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Citation: 2006 PSLRB 20

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

DAN DUBREUIL

Complainant

and

TREASURY BOARD (Correctional Service of Canada), LUC DOUCET, DAVID LEWIS AND DAVE NILES

Respondents

Indexed as
Dubreuil v. Treasury Board (Correctional Service of Canada) et al.

In the matter of a complaint made under section 23 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Thomas Kuttner, Q.C., Board Member

For the Complainant: John Mancini, UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA – CSN

For the Respondents: Karl Chemsi, counsel

Heard at Moncton, New Brunswick,
February 17 & 18 and March 8 & 9, 2004.

Complaint before the Board

[1] In this case, Dan Dubreuil, the complainant, seeks redress for perceived harassment suffered over an extended period of time and culminating in his redeployment in May 2003, from the position of correctional officer II at the Shepody Healing Centre (SHC), to the position of correctional officer II at Dorchester Penitentiary, located in New Brunswick. He does so by the bringing on of this *Public Service Staff Relations Act* (the "former *Act*") section 23 complaint, alleging that the Correctional Service of Canada (CSC), through the actions of Luc Doucet, David Lewis and Dave Niles, continually harassed him and ultimately redeployed him in retaliation for the complainant's having sought to ensure compliance by managerial personnel with their statutory obligation to ensure a secure, safe and healthy work environment. This, he says, is discriminatory and intimidating conduct violative of the unfair labour provisions of the former *Act*, and in particular, paragraph 8(2)(*a*) and subparagraph 8(2)(*c*)(ii) thereof.

[2] This complaint went directly to hearing, without prior mediation. However, following the testimony of the first witness for the respondents, Mr. Doucet, and discussion between the parties, the parties requested that I first attempt to mediate this dispute and further consented that I proceed in adjudicative mode should mediation discussions prove unsuccessful. Mediation talks occupied the bulk of the first day of proceedings, but despite the good faith efforts of both parties, they were unable to resolve their differences through that mechanism and, upon agreement, reverted to formal adjudication proceedings under section 23 of the former *Act*, for final and binding resolution.

[3] On April 1, 2005, the *Public Service Labour Relations Act* (the "new *Act*"), enacted by section 2 of the *Public Service Modernization Act* (*PSMA*), S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 39 of the *PSMA*, the Board continues to be seized with this complaint, which must be disposed of in accordance with the new *Act*.

[4] For the reasons given below, I conclude that this complaint must be dismissed.

Summary of the evidence

[5] In addition to receiving close to 50 exhibits, the Board heard testimony from five witnesses, including two of the named respondents, Mr. Doucet, Executive Director

of the SHC, the Regional Treatment Centre (RTC) for the Atlantic Region of the CSC, and Mr. Lewis, then Nursing Supervisor for the Acute Assessment and Dialectical Behaviour Therapy Unit (AADBT Unit) at the SHC. In addition to the complainant himself, the Board heard testimony on his behalf from his direct supervisor, David Price, Unit Manager for Unit 1 at Dorchester Penitentiary, with additional responsibility for correctional officers assigned to the SHC, and from Clayton McGougan, a fellow correctional officer who holds the position of Vice-President of the Dorchester Local of the UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN (UCCO–SACC-CSN) as well as that of Regional Grievance Coordinator. The Board's summary of the background facts and circumstances giving rise to this complaint is drawn from the totality of the testimony heard and the exhibits filed.

[6] Although located within the walls of Dorchester Penitentiary and so physically a component of that correctional complex (Building B-6), the SHC is no longer an integral component of the penitentiary. Rather, since late 2001, it has functioned as a separate and distinct institution with its own command structure under the executive directorship of Mr. Doucet, who reports directly to the Regional Deputy Commissioner (Atlantic), Rémi Gobeil, as does the Warden of Dorchester Penitentiary, Gary Mills. The SHC is one of five treatment centers operated by the CSC and contains 40 beds, 34 of which are for the mental health division for the treatment of mentally challenged, mentally disordered and behaviourally disordered inmates; the remaining six are in the physical health division. The facility offers in-patient services for the entire Atlantic Region and out-patient services for inmates in Dorchester Penitentiary and the Westmoreland Institute, both in New Brunswick.

[7] The staff comprises principally psychologists, nurses and social workers, with psychiatrists and general practitioners from the local region on standby and the services of other medical practitioners and paraprofessionals provided on an 'as needed' basis. The SHC and Dorchester Penitentiary have entered into several shared services agreements whereby Dorchester Penitentiary provides management services, correctional programs and correctional operations for the SHC, including the deployment of correctional officers and a correctional supervisor (Exhibits C-28A, 28B, 28C, MOU of February 2002). The two facilities are fiscally distinct, each with its own budget.

[8] Within the mental health division of the SHC, there are several units and therapeutic modules or programs for patient treatment. Principal among these is the AADBT Unit, where the respondent, Mr. Lewis, now Chief of Health Services, held the position of Nursing Supervisor at the time relevant to this complaint. Within the AADBT Unit, the staff have developed and implemented a program of behaviour modification, the program of behaviour modification known as Dialectical Behaviour Therapy (DBT), under the direction of the Ottawa-based Dr. Donna McDonagh, Manager of the National Mental Health Program for the CSC. DBT is an inter-disciplinary approach to behaviour modification calling on all those who work with the patient inmates to cooperate and act consistently as a team. This includes not only the professional staff but also the correctional officers, whose participation and cooperation in the program is essential to its success. To this end, correctional officers assigned to maintain security at the SHC receive the five-day training program mounted by Dr. McDonagh. There, they are introduced to the philosophy and theory behind DBT and taught techniques useful in interacting with patient inmates in such a manner as to further acceptable behaviours rather than exacerbate inappropriate ones. Patient inmates in the AADBT Unit are often severely mentally ill and may exhibit delusional, paranoid and schizophrenic behaviours, which might be triggered by inappropriate reactions to their conduct on the part of the staff, including correctional officers. DBT is tailored to the particular needs and behaviours of the individual patient inmate, whose progress is monitored closely and reviewed weekly by the therapy team and for whom adjustments and variations to treatment methods are implemented accordingly. Both Messrs. Doucet and Lewis stressed the importance of commitment to the philosophy underlying DBT and cooperation in its implementation by all staff, including the correctional officers assigned to maintain security at the SHC.

[9] The complaint itself was filed with the Board on February 17, 2003 (Exhibit C-1). However, the allegations there made of breaches by managerial personnel of the CSC health, safety and security regulations and reprisals against the complainant for having continually raised these matters both before and after the filing of the complaint shows that the complaint is but one phase of a broader set of circumstances pitting the complainant and the UCCO-SACC-CSN against the CSC.

[10] The Board outlines here the sequence of events, including the various actions taken by the UCCO-SACC-CSN and the complainant in an attempt to remedy what were

perceived to be serious failings on the part of managerial personnel at Dorchester Penitentiary and the SHC, as well as the actions taken by management in response.

[11] On June 10, 2002, Mr. McGougan, acting on behalf of the UCCO-SACC-CSN, filed a complaint at the CSC national headquarters with the senior officer, Values and Ethics, alleging "gross mismanagement and violation of law and regulations" on the part of senior managerial personnel at Dorchester Penitentiary and the SHC. The allegations were wide-ranging and included several touching the complainant in these proceedings, which were repeated as a recurring theme in the many subsequent proceedings taken by him or on his behalf (Exhibit C-29. i-iv; xxiii).

[12] First, there was the allegation that both Messrs. Doucet and Lewis had asked nursing staff to bring in tobacco for the use of patient inmates at the SHC.

[13] Second, it was alleged that, on March 21, 2002, Mr. Lewis threatened the complainant with removal from the SHC for having acted disrespectfully in advising him that the unauthorized introduction of "contraband" tobacco into the facility was unlawful and as such would be seized.

[14] Third, it was alleged that Mr. Doucet improperly dismissed internal charges laid against patient inmates by correctional staff, including the complainant. Mr. McGougan's allegations were later reformulated as breaches of Part II of the *Canada Labour Code,* R.S.C. 1985, c. L-2, governing occupational health and safety, in a letter sent to the then CSC Commissioner, Lucie McClung, on July 22, 2002, requesting that action be taken to address the UCCO-SACC-CSN's concerns (Exhibit C-29. xxxvii).

[15] As to the allegations relating to "contraband" tobacco, Hubert Danis, the SHC Acting Executive Director, subsequently wrote a memorandum on August 2, 2002, addressed to the nursing staff and correctional officers in the AADBT Unit (Exhibit C-25). In it, he advised that, with respect to specified patient inmates certified under the *Mental Health Act*, R.S.N.B. 1973, c. M-10, as not fully responsible for their actions and who suffered from nicotine dependency, management would take the necessary steps to ensure that they were sufficiently supplied with tobacco over and above what was normally allocated to inmates. That memorandum precipitated an immediate response from the complainant, who the following day sent an e-mail memo on the matter addressed to the SHC staff, including senior management, advising that the introduction of contraband into the institution whether upon the request of an

offender, a fellow staff member or managerial personnel was illegal. It was a violation of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (*CCRA*); possession of contraband beyond the visitor control point and its delivery to an inmate were summary conviction offences (Exhibit R-19). For doing this, he was counselled and subsequently filed a grievance on August 24, 2002, alleging that such counselling was unfair and requesting by way of relief a written apology from the employer (Exhibit C-16).

[16] Matters escalated significantly in the fall of 2002. First, on October 22, 2002, Mr. McGougan, again acting on behalf of the UCCO-SACC-CSN, forwarded to Edward Keyserlingk, the Public Service Integrity Officer for the Government of Canada, a copy of the complaint that he had originally made to the CSC senior officer, Values and Ethics, in June 2002. In his cover letter, Mr. McGougan alleged that the complainant had suffered job reprisals at the hands of Messrs. Doucet and Lewis and his then unit supervisor, Mr. Niles, because of his actions and further requested that a "proper independent investigation" into the matter be undertaken (Exhibit C-29.xl).

[17] On the following day, October 23, 2002, Mr. McGougan wrote to the Solicitor General of Canada, requesting "an impartial investigation into the matter" (Exhibit R-12.i). That same day, Mr. McGougan filed a formal harassment complaint on behalf of the complainant against Messrs. Doucet, Lewis and Niles, pursuant to the Treasury Board *Policy on the Prevention and Resolution of Harassment in the Workplace* (Exhibit R-15).

[18] The substance of the harassment complaint closely mirrored the two values and ethics complaints, alleging retaliatory action on the part of the three managers in response to the concerns raised by the complainant that management personnel had acted improperly: first, in requesting that staff bring in "contraband" tobacco for patient inmates at the SHC and, second, in dismissing inmate offence reports submitted by correctional officers with respect to SHC patient inmates (Exhibit R-1).

[19] The harassment complaint was received by Mr. Gobeil, the Regional Deputy Commissioner (Atlantic Region), on November 5, 2002. In the interim, the UCCO-SACC-CSN took further action. On November 2, 2002, Mr. McGougan filed a complaint against Messrs. Doucet and Lewis with the Sackville Detachment of the Royal Canadian Mounted Police (RCMP) in the following terms (Exhibit R-6):

. . .

> *With reference to: Luc Doucet – Director, Atlantic Regional Treatment Centre*
>
> *David Lewis –Nursing Supervisor, Atlantic Regional Treatment Centre*
>
> *Please accept this correspondence as a formal request for an investigation into possible violations, by the above noted persons, of sections 126(1), 128, 129(a) and 139(2) of the Criminal Code of Canada.*
>
> *Past and present RTC Correctional Officers, as well as the Institution Preventative Security Officer, will provide evidence that properly processed charges under the Corrections and Conditional Release Act (CCRA) and regulations are being unlawfully disposed of.*
>
> *A complete list of witnesses, and the available related documented evidence will be provided to the investigating officer upon request. Please be aware that, for fear of job reprisals, many officers will be reluctant to provide information until they are made aware that an "official" investigation is being conducted.*

. . .

The referenced provisions of the *Criminal Code,* R.S.C. 1985, c. C-46, address misconduct on the part of peace officers (subs. 126(1) and s. 128) and resistance or obstruction of peace officers (par. 129(*a*)), for which one is liable to two years' imprisonment; as well as the wilful attempt to obstruct, pervert or deflect the course of justice (subs. 139(2)) for which on conviction one is liable to ten years' imprisonment.

[20] On November 13, 2002, Mr. Doucet formally sought the redeployment of the complainant from the SHC back to Dorchester Penitentiary, as his continued presence interfered with the proper functioning of the SHC and obstructed its operations. He did so by an e-mail memo, couched in the following terms, that was sent to Mr. Mills and Deputy Warden Hal Davidson, with a copy to Mr. Gobeil (Exhibit C-8):

. . .

> *The Shepody Healing Centre Management Team has come to the conclusion that presence of Correctional Officer Dan Dubreuil at the Centre is detrimental to the good functioning of our Centre. On regular basis officer Dubreuil has: challenged decisions made by management, took actions*

> *contrary to team decisions, decided on his own not to take inmates for their hour of outdoor exercise contrary to Section 83 of the CCRR. As recent as yesterday, when I was on a tour of the SHC with the DC, officer Dubreuil indicated that inmates would not access the daily hour fresh air they are entitled to. I told him that the Warden and the Deputy Warden had assured me that the CCRR would be respected at all time and I suggested that he should discuss this with the Deputy Warden. The attitude and comportments of officer Dubreuil have been reported regularly to his superiors and he has been counselled* [*sic*] *without any apparent success. This cannot be accepted and we will not allow for one person to obstruct our operations. We are therefore requesting that officer Dubreuil be removed from the SHC and redeployed to another department.*
>
> . . .

[21] Mr. Davidson took immediate action and instructed the complainant's immediate supervisor, Mr. Price, to review the allegations made by Mr. Doucet against the complainant. Mr. Price reported back to Mr. Davidson, by memorandum, on November 14, 2002, on which Mr. Doucet was copied, that, after interviewing the complainant, he had concluded that there were no "clear nor specific examples" to support the allegations, which he characterized as "hearsay . . . subjective and personal rather than objective", warranting no further action (Exhibit C-8.ii-iv). No formal response to Mr. Doucet's request of November 13, 2002, was forthcoming from penitentiary officials, nor was action taken as requested.

[22] However, Mr. Gobeil did take action throughout the month of November in response to the harassment complaint filed on behalf of the complainant by Mr. McGougan on October 23, 2002, as outlined in his memo to the complainant of December 2, 2002 (Exhibit R-1). There, he advised the complainant that, upon review and analysis of the complaint, as originally filed and with additional information provided November 13, 2002, the only matters that would be processed through the Treasury Board *Policy on the Prevention and Resolution of Harassment in the Workplace* would be the allegations that Mr. Lewis had made derogatory comments to the complainant and threatened him with removal from the SHC in March 2002, and that Mr. Doucet had twice sought to have him removed.

[23] Arrangements were made to attempt a resolution of these complaints by way of mediation with the assistance of the Public Service Commission (PSC), scheduled for mid-December 2002. Mr. Gobeil declined to proceed further with the other complaints

filed under the Treasury Board *Policy on the Prevention and Resolution of Harassment in the Workplace*. An allegation of discipline for unjust cause as a result of e-mail usage was already the subject of a grievance under the collective agreement (Exhibit C-16).

[24] The allegation of an improper performance evaluation was to be referred to a performance review committee, as per internal CSC policy (that issue was subsequently settled to the satisfaction of the complainant following a performance review in January 2003) (Exhibits C-1, C-2, C-3 and C-5).

[25] Mr. Gobeil had sought clarification from Mr. Doucet in a memorandum dated November 15, 2002 (Exhibit R-9), regarding the complainant's allegations as to the unauthorized introduction of "contraband" tobacco for the use of patient inmates at the SHC and the improper dismissal of internal charges laid against patient inmates by correctional staff. Mr. Doucet responded in a memorandum dated November 18, 2002, advising that the practice of staff being asked to bring in tobacco for patient inmate use had officially ceased in June 2002, and that a protocol was being developed on the management of tobacco for patient inmates affected by tobacco deprivation.

[26] As to the allegation that internal charges had been improperly dismissed, Mr. Doucet advised that all proper charges are processed in a timely fashion but that on two occasions he did not authorize such charges as they had been improperly laid against patient inmates who had been declared not mentally competent by the attending psychiatrist. As he noted (Exhibit R-10):

> *The Shepody Healing Centre is not only a correctional facility but also a psychiatric hospital and we must adhere to community standards in the delivery of care, services and treatment and in the management of individuals with mental disorders.*

[27] Mr. Gobeil advised the complainant in his memorandum of December 2, 2002, that as a result of that clarification he was satisfied that the tobacco issue had been resolved and accordingly would not be further processed under the Treasury Board *Policy on the Prevention and Resolution of Harassment in the Workplace*.

[28] As to the allegations that internal charges had been improperly dismissed, Mr. Gobeil advised the complainant that the CSC would await the results of the RCMP investigation sought by the UCCO-SACC-CSN into the matter. By this time, the RCMP investigation had become a matter of public record. A local MP raised the issue in

Parliament and later released to the press Mr. McGougan's letters of October 23 to the Solicitor General and of November 29 to the RCMP, which Mr. McGougan had sent to the MP.

[29] The matter received prominent coverage in the New Brunswick press, both the Moncton *Times & Transcript* and the Saint John *Telegraph Journal* reporting at length the nature of the complaints made against two officials at Dorchester Penitentiary (Exhibit R-12.1 (i)(ii)).

[30] Two months later, the *Times & Transcript* reported on January 28, 2003, that following investigation the RCMP had concluded that there was no evidence to support any criminal charges (Exhibit R-12 (iii)).

[31] On December 2, 2002, Mr. Gobeil had also advised both Messrs. Doucet and Lewis of the complainant's harassment complaint and had invited them as well to attempt its resolution through mediation, but both of them declined to do so (Exhibits R-16 and R-17). Nevertheless, together with Denise Thériault, a CSC Human Resources (HR) harassment specialist, Mr. Gobeil met with the complainant and Mr. McGougan on December 18, 2002, to discuss further how the matter would proceed.

[32] During that meeting, the complainant made further complaints against Mr. Doucet for his most recent attempt to have him removed from his SHC position and against Mr. Lewis for allegedly mocking him in song on November 17, 2002. This latter complaint arose from an incident in which a sharp knife-like weapon was confiscated from a patient inmate who apparently was intent on stabbing the complainant. The complainant filed these additional allegations by letter dated December 19, 2002 (Exhibit R-2), and confirmed in it his insistence that all the allegations that he had made should be addressed through the Treasury Board *Policy on the Prevention and Resolution of Harassment in the Workplace* process and not "segmented" into several distinct processes as Mr. Gobeil had advised in his letter of December 2, 2002. As Mr. Gobeil advised the complainant by memo dated January 9, 2003, these additional harassment allegations were added to the original complaint and the entire matter was referred to a PSC investigator for formal investigation (Exhibit R-3).

[33] During the December 18, 2002 meeting, there was discussion of a temporary reassignment of the complainant from the SHC, pending the outcome of the

investigation which was expected to be completed by the end of February 2003. The complainant refused to consider the matter and requested instead that Messrs. Doucet and Lewis be redeployed. The complainant confirmed all this by letter to Mr. Gobeil dated January 6, 2003, in which he stated *inter alia* (Exhibit C-17):

> . . .
>
> *Further to your correspondence dated December 20, 2002, I wish to document the following facts:*
>
> . . .
>
> *I do not agree with your decision to leave Mr.'s* [*sic*] *Doucet and Lewis in a position where they are able to continue the harassment. As I clearly stated during the meeting, I do not believe the harassment will stop.*
>
> *In this case, harassment is not a "complex issue". I am being harassed because I attempted to carry out my duties as a Peace Officer.*
>
> *As stated during the meeting, I will not accept being removed from my position until the outcome of the investigation, as I have done nothing wrong. I again request that you immediately take the necessary steps to have Mr.'s* [*sic*] *Doucet and Lewis removed from my work environment.*
>
> . . .

[34] That letter prompted this response from Mr. Price, sent by e-mail on January 7, 2003, (Exhibit R-7):

> *Mr. Dubreuil; With no disrespect, I am now privy to your situation and I am genuinely concerned about your concerns that you feel that harassment will not stop unless Mr. Doucet and Mr. Lewis are not removed from your work environment. I have no recent evidence that would conclude you are being harassed and I have no evidence that any action or investigation that is in a process, has concluded there has been harassment.*
>
> *As a Manager responsible for the Management and Supervision of staff assigned to the Unit, it is my responsibility to ensure there is a positive work environment conducive to professional standards.*
>
> *I may appreciate that you may be frustrated about the process, but it is not your decision to dictate who should go where and where you should go. You have to understand we have an obligation to operate and I am finding it*

> *increasingly difficult to maintain silence in this case as there has been nothing concluded.*
>
> *However it is evident in your e-mail that you have concluded you are being harassed and will be continued to be harassed if the other employees remain in their positions. I do not share this concern as I have been monitoring the situation closely and at present I am considering to redeploy you to another area other than the Sheopody* [*sic*] *Healing Centre to ensure you are not subjected to harassment be it real or perceived.*
>
> *Under no circumstances should you consider or interpret this to be a decision to undermine the process of your allegations. As you are aware, Mr. Doucet and Mr. Lewis do not work at Dorchester Penitentiary, they work at the Shepody Healing Centre. You are an employee of Dorchester Penitentiary and fall under the umbrella of Correctional Operations when there are concerns such as yours being brought forward to my attention.*
>
> *I am trusting that you do respect my position as much as I support your situation regarding your allegations of harassment. As previously noted, I want to reassure you that if I choose to intervene, it will be based on what I believe to be in the best interests of not only the parties involved, but in regards to our obligation to ensure we all work in an environment free of harassment. In your situation, I have not been advised the situation has been concluded and in referring to your e-mail, I feel we need to further discuss together what will be the best method of ensuring we minimize any potential further conflict in a reasonable manner.*
>
> *Upon your first day of return to work I would like you to contact Susan Spence to schedule a meeting so we may address the present situation. You are advised, should you wish to have a Union Representative present, you may do so.*
>
> . . .

[35] The internal investigation through the PSC got underway in late January. Following an initial meeting with the PSC investigator, Mr. McGougan, as UCCO-SACC-CSN's representative, wrote to Ms. Thériault, the CSC HR harassment specialist, that, inasmuch as the investigation was limited to matters referred by Mr. Gobeil for action pursuant to the Treasury Board *Policy on the Prevention and Resolution of Harassment in the Workplace*, neither the UCCO-SACC-CSN nor the complainant would participate.

[36] Mr. McGougan alleged that Mr. Gobeil was attempting to suppress the introduction of relevant evidence of wrongdoing, by manipulation and interference, and so was preventing a complete and impartial investigation from being undertaken (Exhibit C-22). That same day the CSC retained McIntyre Consulting of Halifax, Nova Scotia to undertake a full investigation of the harassment complaint. Ms. Thériault, as CSC HR harassment specialist, advised the complainant by memo dated February 11, 2003, with a copy to Mr. McGougan, that the investigation by Ms. McIntyre would proceed, even if the complainant declined to be interviewed and that the complainant would be kept abreast of the investigation process in any event (Exhibit R-4). It was shortly thereafter that the within complaint of unfair practice under the former *Act* was filed before the predecessor tribunal on February 16, 2003 (Exhibit C-1).

[37] McIntyre Consulting filed its final Harassment Investigation Report on March 28, 2003 (Exhibit R-18). In it, Ms. McIntyre reviewed exhaustively the outcome of her workplace investigation, which entailed a review of the voluminous documentary materials, including those filed by the complainant, and the results of her interviews of eleven witnesses whose names had been provided by the complainant and the two respondents, Messrs. Doucet and Lewis. The witnesses included senior administrators throughout Dorchester Penitentiary, immediate supervisors and other staff. The matters referred to Ms. McIntyre for investigation were three-fold (Exhibit R-18):

. . .

> 1. *the respondents subjected him to threats, intimidation and retaliation as a result of his expressing concerns about perceived unethical or illegal workplace behaviours;*
>
> 2. *the respondent Mr. Doucet harassed him by attempting to have him wrongly removed from his post at the Shepody Healing Centre. Mr. Doucet fabricated a false complaint and alleged numerous infractions which were not substantiated upon investigation.*
>
> 3. *the respondent Mr. Lewis harassed him by singing about and mocking the discovery of a weapon on the unit which allegedly was meant to stab the complainant.*

[38] As to the first allegation, Ms. McIntyre concluded that there was no corroborative evidence to support the allegations of intimidation and retaliation. As to the second allegation, Ms. McIntyre concluded that the preponderance of the evidence supported the respondents' position that the redeployment requests were a managerial decision taken to ensure that staff working on the AADBT unit would have the requisite skills to function effectively. With respect to the third allegation, Ms. McIntyre concluded that since no evidence whatsoever had been provided to her, the allegation was unfounded. As a result, Ms. McIntyre found that all of the allegations of harassment were "unsubstantiated and without merit".

[39] On March 18, 2003, Ms. McIntyre had provided the complainant with a copy of her preliminary report so as to give him an opportunity to respond to its contents. This he did by letter dated March 22, 2003, in which he made serious allegations of 'wrongdoing' on the part of Messrs. Doucet and Lewis in the investigation process itself. He wrote *inter alia* :

> *With reference to your correspondence dated March 18, 2003 and attached preliminary report.*
>
> . . .
>
> *It is apparent that Mr.'s* [sic] Doucet *and Lewis, believing that their offences have been successfully covered up, are using this investigation as a means of retaliation. You will note that none of their accusations or statements are supported by any type of evidence or documentation. It is only after the fact that Mr. McGougan and myself began producing documented evidence and complaints of their offences, that they began expressing any concerns regarding my abilities. You will find attached the "Investigation results", completed by Unit Manager D. Price, regarding the November 12, 2002 false complaint by Mr. Doucet and the original "Values and Ethics" complaint as just two of many examples.*
>
> *The statements of those interviewed, along with the actual documented evidence, are further proof of Mr.'s* [sic] Doucet *and Lewis' wrongdoing and deceit. By lying to you during this investigation they have, again, violated provisions of CSC's Discipline Code and the required steps to address this are being taken.*

[40] The complainant also responded to the final Report, challenging its conclusions by letter dated April 15, 2003. In his reply to the complainant, Mr. Gobeil advised that

he accepted the report in its totality, the investigator McIntyre being "an impartial, independent investigator" (Exhibit R-5).

[41] On that same day Mr. Gobeil wrote to Mr. Mills, advising that the McIntyre Harassment Investigation Report would suggest that the complainant "may not be suited" for the SHC environment and that "serious consideration be given to bringing back Officer Dubreuil to his base position in the Operation Division" – and asking that he be apprised of the action taken by May 23, 2003 (Exhibit R-13). The Acting Deputy Warden, Ed Muise remitted the matter for action to the Unit Manager, Mr. Price, who was initially not supportive of the redeployment, which he cautioned "would undoubtedly be seen as retribution by management" (Exhibit C-26). However, on May 26, 2003, Mr. Price advised the complainant of his redeployment, from the SHC to Dorchester Penitentiary in the following terms (Exhibit C-7):

> *As a follow up to our telephone conversation of 2002-05-23 you are advised I have made a decision to have you re-deployed from the Shepody Healing Centre to Dorchester Penitentiary. This decision is based upon the results of the Personal Harassment Investigation.*
>
> *For the time being you are not to be posted to the Shepody Healing Centre until such time I am satisfied there will be harmony at the work place.*
>
> *Please understand my decision is based on what I see as my responsibility as a manager to ensure there is no opportunity or potential for further conflict.*
>
> *Your redeployment is an intervention that I have not considered without serious thought. My decision is based upon my responsibility to ensure the work environment remains harmonious and at present I am not satisfied the opportunity exists.*
>
> *I am not stating that any person would be unprofessional or inappropriate but considering the knowledge of the situation and the results of the investigation, I am not prepared to chance the same.*
>
> *In closing, I have clearly indicated there is no intention to have you permanently removed from being reassigned to the Shepody Healing Centre.*
>
> *As discussed, we will review this at a later date when I feel the working environment will be such, that underlying feelings or issues are no longer present.*

> *Should you have any further questions, ideas or suggestions,*
> *I encourage you to contact me.*

[42] The complainant's response to his redeployment was two-fold. On June 16, 2003, he filed a harassment complaint against Mr. Price, alleging that his redeployment had been a reprisal for his having initiated the harassment complaint against Messrs. Doucet and Lewis and asked that he be reassigned to his position at the SHC (Exhibit C-21). On June 24, 2003, he filed a grievance under the collective agreement seeking the same relief (Exhibit R-8). The status of neither that complaint nor the grievance was addressed before me.

Summary of the arguments

For the complainant

[43] The complainant submits that this case falls squarely within the provisions of paragraph 23(1)(*a*) of the former *Act*. The evidence supports the allegations made by the complainant that the actions taken against him by Messrs. Doucet and Lewis were done in retaliation for his having exercised his right under section 6 of the former *Act* to be a member of the UCCO-SACC-CSN and to participate in its lawful activities.

[44] The performance evaluation reports (Exhibits C-2, C-3, C-4) reveal an exemplary employee and make no mention whatsoever of an inability to participate as a 'team player' in the rehabilitation program in the AADBT Unit. The evidence reveals that the complainant consistently and repeatedly raised with Messrs. Doucet and Lewis his concerns as to non-compliance with regulations governing inmate access to recreation (Exhibit C-12) and to tobacco (Exhibits C-9, C-10 and C-11), as well as violent and disruptive inmate misconduct (Exhibit C-20) warranting a disciplinary response under the *CCRA*. These are all matters that go to the health and safety of correctional officers who are in the front line of maintaining the security of any CSC penal institution, including the SHC.

[45] The emphasis which Messrs. Doucet and Lewis placed on the patient status of those receiving treatment at the SHC cannot override the fact that they are first and foremost inmates in a federal penitentiary. As a correctional officer, the complainant must ensure that proper security measures are taken vis-à-vis these inmates for the benefit not only of members of the UCCO-SACC-CSN, but for all those in the AADBT Unit involved in their treatment.

[46] Under the guise of his supposed inability to work within the cooperative framework of DBT in the AADBT Unit, Messrs. Doucet and Lewis retaliated against the complainant and had him transferred out of the SHC back to Dorchester Penitentiary because of his insistence that they comply with the basic security, health and safety standards applicable in all penal institutions. It is irrelevant that the complainant was not acting as a representative of the UCCO-SACC-CSN in raising his concerns with management. The provisions of section 8 of the former *Act* prohibit the employer from retaliating against any employee in the bargaining unit exercising a right under section 6 of the former *Act* to participate in the activities of the UCCO-SACC-CSN – a right which must be read broadly so as to include the right to further the health, safety and security concerns of UCCO-SACC-CSN members.

[47] The manner in which Messrs. Lewis and Doucet acted constituted harassment of the complainant and caused serious psychological stress for which the complainant has sought assistance under the Employee Assistance Program. As a consequence, he took over 200 hours of sick leave between November 2002 and April 2003 and has received psychological counselling (Exhibit C-24). The stress has detrimentally affected his marriage and his self-esteem as a correctional officer. Moreover, the manner in which the complainant was dealt with is such as to entitle him to aggravated damages as per the decision of the Board in *Chénier v. Treasury Board (Solicitor General Canada – Correctional Service),* 2003 PSSRB 27.

For the respondents

[48] The respondents submit that the narrow issue before the Board is whether the respondents have engaged in unfair labour practices contrary to the provisions of the former *Act*. The burden of proof rests on the complainant, and it is an onerous one to establish, by clear and cogent evidence, that the respondents discriminated against the complainant and sought to compel him by threats and intimidation to refrain from exercising his right to participate in the lawful activities of the UCCO-SACC-CSN, thus violating paragraph 8(2)(*a*) and subparagraph 8(2)(*c*)(ii) of the former *Act*.

[49] There is no evidence whatsoever that, in raising his concerns with management as to security, health and safety issues, the complainant was acting as a representative of the UCCO-SACC-CSN and, even if this were so, as asserted by the complainant and Mr. McGougan, his status as a UCCO-SACC-CSN's representative was never communicated to the employer. The evidence of Messrs. Doucet and Lewis in this

regard is confirmed by that of Mr. Price, who was called as a witness on behalf of the complainant and testified that they all understood the complainant to be acting on his own and in no way in a representative capacity on behalf of the UCCO-SACC-CSN. The complaint simply does not fall within the ambit of paragraph 23(1)(*a*) of the former *Act* and should be dismissed on that basis alone.

[50] The respondents note that the redeployment of the complainant has had no detrimental effect on his employment status as he maintains his salary, classification and other rights and benefits under the collective agreement. The decision taken by Mr. Price to redeploy the complainant was nothing other than a reassignment of duties by the employer in the exercise of its managerial rights under section 7 of the former *Act* "to determine the organization of the Public Service and to assign duties to and classify positions therein." Indeed, the substantive issues raised by way of this complaint cannot be said to engage section 8 of the former *Act* at all, as the complainant cannot identify 'a right under the *Act*' the exercise of which precipitated the alleged intimidating conduct of the respondents.

[51] Moreover, the allegations made are identical to those raised in other forums, in which they were found to be groundless. These include, first, the November 2002 complaint to the RCMP alleging violations by Messrs. Doucet and Lewis of both the *Criminal Code* and the *CCRA*, which upon investigation were found by the RCMP to have had no basis (Exhibit R-12 iii) and, second, the contemporaneous harassment complaint filed against Messrs. Doucet and Lewis, which upon investigation was also found to be without merit in March 2003 (Exhibit R-18). In any event, even if this complaint were upheld, the claim for damages is punitive and beyond the authority of the Board.

[52] In support of their argument on the merits, the respondents referred to the decisions of the Board in *Hamelin v. Treasury Board (Solicitor General – Correctional Service Canada) et al.*, PSSRB File No. 161-02-591 (1991) (QL); *Moore v. Caloia et al.,* PSSRB File No. 161-02-716 (1994) (QL); *Chopra et al. v. Nymark*, PSSRB File Nos. 161-02-858 and 860 (1998) (QL); and *Day v. Blattman et al.*, PSSRB File Nos. 161-02-809, 810 and 812 (1998) (QL). As to the issue of damages, reference was made to *Canada (Attorney General) v. Lussier,* [1993] F.C.J. No. 64 (C.A.) (QL); *Canada (Attorney General) v. Hester*, [1997] 2 F.C. 706 (T.D.); *Marinos v. Treasury Board (Solicitor General –*

Correctional Service Canada), PSSRB File No. 166-02-27446 (December 24, 1997) (QL); and *Chénier* (*supra*).

Reasons

Preliminary Issues

[53] This is a matter with which the Board was seized immediately prior to the coming into force on April 1, 2005, of a new, substantive statutory regime under the new *Act* and the *PSMA*. The *PSMA* governs the transition from the provisions of the former *Act*, itself repealed by virtue of section 285 of the *PSMA*, to those of the successor legislation, the new *Act*. That being the case, the Board must determine which statutory regime is to govern the resolution of the matter before it. Subsection 39(1) of the *PSMA* sets out the framework for determining the issue as follows:

> ***39.*** *(1) Subject to this Division, any proceeding that the former Board was seized of immediately before the day on which section 12 of the new Act comes into force is transferred to the new Board to be disposed of in accordance with the new Act.*

[54] The provisions of subsection 39(1) of the *PSMA* make it clear that the newly established PSLRB has jurisdiction over those matters in train before the now defunct PSSRB and not yet disposed of by that tribunal, thus ensuring the seamless institutional transfer of all matters pending before the predecessor tribunal to its newly established successor. The manner in which the case is to be disposed of is to be in accordance with the provisions of the new *Act*.

[55] However, to determine the substantive law to be applied in these circumstances one must have recourse to the relevant authorities and the provisions of the *Interpretation Act*, R.S.C. 1985, c. I-21. These are drafted to ensure the attenuated survival of repealed legislation, which continues to apply to circumstances arising prior to repeal, provided vested rights are at issue. By way of contrast, matters of procedure do not survive repeal, and for these the new legislation takes immediate effect, even for circumstances arising prior to its enactment. Section 43 of the *Interpretation Act* provide in part:

> ***43.*** *Where an enactment is repealed in whole or in part, the repeal does not*

. . .

> (c) *affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,*
>
> . . .
>
> (e) *affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph* (c). . . .
>
> *and an investigation, legal proceeding or remedy as described in paragraph* (e) *may be instituted, continued or enforced . . . as if the enactment had not been so repealed.*

[56] The authorities are in agreement that the statute codifies the common law presumption that, absent a clear legislative intent to the contrary, vested rights are not affected by new legislation and survive the repeal of an enabling statute, which continues to apply in such circumstances as if not repealed. As to matters of procedure, the repealed legislation has no force, and the new legislation applies. The cases are discussed by Sullivan in *Sullivan and Driedger on the Construction of Statutes* (4th ed., 2002) at pp. 565-589 and by Côté in *Interpretation of Legislation in Canada* (2nd ed., 1992) at pp. 137-169. Are there vested rights at issue here or mere procedural matters? This brings us to the issue of onus and its characterization.

[57] In contrast to the provisions of the former *Act* governing a complaint of unfair practice, in certain circumstances those of the new *Act* shift the burden of proof from the complainant to the respondent. The legislation stipulates at s. 191 (3) of the new *Act*:

> (3) *If a complaint is made in writing under subsection 190(1)* [subsection 23(i) of the former *Act*] *in respect of an alleged failure by the employer or any person acting on behalf of the employer to comply with subsection 186(2)* [subsection 8(2) of the former *Act*] *the written complaint is itself evidence that the failure actually occurred and, if any party to the complaint proceedings alleges that the failure did not occur, the burden of proving that it did not is on that party.*

[58] Is this shift in the burden of proof merely a matter of procedure or is it one of substance affecting vested rights? As a general principle, the rules of evidence are said to be procedural in that they affect rights adjectivally but not substantively. But, as Côté notes, there is conflicting case law on whether reversal of the onus of proof is a

matter of mere procedure or of substance affecting rights (*supra,* at p. 167, fn 403). However, since the decision of the Supreme Court of Canada in *Wildman v. The Queen,* [1984] 2 S.C.R. 311, the better view is that it is a matter of substance. There, Justice Lamer (as he then was) wrote at page 331:

. . .

> *Some rules of evidence must nevertheless be excluded for they are not merely procedural, they create rights and not merely expectations and, as such, are not only adjectival but of a substantive nature. Such has been found to be the case for rules or laws creating presumptions arising out of certain facts." (p. 657). . . .*

. . .

[59] The argument, then, is that to impose on the respondents the reverse onus of proof introduced in the new *Act* would interfere with their vested right to rely on the ordinary common law principle that 'one who alleges must prove'. It is strengthened by the fact that the presentation and argument of this case took place twelve months prior to the coming into force of the new *Act*. In such circumstances, dilatoriness on the part of the Board in issuing a decision ought not to prejudice a party before it.

[60] Having considered the matter, and in light of its jurisprudence, the Board concludes that the burden of proof lies on the complainant in the matter before it (see *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Workers v. Correctional Service Canada, Treasury Board and Don Graham*, 2005 PSLRB 50; *Lamarche v. Marceau*, 2005 PSLRB 153; *Cloutier v. Leclair*, 2006 PSLRB 5; and *Rioux v. Leclair*, 2006 PSLRB 12). That said, even were the Board to have concluded the opposite, it is of the view that the respondents would have discharged that onus decisively. As was pointed out by the Ontario Labour Relations Board in *Barrie Examiner v. Typographical Union, Local 873,* [1975] OLRB Rep. October 745 (QL), on an unfair labour practice complaint where anti-union animus was an element of the misconduct, the location of the onus of proof is of relevance only where the evidence before the Board is equally balanced. In such circumstances, it is difficult to determine whether the alleged misconduct was innocuous or motivated by anti-union animus, so one resorts to the onus of proof to reach a decision. But that is not this case.

[61] Here the evidence in its totality supports conclusively the position of the respondents, that their actions vis-à-vis the complainant were taken for valid managerial reasons. As absolutely no evidence was forthcoming and no submissions made with respect to the individual respondent Dave Niles, the Board deems the complaint made against him to have been abandoned in any event.

The merits of the complaint

[62] The operative sections of the former *Act* here are section 23 and subsection 8(2), which read in part:

> ***23.*** *(1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed*
>
> *(a) to observe any prohibition contained in section 8, 9 or 10;*
>
> *(2) Where, under subsection (1), the Board determines that the employer, an employee organization or a person has failed in any manner described in that subsection, the Board may make an order directing the employer, employee organization or person to observe the prohibition, give effect to the provision or decision or comply with the regulation, as the case may be, or take such action as may be required in that behalf within such specified period as the Board may consider appropriate.*
>
> ***8.*** *(2) Subject to subsection (3), no person shall*
>
> *(a) refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act;*
>
> . . .
>
> *(c) seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee*
>
> . . .
>
> *(ii) to refrain from exercising any other right under this Act.*

[63] In argument, the respondents submitted that, as presented, this complaint falls outside of the Board's jurisdiction on two grounds: there is simply no evidence that would support the allegation that the respondents' alleged misconduct was motivated by knowledge of the complainant's membership in an employee organization nor evidence that the complainant was exercising a right under the former *Act*. They ask the Board not to consider the matter on its merits.

[64] The complainant countered that, in all of his actions, he was furthering the health, safety and security concerns of the UCCO-SACC-CSN and its members, and as such was exercising his right to "participate in the lawful activities of the employee organization of which the employee is a member", under section 6 of the former *Act*.

[65] Both *Moore v. Caloia et al.* (*supra*) and *Day v. Blattman et al.* (*supra*), can be read as having been decided on the narrow jurisdictional basis that the Board could not inquire into the complaints there made because the complainants were not exercising a 'right under this Act'. In neither was section 6 of the former *Act* pleaded. That is not this case.

[66] Here, section 6, which can be said to be the keystone of the former *Act*, guaranteeing as it does the right of every employee to be a member of an employee organization and to participate in its lawful activities, has been pleaded. The ordinary principles of statutory interpretation counsel that the section be given a "fair, large and liberal construction" (see section 12 of the *Interpretation Act*), and such an approach is buttressed by the principles of the *Canadian Charter of Rights and Freedoms,* which at paragraph 2(*d*) guarantees freedom of association (see *Dunmore v. Ontario (Attorney General),* 2001 SCC 94).

[67] Moreover, Chief Justice Dickson long ago observed that "the question of what is and is not jurisdictional is often very difficult." That was in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. All of this leads the Board to conclude that rather than make a determination on narrow jurisdictional grounds, it should review the complaint fully on its merits and determine whether or not the respondents have acted in violation of section 8 of the former *Act* as alleged.

[68] This complaint was filed on February 17, 2003, alleging violations of the former *Act* by the respondents to that date. In the proceedings before me, the respondents

were content to allow the matter to proceed with the inclusion of allegations of misconduct violative of the former *Act* on the part of the respondents occurring subsequent to that date. These culminated in the redeployment of the complainant from the SHC to Dorchester Penitentiary, effective on May 26, 2003.

[69] The complaint itself was never formally amended to that effect but even absent such formal amendment the Board has an inherent jurisdiction to entertain those additional allegations. This is clear from the decision of the Federal Court of Appeal in *Via Rail Canada Inc. v. Cairns*, 2004 FCA 194, where at issue was the remedial jurisdiction of the CIRB on reconsideration to take into account events occurring subsequent to the original breach of the governing legislation. There, upholding the propriety of the Canada Industrial Relations Board (CIRB) in so doing – and indeed its desirability in the labour relations context – Justice Evans wrote as follows at paras. 75-78:

. . .

> *(iii) could the Board take account of events subsequent to Decision 35?*
>
> [75] *Counsel for VIA stressed that the only breach of the Code that* Decision 35 *was designed to remedy occurred in the period leading up to the CCAA. Accordingly, the Board exceeded its jurisdiction when, in framing the remedial order in* Decision 230*, it took into account events that had occurred after the date of the BLE's breach of the Code.*
>
> [76] *I do not agree. In the "dynamic, complex and sensitive field" of labour relations (*Royal Oaks Mines *at para. 57,* [1996] 1 S.C.R. 369] *labour relations boards must be able to take account of changing circumstances if they are to discharge their statutory mandate with respect to "the constructive resolution of labour disputes for the benefit of the parties and the public" (*ibid*. at para. 56). Thus, referring to the wide powers conferred on the Board by subsection 99(2), Cory J. said in* Royal Oak Mines *(at para. 55):*
>
> > In my view, this was done to give the Board the flexibility necessary to address the ever changing circumstances that present themselves in the wide variety of disputes which come before it in the sensitive field of labour relations.
>
> [77] *To confine the Board's ability to craft a remedy by reference to the facts as they were when the breach was*

> *committed would encourage the filing of multiple complaints covering different periods of time. To put the Board into this kind of a straitjacket would thwart Parliament's purpose in granting broad and flexible remedial powers to the Board, namely, to enable it to bring about the constructive resolution of industrial disputes in fluid labour relations situations.*
>
> [78] *Counsel provided no authority for the proposition that, in fashioning a remedy for a breach of the Code, the Board may not take into account events occurring after the date of the breach. In my view, it was not patently unreasonable for the Board in* Decision 230 *to have had regard to events subsequent to the BLE's breach of the Code.*
>
> . . .

If that is the case on a reconsideration application, then *a fortiori* on an original complaint. See as well *Re Saint John Shipbuilding, a division of Irving Shipbuilding Inc.*, [2004] N.B.L.E.B.D. No. 28 (QL).

[70] The Board has already indicated that the burden of proof in these proceedings lies on the complainant. The burden is substantial, for as the Board noted in *Gennings v. Milani*, PSSRB File No. 161-02-87 (1971) (QL), ". . . [it is to] be borne in mind that a complaint under section 8 of the Act has quasi-criminal qualities. . . ." However, the test is a civil one, that of a balance of probabilities. That test is a fluid one and takes its shape and contour from the nature and circumstances of the particular case. In short, within the rubric of 'balance of probabilities' there are degrees, although the standard itself remains the same. There is highest authority for this proposition. In *Bater v. Bater,* [1950] 2 All E.R. 458 (C.A.) Denning, L.J. stated:

> . . .
>
> *. . . Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion. . . .*
>
> . . .

[71] Canadian courts have asserted that the same principle applies in proceedings such as this. Thus, Justice O'Leary of the Ontario Divisional Court stated in *Re Canadian Union of Public Employees, Local 1 and Toronto Hydro Electric System et al.*, (1978), 84 D.L.R. (3d) 601:

. . .

> *This Court in Re Bernstein and College of Physicians & Surgeons of Ontario (1977), 15 O.R. (2d) 447, 76 D.L.R. (3d) 38, made an attempt to be of some assistance to arbitrators and like bodies in interpreting what is meant by the proposition that "in civil matters the test is that of the balance of probabilities". I quote in particular from p. 470 O.R., p. 61 D.L.R. of that decision:*
>
> > *In my view discipline committees whose powers are such that their decisions can destroy a man's or woman's professional life are entitled to more guidance from the Courts than the simple expression that "they are entitled to act on the balance of probabilities". By referring to the decisions of several distinguished jurists I hope I have made it easier for them to understand the kind of proof required before a conviction can be entered in a particular case.*
> >
> > *The important thing to remember is that in civil cases there is no precise formula as to the standard of proof required to establish a fact.*
> >
> > *In all cases, before reaching a conclusion of fact, the tribunal must be reasonably satisfied that the fact occurred, and whether the tribunal is so satisfied will depend on the totality of the circumstances including the nature and consequences of the fact or facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding.*

. . .

[72] These considerations are particularly apposite in cases such as this where the Board is asked to draw adverse inferences from evidence on its face not corroborative of the allegations made.

[73] At bottom, this is an unfortunate case of the clash of two cultures within a common enterprise – the CSC. On the one hand, there is the security driven culture of

correctional officers trained to provide the full range of security services in the high-risk environment of a correctional facility. On the other, there is the rehabilitative culture of a therapeutic staff trained in the treatment of mentally ill patient inmates of a correctional facility.

[74] On his deployment from Dorchester Penitentiary to the SHC, the complainant, unfortunately, became enmeshed in the clash of those two cultures. There is no question that the complainant is a highly competent correctional officer who, on the basis of the evidence and testimony before me, performed his primary security duties commendably. But in the setting of the SHC he was required as well to integrate into the AADBT Unit as an active participant in the program of behaviour modification employed there for patient inmate rehabilitation known as DBT.

[75] This calls for modulating the approach ordinarily taken by correctional officers to security issues in a correctional facility so as to accommodate the behaviours and needs of patient inmates in the AADBT Unit. From the evidence it is clear that the complainant had difficulty in adapting to the philosophy underlying DBT and did not integrate well into the therapeutic setting. He preferred a setting more focussed on security. Already in the spring of 2002, his zeal to ensure strict compliance with what he perceived to be serious security breaches at the SHC was evident. Principal among these were the issues of "contraband" tobacco being supplied to patient inmates by therapeutic staff and failure on the part of senior SHC personal to process internal charges laid against patient inmates .

[76] The complainant wrote in his letter of January 6, 2003, to Mr. Gobeil that throughout his deployment to the SHC he had "attempted to carry out my duties as a peace officer" (Exhibit C-17).

[77] But there are appropriate ways to carry out those duties and ways to do so inappropriately, and the complainant chose to follow the latter path. Since this concerns involved security, he ought to have raised them directly with his immediate supervisor, Mr. Price, for appropriate action to be taken by senior personnel as between the two institutions, Dorchester Penitentiary and the SHC.

[78] Instead, the complainant took it upon himself in the case of the "contraband" tobacco to advise the SHC staff of his assessment of the practice as one for which they could be criminally liable (Exhibit R-19).

[79] Similarly, with respect to the alleged failure to process internal charges, the complainant did not raise the matter formally with his immediate supervisor, as he ought to have done. Rather, he cooperated with Mr. McGougan, providing much of the information which the UCCO-SACC-CSN used to pursue the issue by a series of complaints.

[80] The first complaint was made to the CSC Senior Officer, Values and Ethics, in June 2002 (Exhibit C-29.i-iii; xxiii); the second was made to then CSC Commissioner McClung on July 22, 2002 (Exhibit C-29.xxvii). Several months later, in late October, further complaints were made to the Public Service Integrity Officer for the Government of Canada (Exhibit C-29.xl) and to the Solicitor General of Canada (Exhibit R-12.i). By this time, the atmosphere at the SHC was a tense, even volatile one.

[81] This confrontational approach to addressing these serious matters culminated in the complaint against Messrs. Doucet and Lewis that was filed with the RCMP on November 2, 2002, requesting that the two be investigated for possible *Criminal Code* violations. It was shortly thereafter that Mr. Gobeil received the harassment complaint against Messrs. Doucet, Lewis and Niles. The complaint filed with the RCMP was a particularly serious matter, one devastating to Messrs. Doucet and Lewis, whose professional integrity was publicly called into question and this needlessly so as the RCMP concluded two months later following investigation that there was no evidence to support any criminal charges (Exhibit R-12.iii).

[82] It is little wonder that from this barrage of complaints attacking the integrity of senior personnel Mr. Doucet would conclude that the complainant's continued presence at the SHC "is detrimental to the good functioning of our centre" and obstructing its operations. This he did in his memo to the Warden and Deputy Warden of Dorchester Penitentiary requesting that the complainant "be removed from the SHC and redeployed to another department" (Exhibit C-8).

[83] As the evidence shows, Mr. Gobeil took every reasonable step to ensure that the allegations made by the complainant in his harassment complaint would be addressed through proper channels, be it by way of the grievance process, in the case of alleged unjust discipline, by way of review in the case of his unsatisfactory performance evaluation, by way of policy revision in the case of "contraband" tobacco, and by way of deferral to the RCMP investigation in the case of the alleged improper dismissal of internal charges (Exhibit R-1).

[84] The principal allegations against Messrs. Lewis and Doucet - that they sought to have the complainant redeployed by way of retaliation for his actions - were properly processed for independent investigation in accordance with the Treasury Board *Policy on the Prevention and Resolution of Harassment in the Workplace*. The complainant withdrew from that investigation to his own detriment and cannot now be heard to assert that he was not provided an opportunity to put forward his case.

[85] In none of this, despite the complainant's assertions to the contrary, is there the slightest evidence of manipulation or interference in the investigation by Mr. Gobeil, much less an attempt to suppress relevant evidence of wrongdoing (Exhibit C-22).

[86] Likewise, the complainant's intemperate letter of March 22, 2003, to the investigator, Ms. McIntyre, accusing Messrs. Doucet and Lewis of "wrongdoing and deceit" and of "lying to you during this investigation" was groundless (Exhibit C-18). It is of a piece with the complainant's startling assertion on the stand that the RCMP had wrongly concluded that there was no evidence to warrant the laying of criminal charges against Messrs. Doucet and Lewis.

[87] In short, the evidence reveals a complete misperception by the complainant of the circumstances surrounding his redeployment from the SHC back to Dorchester Penitentiary. His own conduct, even if driven by a sense of righteous conviction that he was carrying out his duties so as to ensure the health, safety and security of the SHC, showed him to be incapable of integrating into the DBT rehabilitation program carried out there on behalf of patient inmates. Driving both Messrs. Doucet and Lewis in their attempts to have the complainant redeployed from the SHC was a legitimate concern and professional opinion that his continued presence there was detrimental to the DBT program itself and the ongoing functioning of the SHC.

[88] Telling in this regard is the assessment of the situation by the complainant's immediate supervisor, Mr. Price, who was called to testify on his behalf. His initial assessment of the request by Mr. Doucet to have the complainant redeployed was that there was insufficient evidence to warrant such action. That was in mid-November 2002 (Exhibit C-8.ii-iv).

[89] By early January 2003, however, aware of the complainant's request that Messrs. Doucet and Lewis be removed from the SHC, Mr. Price suggested that in the interests of ensuring "a positive work environment conducive to professional

standards" it was desirable that they meet to discuss "the best method of ensuring we minimize any potential further conflict in a reasonable manner" (Exhibit R-7). In the event, such a meeting did not take place as the complainant was away on sick leave for the greater part of the first few months of 2003.

[90] In his letter of May 26, 2003, following release of the McIntyre Harassment Investigation Report, advising the complainant of his redeployment from the SHC to Dorchester Penitentiary, Mr. Price emphasized that he was taking that action "to ensure the work environment remains harmonious and at present I am not satisfied the opportunity exists." At the same time he emphasized that "there is no intention to have you permanently removed from being reassigned to the Shepody Healing Centre" once satisfied that the work environment there was such that harmony could be assured (Exhibit C-7).

[91] On the stand, Mr. Price reiterated that the complainant's redeployment from the SHC was not permanent and would be reconsidered in the future. This testimony, coupled with Mr. Price's letter of May 26, 2003, confirms my view that the actions of the respondents which are the subject of this complaint were taken so as to ensure the integrity of the DBT Program at the SHC.

[92] On the basis of all of the foregoing, I am satisfied that the impugned conduct of the individual respondents, Luc Doucet and David Lewis, and of the Institutional respondent, Treasury Board (Solicitor General Canada – Correctional Service), was in its totality non-culpable conduct free of anti-union animus. Throughout these respondents acted properly in the exercise of managerial rights under section 7 of the former *Act*. As noted at paragraph 61, the complaint against Dave Niles is deemed to have been abandoned. In short, there has been no breach of paragraph 8(2)(*a*) and subparagraph 8(2)(*c*)(ii) of the former *Act*.

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

(The Order appears on the next page)

Order

[94] This complaint is hereby dismissed.

February 27, 2006

Thomas Kuttner, Q.C.,
Board Member