in which we are told:

> [Translation]
>
> *... Your delegated manager will take into consideration the fundamental principles set out in this document (particularly pages 4, 5, 19 and 20) to ensure that there is no real, potential or apparent conflict of interest. Your delegated manager will evaluate each case on its merit.*

is a case by case study. This wording and the amendment to section 8 of Chapter B of Exhibit S23 demonstrate and reinforce the grievors' claim that sections 1 to 10 are merely examples. Mr. Clouthier stated that "it is not restrictive, it is relative" when referring to section 2. Reading Exhibit 24(b) and considering the directive from Mr. Bastien in Exhibit S24(a), the only possible conclusion is that the amendment should have been included in the S23 booklet. On two occasions, the amendment was not incorporated in the booklets. Exhibit S24(b) refers to the fundamental principles appearing in paragraph 6 on page 4, the only item entitled "Principle", which covers pages 4 and 5. Exhibit S24(b) also makes reference to pages 19 and 20 of Chapter B of

Exhibit S23 and then everything ends on page 20. To claim that the examples are not relative and indicative, and to imply what is found on page 24 of Exhibit S23 creates a tautology; in other words the argument is justified by the argument itself. The witness Clouthier confirmed the grievors' position with respect to this management instrument. Mr. Bouthillette spent several hours trying to obtain the amendment to this management tool. If we consider the context of the interpretation and application of such an imperative standard, then it is the principles on page 20 of Exhibit S23 that are important and the language used reads:

> *Thus, a conflict of interest arises in any situation where:*
>
> - *your personal assets, affairs, or interests place you in a real, potential, or apparent conflict with your public duties and responsibilities; or*
>
> - *your judgment could be affected such that you fail to act in the best interest of the Public Service.*
>
> ***If you have to deal with the file of a customer, competitor, supplier or associate, you must alert your superior.*** *Whenever you are in any doubt as to whether the situation represents a conflict of interest, you have to file a written report to your delegated manager. Moreover, you* ***must always*** *keep the situation under review and make further disclosures whenever necessary (see Section 8 of the Code).*

It is important to note that the text talks about judgment. Now, when Mr. Clouthier takes about "opportunity makes the thief", he is attributing importance to the thief's judgment. The reasons for restricting outside activities must be provided in each case; the employer must show that a potential or real risk exists. The whole of the evidence has not revealed the process, the reasons or the justification for denying the requests made by the grievors. The employer chose not to call to testify the delegated managers who made the decisions. The grievors argue that, in each case, the evaluation of a request must be done based on the informed person test. How can someone make a decision without being well informed? In the instant cases, the delegated manager needs to know the duties and responsibilities of the auditor concerned and the activity that he wants to undertake. This implies a review of the duties and assignments of the employee in question. All of the employees testified concerning the key elements of their duties and assignments. The delegated manager also needs to be well informed about the standard for the decision. The grievors

showed that they understood the standard, to the degree that it is understandable, and they submitted their requests for authorization with assurances, which is important and evidence of goodwill, as confirmed by Mr. Clouthier. These assurances are found in each of the requests submitted by the grievors and Mr. Quesnel used that of Mr. Chartrand as an example:

> [Translation]
>
> [...]
>
> *It is important to explain that in performing this activity, I will not at any time use the assets placed at my disposal for, nor the official information obtained in the performance of my duties.*
>
> *I will also ensure that these outside activities do not in any way infringe on my availability or my effectiveness in performing my duties.*
>
> *Similarly, there is no question that I would never advertise or make known the fact that I work for Revenue Canada as a means of generating or enhancing my business.*
>
> *I will be honest, objective and impartial in the conduct of my personal affairs. Thus, if I must deal with the file of one of my clients, I will alert my superior immediately.*
>
> [...]

It is important to note that, according to Mr. Chartrand, his activity is seasonal, that is, he planned to do a total of 15 to 20 individual returns at the federal and provincial levels annually and he clearly stated that he would not use the employer's assets and would ensure that his availability and effectiveness as a Revenue Canada auditor would not be negatively impacted. It must be pointed out, and this is where the problem really is, that if he were not being paid, the activity would be allowed. In the cases before us, all of the necessary assurances were given not to tarnish the employer's image, not to publicly advertise their status as employees. In reality, the grievors are prepared to set aside any files that might be linked to their outside activities. In Mr. Guay's case, it was he who had to pull out of his own files the authorizations he had previously received from the employer. It is surprising that in a situation that could so severely tarnish the employer's image, it did not keep copies of the authorizations it had approved. If there had been a change of director, the grievor

could have found himself in the position of being dismissed. The managers did not consider the facts. This is clear from the documentary evidence, which is the best evidence: the documents are supported by the testimony of the grievors. The testimony concerning the grievors themselves was showered with praises and their files are irreproachable. The delegated managers who made the decisions on the requests submitted by the grievors did not follow Mr. Clouthier's approach; they copied the biased examples. For example, if we compare the reasons given in Exhibit S21, that is, Patrick Allard's response to Mr. Morneau's request, to the wording of Exhibit S23, and specifically on page 2 (at the bottom) and on page 22, it is clear that the wording of Exhibit S21 copies that of Exhibit S23.

> *... you may be in a situation of real or potential conflict of interest for the following reasons:*
>
> - *When providing financial advice or investment counselling, the salesperson sometimes gives advice with income tax implications. If clients knew that you were an employee of Revenue Canada, they could expect to receive sound tax advice and could regard the situation as an advantage.*
>
> - *Section 80(e) of the Financial Administration Act requires employees who act in any office or job connected with collecting, managing, or disbursing money and who are aware of violation of this Act, or of any revenue law, to report any fraud. Otherwise, they are subject to a significant penalty.*
>
>  *Thus, when you are looking into the financial situation of your clients to figure the amount of money they could invest, they might well disclose information that they would not have revealed to Revenue Canada. You might have to choose between your loyalty and duty of confidentiality to your clients and your loyalty to the Department, that is, the duty to report income tax evaders.*
>
> - *There could be a problem with public perception of the situation because you, as an employee, could have access to confidential departmental information.*

According to Mr. Quesnel, this is a good illustration of waffling. Can this be viewed as justification? The response makes no reference to Mr. Morneau's situation. There is no reference to the specifics of Mr. Morneau's case. Further, Mr. Morneau confirmed that

no one had approached him to assess his file or to discuss it. Mr. Morneau is perhaps not as busy as Mr. Guay, but the activity that he expected to be able to pursue was the sale of residential homes in his spare time. There is nothing to indicate that his supervisor was interested in knowing this.

Mr. Quesnel claimed that the employer is encouraging stereotypes, general responses which, in themselves, represent incorrect information. In Mr. Clairoux's case, the grievor wanted, and still wants, to do accounting related to his own interests in a rental property and the response in Exhibit S9 to his request was:

> [Translation]
>
> *I must inform you that, under the Conflict of Interest and Post-Employment Code for the Public Service, you may not, with or without remuneration, carry on accounting or bookkeeping activities, prepare financial statements and tax returns for a real estate asset in which you hold less than 25% ownership.*

Nowhere in the first 20 pages of the Code (Exhibit S23) does it make mention of this. Indeed, the only deduction that can be drawn from the Code is that the outside activity Mr. Clairoux wants to undertake is allowed because it is not prohibited. Based on an incorrect interpretation of the document, which cannot be explained, the delegated manager did not analyse the request: he provided a standard and incorrect response, which means that it is not justified. The employer cannot now claim that the activity is prohibited. The request was confirmed by the testimony of witness Clairoux and supported by Mr. Bouthillette and Mr. Clouthier.

In Mr. Guay's case, the employer had already authorized him to do accounting for a business in which he and his spouse held 50% ownership (he 15% and his spouse 35%); he gave assurances and had shown that he understood his obligations. The response that was given to the request that is the subject of his grievance is confusing, as is evident from page 1 of the response he received (Exhibit S15). The response is arbitrary: the circumstances of the request were not considered, there is no reference to the requested activity and the response is ambiguous.

The evidence shows that preparing financial statements is in no way related to tax activities. No one contradicted Mr. Duval's testimony on financial statements. In this case, as with the previous one, no one took into consideration the assurances

given by the grievors in support of their requests. The employer did not assume their good faith. It assumed their bad faith. It reiterated word for word the response given to Mr. Guay's request. Mr. Guay did not meet with Mr. Dextraze, who did not seek further information. How can the delegated manager reach anything except a negative decision if he does not seek further details instead of simply referring to examples that are not very useful? If the ownership dropped to 24% or 49%, what would that change? Nothing - - except for the concept of control which does not really apply.

Exhibit S6 contains the response to Mr. Chartrand's request. The manager misinterpreted the examples given in the Code (Exhibit S23); he did not take into consideration section 8 of Chapter B, which has been amended by Exhibit S24(b). He did not state the basis for his decision; he referred to the amendments, without taking into account the flexibility they offer. Mr. Chartrand does not audit the files of individual taxpayers, but rather those of large businesses. Consequently, the response to his request is arbitrary.

In the case of the response given to Mr. Lampron's request, which is found in Exhibit S18, the manager relied on page 24 of the Code to provide a stereotyped response; it too is arbitrary. According to Mr. Clouthier's testimony on confidential information, and according to Exhibit S25, which covers the terms and conditions for the use of confidential information, it is clear that access to confidential information is controlled randomly by a survey but also directly: there are certain registers that employees can only access for the purpose of processing their files.

All of the grievors gave the assurance that, should situations that might give rise to a conflict of interest arise, they would see the director or would ask their supervisor to change files. Section 80(*e*) of the *Financial Administration Act* makes the fraudulent use of confidential information a criminal offence and the use of such information can result in termination of employment.

Mr. Quesnel is of the opinion that the only confidential information available is references to legal opinions. All of the witnesses confirmed that the auditors use legal opinions in all of their files. It is important to note Mr. Clouthier's inability to explain why it is so important to control legal opinions given in the past. They are not useful

in the future. All of the grievors provided assurance that they would not reveal this information in the context of the outside activities they wished to perform.

The employer claimed that, with the merger of Customs and Excise and Revenue Canada, Exhibit S23 opened the door to greater flexibility in the conflict of interest policy. There was no concrete illustration of that flexibility.

Exhibits S2 and S4 cover Mr. Bouthillette's request. The employer wrongly thought that Mr. Bouthillette wanted to do financial planning. He wants to act as an intermediary. No one came to see him. Mr. Clouthier stated that opportunity makes the thief and that it is not possible to serve two masters at the same time. The employer attacked the integrity of the grievors. Mr. Morneau was insulted to be considered to be dishonest.

None of the grievors was aware of a practice of policy concession. Indeed, despite numerous safeguards, management continues to retain its old attitudes.

Mr. Quesnel went on to argue that, in terms of the employer's position toward real estate agents, common sense would make one question its position toward salespersons of luxury items. According to the employer, a person selling residential homes might fall prey to the lure of luxury or become involved in money laundering, which is ridiculous. The managers did not provide reasons for any of the responses they provided to the requests made by the grievors. The employer cultivates a certain image: it portrays auditors as "diabolical", mystifies accounting and tax rules, does not assess the individual circumstances and does not interpret the rules in favour of its employees. The coincidence of wanting to begin all of these outside activities on January 1, 1997 is explained by the fact that the action was co-ordinated by the grievors in order to give management an opportunity to deal with their requests as a global response to the problem posed by the changes to the conflict of interest policy. This approach was based on the conviction that each response would help settle others. Instead, the employer chose to deal with the situation in a stereotyped way, which does not resolve the problem.

For the employer

Mr. Arcelin decided to begin by responding to the arguments of the grievors. He argued that bookkeeping and the preparation of financial statements are part of accounting and are inextricably linked to it.

In response to the claim that the Conflict of Interest Code (Exhibit S23) is a disciplinary standard, Mr. Arcelin argued that the case does not involve any form of imposed disciplinary measure and, consequently, article 50 of the Treasury Board Policy on the Terms and Conditions of Employment does not apply. It is a question of specified areas and not disciplinary measures. Disciplinary action is taken only if the Code has been contravened.

As for Exhibits S24(b) and S23, the grievors claim that the supplementary measures stop at the end of page 20 and base this conclusion on Exhibit S24(b). The employer referred to article 13.01 of the collective agreement, which mentions specified areas and claims that the specified areas are listed beginning on page 20. It is true that Exhibit S24(b) refers to basic principles relating to the specified areas. Contrary to the grievors' claims regarding Mr. Clouthier's testimony, it is clear that sections 1 to 10 of Chapter B of Exhibit S23 are examples and that these examples are part of the guidelines.

The employer does not accept the reasoning developed in *Fraser and Skinner (supra)*, to the effect that it is necessary to give reasons when denying requests. The employer chose not to call the delegated managers to testify because the burden of proof rests with the grievors. Although the parties agreed that Mr. Clouthier would testify, on behalf of the employer, before the witnesses for the grievors, the burden of proof still rests with them. Contrary to the argument put forward by the grievors, there is no evidence that the delegated managers were not well informed about the requests presented to them.

As for the assurances given by the grievors, it is true that all of them gave them but they do not reduce the risk of potential conflicts. There is no guarantee to that effect.

With respect to the confidential information, the evidence shows that auditors have access to a wide range of confidential information. It is true that they should access only the information required to process the files on which they are working, but they do have the opportunity to access other files and the controls are limited.

As for the attacks on the integrity of the grievors, that is not an issue; the employer simply wants to limit the possibility of potential, real or apparent conflicts.

As for the claim of lost documents and the fact that Exhibit S24(b) is not always appended to Exhibit S23, good faith has to be assumed. It is true that Mr. Guay had to submit to his manager a copy of the previous authorizations that he had received to perform certain activities, but the fact that the manager did not retain a copy is not evidence that the employer did not do so.

With respect to the policy concession, Mr. Chartrand confirmed its existence during cross-examination. Mr. Bouthillette stated in his cross-examination that he was not familiar with it, but that the information is available.

As to the question of the obligation to be informed, we must ask ourselves who has the obligation and what the quality of the information must be? Case law clearly establishes that it is the responsibility of the persons requesting the authorization to carry on outside activities to provide the relevant information in support of their requests. When requests have been vague and the related activities have led to conflicts of interest, disciplinary measures have still been imposed in such circumstances.

The requests presented by the grievors are general and very hypothetical, with the hidden agenda of changing the rules on conflicts of interest. Is the grievance process the right forum for settling this issue?

The concept of control is important, if not essential, in the context of the *Income Tax Act*. When it decided to establish specified areas, the employer referred indirectly to the concept of control, with the 25% rule on the question of buildings. Directly, it believed it was appropriate to reduce the former rule, which set the limit at 50%. The percentages given in Exhibit S24(b) are not what are important. What is

important is that the employee control the destiny of the business, that he be able to impose his decisions and not have those of others imposed on him.

Mr. Arcelin then argued that the designation of the areas is part of the employer's management rights. Article 13.01 of the collective agreement allows outside activities, unless they are in a specified area. Article 13.01 gives the employer discretionary authority, as a result of negotiations, and this provision was renewed in its entirety. The test to be applied is the test of reasonableness. If it can reasonably be concluded that the outside activities fall within an area specified by the employer, the adjudicator does not have jurisdiction to substitute his judgement for that of the managers. If it cannot be reasonably concluded that an outside activity falls within an area specified by the employer, then the circumstances of the case are evaluated to determine whether the employer's decision is correct.

Mr. Arcelin referred to *Grignon* (File No. 166-2-27602), which interprets a collective agreement and in which the question was the exercise of the employer's discretionary authority. The fourth paragraph at page 4 reads:

> *I reviewed the case law and doctrine cited by the parties. It arises therefrom that the adjudicator may not intervene in circumstances like those of the instant case unless the employer's decision is discriminatory, wilful, abusive or arbitrary. There is no evidence to show that that was the case in this instance.*

According to Mr. Arcelin, this statement applies in this instance.

The employer then invited us to read *Perras* (File No. 166-2-16335), which deals with article 16.01 of the collective agreement of the Program Administration group. This article is the equivalent of article 13.01 of the collective agreement before me. Mr. Perras, a Customs and Excise employee, wanted to sell Amway products and to provide a personal income tax preparation service. Mr. Perras also had a multiple product concession. The employer allowed the sale of Amway products and the preparation of the tax returns under certain circumstances, but prohibited the multiple product concession. The adjudicator found that the employer's decision was not unreasonable and was very clear. The grievance was denied. In the instant case, there is no evidence to the effect that the jobs requested could not fall within the specified areas. Accordingly, the adjudicator does not have jurisdiction to intervene.

In the event that I might be of the opinion that there was such evidence in all of the grievances, Mr. Arcelin cited *Lalla* (File No. 166-2-23969) and invited me to read the last paragraph of page 24 continuing on page 25 which, in his opinion, sets out the test to be applied in the instant cases.

He then cited *Patterson* (File Nos. 166-2-10263, 10491 and 10492), in the English version, and referred to pages 35 and 36, to the fourth paragraph of page 37 and the last paragraph of page 39. Next, he referred to *Liske* (File No$^{s}$ 166-2-8153, 8405 to 8408), which is referred to in the preceding decision, in which it was decided that the employer had exercised its management right in a reasonable manner.

Lastly, Mr. Arcelin referred to *Fraser and Skinner (supra)*, which is the only case where the question relates to article 13.01 of the collective agreement before us. The adjudicator did not apply the test of arbitrariness. It is a very interesting case. Mr. Arcelin cited page 137 of the English version (which is found at page 155 in the French version). He argued that, in all of the grievor's cases, there is apparent, real or potential conflict of interest.

With respect to Mr. Bouthillette's case in particular, Mr. Arcelin argued that the activities that the grievor wants to undertake are not clear. Mr Bouthillette first wrote "tax advisor" and then "government advisor". He gave as an example activities relating to employment insurance; paragraphs 5(2)(*c*) and 3(2)(*c*) of the *Employment Insurance Act* involve departmental discretion because it is the Department of Revenue that determines the insurability of taxpayers' jobs. How can one not have two masters when doing this type of activity?

Under cross-examination, Serge Clairoux admitted that policy concessions existed although Mr. Bouthillette said that they did not. Mr. Bouthillette submitted Exhibit S27, which provides a very complete description of the grievors' expertise. "*Honest tips*", accounting and taxation knowledge, as well as the status of a taxation expert, these things are facts. In Mr. Bouthillette's case, the request was not denied; he was asked to provide more information. Mr. Bouthillette did not discharge his burden to explain clearly the activities that he wanted to perform and his grievance should be denied.

In Mr. Chartrand's case, he wanted to prepare T1 returns for individuals; this is a case of serving two masters. There is a clear appearance of a conflict and one that could even be prejudicial. The amendment made under Exhibit 24(b) relates to Customs agents because of the merger and because, formerly, they had permission to prepare tax returns. The employer still grants this permission to persons who do not administer the *Income Tax Act*, and there is a fundamental distinction between the work of a Customs agent and that of an auditor. Auditing large businesses involves auditing their shareholders, employees and suppliers. Auditing is not a static activity: it can spill over to third parties. Page 4 and Chapter B of Exhibit S23 apply. All of these concepts need to be taken into consideration. Mr. Chartrand would be in a position of serving two masters. It should be noted that Mr. Duval stated in his testimony: "if I prepared T1s and T2s, I would be in conflict". The grievance should be denied.

With respect to Serge Clairoux's request (Exhibits S8 to S10), it is vague and hypothetical and the employer questions its validity. With respect to Mr. Clairoux's 25% ownership, the employer relaxed its rules for employees owing buildings, but it is important to keep in mind the general principles and the problem of credibility. The employer designated this field as one of the specified areas. The grievance should not be allowed.

In the case of Jacques Duval, who wants to prepare financial statements and who does not like preparing tax returns, the fact remains that, despite the adjustments required, financial statements reflect transactions and can impact a business' tax return. Mr. Duval admitted that financial statements could be used to prepare tax returns and that he could be called upon to testify in such circumstances. That constitutes an apparent conflict of interest. Accounting includes both bookkeeping and financial statements. For small businesses, which apply in Mr. Duval's case, bookkeeping and financial statements are closely linked. His grievance should be denied.

For Benoit Guay, the important aspect is the concept of control. According to Exhibit S14, this is a business in which he owns less than 50%. There is a risk of potential conflict of interest when the employee does not hold controlling interest. Mr. Guay would be called on to serve two masters because, as a shareholder, he would

have another master. This is where the concept of control becomes important and why Mr. Guay's grievance should also be denied.

In Gaston Lampron's case, he wants to prepare T2 returns, which are departmental documents. He would therefore be called on to serve two masters, which presents a potential and even a real conflict of interest. The relationship between Mr. Lampron and his brother-in-law would be contrary to the principles set out on pages 4 and 5, as well as on pages 19 and 20, of the Code (Exhibit S23). Mr. Lampron's grievance should be denied, as should Pierre Chartrand's grievance.

Jacques Morneau wants to become a residential real estate agent. The employer questions the seriousness of this request because, in order to exercise this profession, you have to take a course. Mr. Morneau made the request without looking into the course required. He admitted that he might be required to audit businesses in financial difficulty and that, as a result, it would be possible for him to obtain privileged information on real estate property that might be sold by court order following negotiations with Revenue Canada. There are potential conflict situations and therefore the grievance should be denied.

Lastly, Mr. Arcelin referred to Exhibit E1, which shows that the employer took steps to make the rules more flexible in the case of specific tasks, but the fact remains that the decisions of the four delegated managers are not reviewable.

Reply

Mr. Quesnel replied that the employees are victims of flaws in the system and of prejudices. The decisions on the grievors' requests were made on the basis of documents dating back to a time that preceded the implementation of new standards communicated to employees.

It is necessary to concentrate on the evidence. It was not established that Exhibit S23 defines the list of specified areas. The problem is in the employer's approach. Page 19 of Exhibit S23 invites the use of judgment. If the adjudicator determines that there was no assessment of the circumstances surrounding the requests, then it is not an "appeal" of the decision. The decision in *Canada (Director of Investigation and Research Competition Act) v. Southam Inc.,* [1997] 1 SCR 748, deals

with the test to be used when intervening in cases involving the exercise of discretionary power. That test is whether the decision respects reasonableness *simpliciter* or patent unreasonableness.

Specifying areas must not be confused with permission to exercise outside activities.

Exhibit S23 was not in effect at the time of *Fraser and Skinner (supra).*

Under article 26 of the Code (Exhibit S23), outside activities are allowed. In Mr. Bouthillette's case, he does not want to prepare returns in accordance with sections 3(2)(*c*) and 5 of the *Income Tax Act*; he met with management on three occasions regarding this point.

There is no evidence that there is a difference between taxation auditing and customs auditing.

The managers may see conflicts in their perception of things but they have an obligation to justify their denial of the requests.

As for the case law cited, it relates to disciplinary measures and is not relevant.

The grievances should be allowed because the activities in question are allowed by the fact that they are not specified activities.

REASONS

The question at issue is to determine whether the employer contravened article 13.01 of the collective agreement of the Auditing group (AU) by not approving the outside activities that the grievors wanted to exercise. In reading article 13.01,

> *13.01 Unless otherwise specified by the Employer as being in an area that could represent a conflict of interest, employees shall not be restricted in engaging in other employment outside the hours they are required to work for the Employer.*

we see that the condition required for an outside activity to be approved is that it not be in an area specified by the employer as one that could represent a conflict of interest. There is no restriction on the employer in terms of designating any specific field, nor any indication of how it should go about specifying these areas. The

evidence showed that the employer published a Conflict of Interest and Post-Employment Code for the Public Service (Exhibit S23). This Code was apparently revised in 1987 and reprinted in 1990 and 1995. It is therefore not surprising that the parties are familiar with this exhibit and submitted it by mutual consent.

The question that I must decide is whether the Code (Exhibit S23) specifies the areas in which the grievors want to work as areas that could represent a conflict of interest.

Exhibits S23 has two parts, one general that applies to the whole of the public service, and Chapter B, which applies more specifically to Revenue Canada. Section 8 of Chapter B was amended and the amendment is found in Exhibit S24(b). There is no question that Exhibits S23 and S24(b) list a number of areas that could represent a conflict of interest. Part I of Chapter A of the Code (Exhibit S23) (page 4) sets out the general principles that apply to all employees. Part II of Chapter A covers the methods of compliance, the disclosure that all employees must make of assets, interests, commitments and requirements that are not specifically exempted under paragraph 20. Parts III and IV of Chapter A cover post-employment and special case. Therefore, I must conclude that the Conflict of Interest and Post-Employment Code for the Public Service serves, among other things, to specify the areas that could represent a conflict of interest. Where in the Code (Exhibit S23) does one find examples of specified areas? They are found in paragraph 20 of Part I of Chapter A and in Chapter B, for Revenue Canada employees. In Chapter B, 10 areas are specifically mentioned, and explanations are given that allow some exceptions. It is these exceptions that have given rise to the instant case, because they raise many doubts about what they do not mention. Delegated managers are given a great deal of discretion in evaluating the exceptions. Exhibit E1 sets out the guidelines for delegated managers who must exercise this discretion. Unfortunately, this document, which is dated February 19, 1992, does not appear to have been amended since then to reflect the changes in 1995 (Exhibit S23) and 1996 (Exhibit S24). It is likely that this dispute could have been avoided if the employer had republished the guidelines for delegated managers and had shared them with the union. The lack of transparency in applying the changes gave rise to expectations among employees and contributed to the proliferation of interpretations, all equally valid, but of no use in applying the collective agreement.

In the case of Mr. Bouthillette, who wants to become a government advisor and to act as an intermediary between clients and the various levels of provincial, municipal and federal governments, including Revenue Canada, the employer asked for more information but, based on what Mr. Bouthillette described, the grievor would be in contravention of principle (f) of paragraph 6, which reads:

> *employees shall 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 any person;*

Mr. Bouthillette is of the opinion that the delegated manager was required to seek further information on the outside activities that were the subject of his request and to provide him with a response concerning representation at the levels of government other than federal. I do not agree, Mr. Bouthillette wants to market the knowledge he has acquired through his union and volunteer activities over the years he has worked for Revenue Canada. It is his responsibility to specify in a confidential report, as required by paragraphs 16(b) and 19 of the Code (Exhibit S23), the outside activities that he wants to undertake. He must provide sufficient detail to enable the delegated manager to decide whether these activities could give rise to a conflict of interest. It is possible that, once he has sufficient information, the delegated manager might approve Mr. Bouthillette's request. The fact that Mr. Bouthillette is working almost full-time for the union and that he uses other employees to access the computer system, does not in any way change his responsibilities as an employee and does not in any way reduce his tax and accounting expertise. It is not clear that the activity that he wants to undertake would not be impacted by the government activities in which he is involved. Consequently, Mr. Bouthillette's grievance cannot be allowed.

Pierre Chartrand wants to prepare T1 tax returns for 15 to 20 salaried workers or professionals annually. The employer specified as an area that could represent a conflict of interest the "Preparing and filing departmental documents on behalf of others" (see Code (Exhibit S23) and amendment (Exhibit S24(b)), section 8). The employer introduced some confusion in this area by wanting to show some flexibility and wanting to reflect the different legislation that applies to Revenue Canada employees. It appears that the amendments made to Chapter B of the Code

(Exhibit S23) are the source of the expectations of employees who interpret the Code as allowing them to exercise their discretion with respect to the outside activities they want to exercise. Mr. Chartrand does not think that preparing T1s for compensation while working in the Taxation section of Revenue Canada is any more of a conflict of interest than when he was an employee of Customs and Excise because he audits large businesses. Unfortunately, since the desired activity falls within a specified area, he must convince his delegated manager by providing him with sufficient detail to show that there is no real, potential or apparent conflict. The employer could have prevented the misunderstanding by providing the bargaining agent with Exhibit E1 and by confirming to it that this guide remained in effect regardless of the amendments to the Code (Exhibit S23). It would be in the employer's interest to clarify with its employees and delegated managers which guidelines apply since the introduction of the amendments. However, Mr. Chartrand's grievance must be denied.

In the case of Serge Clairoux, who wants to buy buildings on a co-ownership basis and to do the accounting for those buildings, this activity is specified under section 1, page 20 and section 6 of page 23 of Chapter B of Exhibit S23, but it is also referred to in paragraph 22(d) on page 9 of the Code. It is not sure that Mr. Clairoux's desired activity would not be directly related to the Act he is required to administer. It is therefore his responsibility to provide sufficient detail to his delegated manager to convince him to approve the authorization. The lack of clarity around the importance that the employer seems to give to the notion of control creates confusion. It is also a source of frustration for employees who have difficulty understanding the difference between owning 25% and 20% of a rental asset. While I cannot allow Mr. Clairoux's grievance, I can strongly recommend to the parties to sit down together and clarify the concepts that are to be used by delegated managers in applying the Code to requests involving accounting and bookkeeping on behalf of others and their involvement in personal businesses on a co-ownership or partnership basis.

Jacques Duval wants to prepare financial statements for accounting purposes and not for tax purposes. In my opinion, this activity falls into the area of "Accounting and bookkeeping". Exhibit S35 and Mr. Duval's testimony convinced me that financial statements are part of general accounting. It is Mr. Duval's responsibility to convince his delegated manager, by providing sufficient information about the business that he wants to carry on, that his activities will not be directly

related to the legislation that he is required to administer. Since the desired activity is in a specified area, it is not within my jurisdiction to decide whether an exception could be made. Accordingly, Mr. Duval's grievance is denied.

Benoit Guay wanted to be involved in a business with his brother-in-law and to do the accounting for it. His situation is similar to that of Mr. Clairoux in that it falls under paragraph 1, page 20 of Exhibit S23. Here again, misunderstanding and frustration are created by a lack of clarity on the principles governing exceptions. While I cannot allow his grievance, I encourage Mr. Guay to discuss with his delegated manager the guidelines and the details of his participation in such a business. I am not convinced that they could not arrive at a more satisfactory response.

Gaston Lampron wanted to prepare tax returns for his brother-in-law's business for compensation. This activity falls under section 8 of Chapter B of Exhibit S23, "Preparing and filing departmental documents on behalf of others". This activity is directly related to the Act that he is responsible for administering. It is Mr. Lampron's responsibility to provide his delegated manager with the necessary information on the businesses in question and on his activities to convince him to approve the authorization. Mr. Lampron's grievance cannot be allowed.

Jacques Morneau wants to sell residential houses on a part-time basis. This activity falls under an area specified in paragraph 2, page 21 "Financial planning, real estate sales, and appraisals". Even though the reasons given for specifying this activity may be confusing, it still remains that it is a specified area. It would be in the employer's interest to review this activity with the bargaining agent, especially if one compares it to the sale of other equally expensive items. I cannot allow Mr. Morneau's grievance.

**Évelyne Henry,**
**Deputy Chairperson.**

OTTAWA, February 8, 1999.

Certified true translation

Serge Lareau