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File: 566-02-417

Citation: 2007 PSLRB 70



*Public Service  
Labour Relations Act*

Before an adjudicator

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BETWEEN

**BALKAR SINGH BASRA**

Grievor

and

**DEPUTY HEAD  
(Correctional Service of Canada)**

Respondent

Indexed as

*Basra v. Deputy Head (Correctional Service of Canada)*

In the matter of an individual grievance referred to adjudication

**REASONS FOR DECISION**

***Before:*** Paul Love, adjudicator

***For the Grievor:*** Corinne Blanchette, Union of Canadian Correctional Officers -  
Syndicat des agents correctionnels du Canada - CSN

***For the Respondent:*** Ken Graham, Treasury Board Secretariat,  
Amita Chandra, counsel and Harvey A. Newman, counsel

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Heard at Abbotsford, British Columbia,  
October 25, 26 and 27, 2006.

## REASONS FOR DECISION

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### **Individual grievance referred to adjudication**

[1] Balkar Singh Basra is a correctional officer at the CX-01 group and level employed at the Matsqui Institution of the Correctional Service of Canada (“the CSC”), in Abbotsford, British Columbia. He grieves an indefinite suspension imposed by the CSC on April 3, 2006, in the following terms:

...

*On April 3, 2006, Randie Scott, acting warden of Matsqui Institution suspended me indefinitely without pay pending an investigation. I grieve that this disciplinary action is unwarranted, excessive and unfounded in facts and law.*

...

[2] Mr. Basra seeks immediate reinstatement, destruction of the mention of disciplinary action and investigations from his file, payment of all wages lost since the suspension, a credit for all leave that would have accrued, missed overtime, reinstatement of pension credits that would have been earned, and interest.

[3] This matter was referred to adjudication under paragraph 209(1)(b) of the *Public Service Labour Relations Act* (“the Act”), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22.

### **Summary of the evidence**

[4] Mr. Basra has been employed at Matsqui Institution since he became an indeterminate employee on August 24, 1999. Matsqui Institution is a medium security penitentiary for male inmates in the Pacific Region. It has a capacity of 350 inmates and a staff complement of 250.

[5] On August 24, 1999, Mr. Basra signed a declaration acknowledging that he had received the *Standards of Professional Conduct in the Correctional Service of Canada* (“the *Standards of Professional Conduct*”) (Exhibit E-4) and the *Code of Discipline in the Correctional Service of Canada* (“the *Code of Discipline*”) (Exhibit G-17) and that he would undertake to maintain the standards of professionalism and integrity set out in those documents (Exhibit E-5).

[6] In the *Criminal Code*, R.S.C., 1985, c. C-46, the definition of peace officer includes a guard as defined under Part I of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. In his letter of appointment dated August 10, 1999 (Exhibit E-3), Mr. Basra was advised that he was a peace officer.

[7] The “Commissioner’s Introduction” to the *Standards of Professional Conduct* reads in part as follows:

...

*As public servants, we are accountable to our Minister and to Parliament, and, through them, to the Canadian people as a whole. Our behaviour must, at all times, show that we are worthy of their trust and confidence to carry out the responsibilities of our agency. As employees in the field of corrections, we have a special obligation to make sure that everything we do in our work – whether it is administrative or involves direct contact with offenders – ultimately contributes to the protection of society. This is a vital obligation that is both demanding and exciting. It calls upon each of us to meet high standards of honesty and integrity, and to approach our work in a spirit of openness, compassion and co-operation. These are indeed the hallmarks of professionalism.*

...

[8] The CSC has published the *Code of Discipline* (Exhibit G-17) containing a number of specific rules, including “Standard Two Conduct and Appearance,” which reads in part as follows:

...

#### *Infractions*

*An employee has committed an infraction, if he or she:*

...

- *acts, while on or off duty, in a manner likely to discredit the Service;*
- *commits an indictable offence or an offence punishable on summary conviction under any statute of Canada or of any province or territory, which may bring discredit to the Service or affect his or her continued performance with the Service;*

- *fails to advise his or her supervisor, before resuming his or her duties, of being charged with a criminal or other statutory offence;*

...

[9] The respondent called Glen Brown, who is the Warden at Matsqui Institution, as its only witness. From the cross-examination of Mr. Brown, including a review of the documents entered as exhibits in his cross-examination, it appears that Mr. Basra has met the performance objectives set for him by the CSC for various performance periods from November 1, 1999, to September 30, 2005 (Exhibits G-6, G-7, G-8, G-9, G-10 and G-11). He received from Mr. Brown (Exhibit G-12) and the Deputy Commissioner (Exhibit G-13) commendations for his role in preventing an escape attempt in September 2001. Mr. Basra has a good attendance record at work (Exhibit G-2). The respondent does not dispute that Mr. Basra is a good employee.

[10] Mr. Brown received a letter from P.A. Insley, Information and Privacy Coordinator/Crown Counsel, Criminal Justice Branch, British Columbia Ministry of Attorney General dated March 24, 2006 (Exhibit E-7). The letter related some circumstances and enclosed a copy of information sworn on March 17, 2006, alleging a sexual assault by Mr. Basra against a female complainant on September 10, 2004, in Surrey, British Columbia, contrary to section 271 of the *Criminal Code*. The letter contained the following synopsis of the allegations:

...

*According to the Police report, Mr. Basra first had contact with the complainant through a chat line. They eventually met for an evening of drinking and clubbing. On the second meeting the couple were at Mr. Basra's house having a few drinks before going out for dinner. After a few sips of the third drink which Mr. Basra made for her, the complainant began to fade, feeling unfocused and hazy. She awoke the next morning naked on Mr. Basra's bed. She was unable to remember most of the previous evening after the point of sipping the third drink.*

*Reportedly, Mr. Basra gave the complainant a false name; however, the police were able to locate him from the complainant's cell phone records. When questioned by the police, Mr. Basra denied having had sex with the complainant or even knowing her and refused to give a DNA sample. A DNA warrant was obtained and Mr. Basra's DNA was found to match an exhibit taken from the complainant.*

*A warrant has been issued for Mr. Basra's arrest. You may wish to contact the Surrey Provincial Court Registry... if further information is required concerning details as to the progress of this case.*

*This information is provided to you pursuant to our policy; you may wish to share this information with Mr. Basra, to allow him to respond in the appropriate forum.*

...

[11] The charge relates to off-duty criminal conduct that is alleged to have occurred 18 months before the information was sworn. The complainant is not an employee at Matsqui Institution. There is no indication that Mr. Basra has been involved in any problem in the workplace or outside of the workplace since the alleged criminal conduct arose.

[12] The letter from the Crown counsel is the only written documentation that the CSC ever obtained during its investigation. The CSC did not obtain any information concerning the terms of Mr. Basra's form of release or any conditions of his judicial interim release. I do not know, for example, whether Mr. Basra is subject to any firearms restrictions.

[13] At the time of the receipt of the letter from the Crown counsel, Mr. Brown was away from Matsqui Institution and Randie Scott was acting as warden in his absence. At a meeting on April 3, 2006, Mr. Scott suspended Mr. Basra indefinitely without pay by letter dated April 3, 2006 (Exhibit E-6). It is important to consider the text of the suspension, as the letter makes it clear that the CSC was convening a disciplinary investigation and that Mr. Basra would be contacted by the investigating manager in due course:

...

*This is to advise that you are hereby suspended indefinitely without pay effective immediately, pending the completion of a disciplinary investigation, which has been convened to establish the facts surrounding your involvement in the allegation that you have contravened the Correctional Service of Canada's Standard of Professional Conduct.*

*Information received from the Crown Counsel, Ministry of Attorney General this date advises you have been charged with sexual assault under Section 271 of the Criminal Code of Canada.*

*During this period of suspension you are not to enter CSC premises without the permission of the Warden or his representative.*

*You will be contacted by the investigating manager in due course.*

...

[14] In an April 3, 2006, email (Exhibit G-3) from Mr. Scott to Donna Mynott, a Human Resources officer at Matsqui Institution, Mr. Scott explained that he went over the gist of the letter with Mr. Basra at the April 3 meeting. During the course of the meeting Mr. Basra volunteered that the matter related to an allegation from 2004, that he had fully cooperated in the original matter, that he had not heard anything for the last year and a half and that he thought that the matter was over. Mr. Scott advised him that a formal investigation into Mr. Basra's actions would be convened. Mr. Scott advised Mr. Basra to call him if he had any questions.

[15] Mr. Scott was not called as a witness by the respondent. Given the text of the letter of suspension and his email of April 3, 2006, he appears to have suspended Mr. Basra without speaking to him first to ascertain the facts surrounding the alleged offence, without reviewing Mr. Basra's history with the CSC and without speaking to any of Mr. Basra's supervisors or co-workers to assist in a risk assessment.

[16] On April 24, 2006, Mr. Scott directed Jason Strijack, Acting Associate Unit Director, PI/RTC, and Jim Farrell, Security Investigative Officer, Mountain Institution, to commence a disciplinary investigation surrounding Mr. Basra's involvement in two allegations (Exhibit E-8):

...

- 1. That on March 17, 2006 Mr. Basra was charged with sexual assault under Section 271 of the Criminal Code. The sexual assault is alleged to have occurred on or about September 10, 2004 at or near Surrey, British Columbia.*
- 2. That Mr. Basra failed to advise his supervisor, before resuming his or her duties, of being charged with a criminal offence.*

...

[17] A report of the investigation was due by May 31, 2006. Neither investigator has yet prepared a written report in connection with the disciplinary investigation. Mr. Brown was absent from Matsqui Institution at the time the order was given to start the disciplinary investigation.

[18] Mr. Basra was notified by letter dated April 24, 2006 (Exhibit E-9), of the appointment of the investigators and the allegations for investigation under the “Code of Professional Conduct.” Mr. Basra was notified of the names of the investigators, but was not provided with their contact information. The letter also stated that he would be contacted in due course to arrange an interview. He was also advised of his right to bring a representative to the interview.

[19] Neither Mr. Strijack nor Mr. Farrell ever talked directly to Mr. Basra about the allegations, sent a letter to Mr. Basra requesting his presence for an interview or notified him of a date set for an interview. The investigators made no attempt to interview Mr. Basra. The best that can be said of the investigation was that Mr. Strijack and Mr. Farrell attended at the courthouse in Surrey from time to time to monitor the criminal proceedings against Mr. Basra and made phone calls to the Royal Canadian Mounted Police (“the RCMP”).

[20] On April 24, 2006, Mr. Scott reviewed the suspension without pay (Exhibit E-11). He determined that the suspension should continue.

[21] Mr. Basra’s lawyer, David B. Clements, wrote to Mr. Brown on April 27, 2006 (Exhibit E-10). The letter indicated that neither Mr. Basra nor Mr. Clements was aware of the sexual assault charge until after Mr. Basra received the letter of suspension. In his letter, Mr. Clements provided some information concerning the nature of the proceedings:

...

*We were retained by Mr. Basra soon after he was interviewed by the Surrey RCMP on November 18, 2004 in relation to an allegation of sexual assault.*

*After giving a statement to the RMCP in November 2004, Mr. Basra was released on a Promise to Appear with a return date of January 10, 2005 in Surrey Provincial Court. We attended for Mr. Basra on that date and we were advised by an employee of the Surrey Provincial Crown Counsel that no report had been received from the RCMP and therefore no*

*charge had been laid. We wrote to the Crown on that same date asking to be advised if and when a report was received from the RCMP (see letter enclosed for ease of reference).*

*Thereafter, on a monthly basis, we contacted the Crown to ask if any report had been received and if any charges were contemplated; the last inquiry being made in early March 2006. On each and every occasion we were informed that no report had been received and therefore no charge had been laid.*

*We were contacted by Mr. Basra in the 3<sup>rd</sup> week of March 2006 and he advised us that he had received a letter from his employer indicating that he was to be immediately suspended because the Crown had advised that he had been charged with a criminal offence. We, however, had never been notified by the Crown despite our repeated requests. We contacted the Crown and found that Mr. Basra had been charged with sexual assault on March 17, 2006 with an offence date of September 10, 2004. Neither we nor Mr. Basra were aware of this charge until he received his letter of suspension.*

...

[22] It is clear from the evidence that even though Mr. Basra was aware that he was being investigated by the RCMP in connection with the charge, Mr. Scott was made aware of the sworn information before Mr. Basra. On May 4, 2006, Mr. Scott wrote an email to the investigators notifying them of the receipt of the letter from Mr. Clements, and in particular referring to an apparent lack of action on the part of the Crown counsel since the date of the offence. He also wrote that neither Mr. Basra nor Mr. Clements was aware of the charge prior to receiving the suspension letter.

[23] Mr. Brown testified that the contents of Mr. Clements' letter did not substantively impact the decision to continue Mr. Basra's suspension. He said that the more material issues of concern to the CSC were the nature of the criminal allegation and Mr. Basra's level of cooperation with the police during the investigation. Mr. Brown said that a less relevant concern was whether Mr. Basra notified the CSC of the allegation.

[24] From the chain of emails filed along with the May 4, 2006, email (Exhibit E-14) it is clear that the investigators had collected no new information and merely attended court.



[25] It appears from an email filed as Exhibit E-15 that by July 7, 2006, the investigators had not contacted Mr. Basra directly and had not obtained any new information from the RCMP. The investigators attended court on July 6, 2006, and reported that Mr. Basra was to be arraigned on July 28, 2006.

[26] On July 27, 2006, the day before the scheduled arraignment hearing, Mr. Brown wrote to Mr. Basra to inform him of his decision to continue the suspension without pay. The only new information at that time was the fact that an arraignment hearing was to take place the next day.

[27] The CSC appears to have had some concerns with the investigation, as set out in the emails filed as Exhibit E-21. On July 28, 2006, Bobbi Sandhu, Regional Administrator for Security, wrote to Inspector J.M. McAllister of the RCMP requesting that the following information be provided:

...

- 1) *When was Correctional Officer BASRA made aware that he was being investigated?*
- 2) *When was Correctional Officer BASRA notified of potential charges?*
- 3) *When was Correctional Officer BASRA formally charged with the offence?*

*A police report will assist in furthering the investigation into this matter.*

*Please forward the information to the undersigned who will then forward [sic] to the assigned disciplinary team.*

...

[28] There was no proof tendered in this proceeding that the CSC obtained an answer from the RCMP. From what was tendered before me, it is clear that the CSC never had in its possession a police report or any of the Crown disclosure package provided in connection with the criminal charge. There is no clear explanation of the CSC's failure to collect further information. If the investigators had been called as witnesses, perhaps there would have been clearer information at the hearing as to the steps that they took to ascertain the facts.

[29] On September 6, 2006, Mr. Brown wrote a letter to Mr. Basra maintaining his suspension (Exhibit E-22). On September 11, 2006, Mr. Farrell reported that he attended court, that Mr. Basra did not attend but had an agent present and that the Crown counsel had not provided all of the disclosure to the defence.

[30] On September 27, 2006, Vince Leblanc, Acting Warden, Matsqui Institution, wrote to Mr. Basra maintaining his suspension (Exhibit E-26). The only new information at that time was that Mr. Farrell and Mr. Strijack attended court on September 19, 2006, and that the court was going to set a date for a preliminary inquiry. Exhibit E-27 references a response from the RCMP; however, no such response was filed as an exhibit before me.

[31] On October 5, 2006, Mr. Basra was notified in a separate memorandum from Mr. Leblanc that a review was being conducted of Mr. Basra's reliability status in light of the sexual assault charge (Exhibit G-20). On October 16, 2006, Mr. Brown wrote a letter to Mr. Basra maintaining his suspension (Exhibit E-25).

[32] In 2006, Mr. Basra made a complaint concerning the breach of his privacy rights by Mr. Brown. An apology has been offered to Mr. Basra from the CSC for the breach of his privacy rights.

[33] The Treasury Board Secretariat has published "Guidelines for Discipline" (Exhibit G-26) for the core public administration. That guide provides that as part of an investigation, the employee has the right to be confronted with the alleged wrongdoing and to have an opportunity to respond as part of a disciplinary investigation. Under those guidelines employees can be suspended indefinitely:

...

- *pending investigation of certain suspected misconduct when the presence of the employee at work cannot be tolerated or could undermine or impede the investigation (see Annex 2 for indefinite suspension criteria as enunciated in Larson PSSRB file 2002 PSSRB 9); or*

...

[34] "A Guide to Staff Discipline and Non Disciplinary Demotion or Termination of Employment for Cause" (Exhibit G-25) calls for timely discipline decisions.

[35] Mr. Brown has a 28-year history in federal corrections. He was Associate Warden at Matsqui Institution from 1996 to 2005. Mr. Brown became Warden at Matsqui Institution in June 2005. He has worked at Kent Institution as a living unit officer and as a living unit development officer. He has worked as a community parole officer and as a project manager at regional and national CSC headquarters. He has also worked as associate warden, and acting deputy warden at Matsqui Institution.

[36] Mr. Brown said that the population at Matsqui Institution contains inmates with entrenched criminal values and includes very few sex offenders. Sex offenders are not well regarded by the inmates at Matsqui Institution.

[37] Mr. Brown testified that there are approximately 150 correctional officers at Matsqui Institution and 80 of them are at the CX-01 group and level. The duties of a CX-01 generally include providing static security, staffing the perimeter and control posts, and controlling movement inside Matsqui Institution. In cross-examination, Mr. Brown admitted that most of the CX-01 posts and duties are weighted heavily towards static security. The respondent filed work descriptions for the CX-01 positions (Exhibits E-1 and E-2). Mr. Brown said that the CX-01s are expected to model behaviour that is expected from inmates. All correctional officers are there to “lend an ear” if an inmate comes forward with problems, but Mr. Brown indicated that the “lion’s share” of this work falls to the CX-02s. The CX-01s work in the “bubble” within Matsqui Institution. The only armed posts within this medium-security institution are the perimeter posts.

[38] Approximately one-third Matsqui Institution staff is female; many of those employees are in positions where the workday ends at 17:00. Some female correctional officers work evenings.

[39] Mr. Brown admitted that he does not have any detailed knowledge of Mr. Basra or his service with the CSC. Mr. Brown reviewed documents and talked to Donna Reynen, Assistant Warden at Matsqui Institution, in preparation for this hearing. He described Mr. Basra as a good employee.

[40] Mr. Brown explained that, as a correctional officer, a CX-01 is a peace officer while engaged in the execution of duties within Matsqui Institution and has the power to arrest an inmate and use force. By policy, this power is restricted and the correctional officer must seek approval in advance from a superior.

[41] Mr. Brown was not involved in any of the early decisions about Mr. Basra, as he was not at Matsqui Institution. Mr. Scott was Acting Warden in Mr. Brown's absence. Mr. Scott has been away on sick leave since September 2006 and did not give evidence in this case. When Mr. Brown returned to Matsqui Institution, he was briefed on major developments by Mr. Scott, which included Mr. Basra's indefinite suspension. Mr. Brown believes that Mr. Scott consulted with Ms. Mynott, who consulted in turn with Beth Tyler, a regional human resources officer.

[42] Mr. Brown said that Mr. Scott told him that prior to suspending Mr. Basra, he had discussions with Staff Relations and the Deputy Warden about "the issues at hand." Mr. Brown said that he thought that Mr. Scott was mostly concerned about the nature of the offence, Mr. Basra's interaction with the police, the serious risks that the matter presented and the need to remove Mr. Basra from the workplace. Mr. Brown said that Mr. Scott felt quite determined about that.

[43] Mr. Brown said that Mr. Scott used as criteria risks in the workplace, the reputation of the CSC through his discussion with Staff Relations and, in particular, the criteria known as the "*Larson* criteria."

[44] I note that Mr. Brown can only relate what Mr. Scott told him and the correspondence that Mr. Brown saw. If the respondent wished to establish what Mr. Scott did and considered, the respondent should have called Mr. Scott. It is clear that Mr. Brown met with Mr. Scott and Ms. Reynen and agreed with Mr. Scott's decision.

[45] Through Mr. Brown, the respondent filed a chain of emails that started on May 4, 2006, from Mr. Scott and that ended with one from Meena Chima on June 7, 2004 (Exhibit E-14). Mr. Brown was not copied on all of the emails in the chain. The chain contained emails from Mr. Scott to the investigators, from Ms. Mynott to Mr. Scott and Mr. Brown and copied to Ms. Tyler, from Mr. Brown to the investigators, from Mr. Strijack to Ms. Mynott, from Ms. Mynott to Mr. Strijack, from Ms. Mynott to Ms. Chima and from Ms. Chima to Ms. Mynott. Except for Mr. Brown, none of these people were called to give evidence. The email chain adds no evidence to this case and makes it clear that, as of June 7, 2006, the CSC had very little information with which to make a risk assessment.

[46] In Exhibit E-14 and in an email from Mr. Strijack dated June 7, 2006, and copied to Mr. Brown, Mr. Strijack wrote in part as follows:

...

*In terms of a Risk Assessment regarding potential work re-location, pay action and such, I would recommend a meeting to discuss all of the factors. I would like to get a little more feedback from the RCMP before that meeting, however.*

...

[47] Mr. Brown does not remember exactly when he became aware of *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9, which sets the criteria used to assess a continuing suspension. It appears that he became aware of these criteria at least by June 16, 2006.

[48] In June 2006, Mr. Brown said that he conducted a more formal review of Mr. Basra's status as a suspended employee. This resulted in a memorandum to Mr. Basra's disciplinary file (Exhibit E-13). Mr. Brown concluded that Mr. Basra's presence inside Matsqui Institution or any other CSC facility represented a reasonably serious risk to the CSC, damaged the reputation of the CSC and rendered Mr. Basra unable to perform his duties.

[49] In particular, Mr. Brown said that the police had already investigated the matter and acquired the evidence to lay the charge. Crown counsel had approved charges. Early information indicated that Mr. Basra did not fully cooperate with the police investigation and that he misled them by giving a false name. Mr. Basra had been directly linked by means of DNA evidence. Further, he did not advise the CSC of the charge, contrary to what he was required to do. While a CSC Board of Investigation had been convened and had not yet concluded, the information received at that point disturbed Mr. Brown as to the CSC's reputation, and suggested that Mr. Basra was unsuitable for discharging care to other persons — particularly persons over whom he could have some power.

[50] Mr. Brown said that he considered whether continued employment might have been achieved through intensive supervision or through a transfer to another location. Mr. Brown's opinion was that Mr. Basra's continued employment was neither reasonable nor possible at that time.

[51] There is no direct evidence before me of a duty of Mr. Basra to cooperate with the police or of his failure to do so. It appears that Mr. Brown is confused as to the information from the Crown counsel. The letter from the Crown counsel disclosed that

Mr. Basra did not give his correct name to the complainant, but there is no evidence of that he misled the police. Further, it is apparent that Mr. Brown did not consider the information provided, either by Mr. Basra when the suspension was imposed or in Mr. Clements' subsequent letter, that Mr. Basra was unaware that a charge had been laid. Further, there is no factual support for the opinion that Mr. Basra is unsuitable for discharging care to other persons. If the alleged offence is true, then the circumstances involve one female, and there are no female inmates at Matsqui Institution.

[52] In a July 7, 2006 email, Ms. Mynott advised Mr. Brown (Exhibit E-15) that "... [t]his would be a good time to review Mr. Basra's suspension without pay, considering the recent information provided by the investigators. . . ." The only new information provided by the investigators as of July 7, 2006, was that they had attended court and had unsuccessfully requested information from the RCMP and that Mr. Basra had not contacted them. The investigators recommended that the suspension be maintained.

[53] At the hearing, Mr. Brown indicated that he would reassess the risk of Mr. Basra working at Matsqui Institution every two or three weeks based on any new information received. He also confirmed that he had not made a disciplinary decision.

[54] Mr. Brown described his consideration of the *Larson* criteria. He said that the CSC looked at the substance of the allegation, a sexual assault in November 2004 and a protracted investigation resulting in the Crown counsel approving and laying a charge 18 months later. Mr. Brown said that another substantive factor was that Mr. Basra did not cooperate with the police. It appears that for a portion of the investigation, Mr. Basra provided a false name and that certain facts were refuted or denied in the face of the physical evidence against him. Mr. Brown was concerned that the police were concerned about a lack of cooperation and forthrightness. Although Mr. Basra was detained as a result of the investigation in 2004, and he retained a lawyer, he did not inform anyone in authority at the CSC about his involvement. Mr. Brown said that in a strict sense, employees may only need to advise the CSC when charges are laid, as officers in the criminal justice system are held to a higher level of accountability and are bound by a higher standard of forthrightness to disclose those kinds of developments. In other cases, officers have come forward with information allowing the CSC to make a comprehensive and balanced risk assessment.

[55] Mr. Brown said that there were a number of risks in ending Mr. Basra's suspension, including risks to the CSC, its operations and its integrity. Mr. Brown said that the charge laid against Mr. Basra had the potential to impact CSC relationships and that this could create a safety issue for Mr. Basra. Mr. Brown said that it could be problematic for Mr. Basra to work constructively with inmates, fulfill his duties of open and honest communication and be considered a role model. Mr. Brown said that the charge laid against Mr. Basra could impact staff members, since the allegations have a predatory and deceptive aspect and 30% of Matsqui Institution staff are women. Men and women work alone on posts; correctional officers have to work closely and need to rely on each other's character.

[56] Mr. Brown said that justice system clientele have a significant history of victimization. Female visitors often come from backgrounds similar to inmates and have often been subjected to sexual assaults in the past, and they should be able to enter through the front gate knowing that they are safe.

[57] Mr. Brown said that the CSC was concerned about its integrity. The purpose of the CSC is to protect the public; the CSC performs that task mainly through risk management. Risk assessments are not scientific, but involve looking at the facts and making informed decisions. Mr. Brown said that the legislation allows for the exchange of information among law enforcement agencies and that the relationship between those agencies is sensitive. Information exchanged may depend on the confidence one agency has with another. An agency such as the RCMP may view correctional officers such as Mr. Basra as being evasive and deceptive, which may in turn affect its perception of the CSC's ability to do business with it.

[58] Mr. Brown said that the CSC's reputation is affected when correctional officers act in an exploitative manner and are not prepared to fully explain or account for their behaviour. The CSC suffers real damage from such behaviour.

[59] Mr. Brown said that he considered whether Mr. Basra could work elsewhere at the CSC. The CSC has 1600 or more employees working in institutional offices, community offices and administrative offices in the Pacific Region. The risks of transferring Mr. Basra somewhere else in the Pacific Region were still unacceptable. Matsqui Institution is co-located with a women's facility and a regional treatment centre. Minimum-security female inmates are given assignments outside the fence and are able to walk around. It seemed inappropriate to assign Mr. Basra to work outside

the fence. Even if Mr. Basra were to be placed into an administrative setting he would still be required to deal with inmates and other persons who were victimized or who are recovering from victimization; Matsqui Institution should be a safe place for them.

[60] Mr. Brown said that in virtually every operation or task within the CSC, people have access to information. Mr. Brown said that this is a key part of the business and that having trust in the correctional officers' integrity is important. It is important to safeguard electronic access to information.

[61] Mr. Brown said that when he looked at how the case developed, and even though Mr. Basra had been a fine employee up to that point, he was concerned that the CSC had not been informed earlier of the November 2004 incident, that police communications were problematic and that there was a very serious trust issue.

[62] Mr. Brown said that when he looked at the general context in which the CSC operates, Mr. Basra's continued employment was not acceptable.

[63] In cross-examination, Mr. Brown admitted that he was not aware who Mr. Basra's supervisor was or of the names of the crew with whom Mr. Basra works. Mr. Brown is aware that Mr. Basra had a role on the executive of his bargaining agent at one point. After reviewing documents put to him in cross-examination, Mr. Brown admitted that Mr. Basra is a good employee who has a better than average attendance at work. The respondent admitted that Mr. Basra does not have a disciplinary record.

[64] Mr. Brown admitted that the only documents received from the Crown counsel and the RCMP were those that he had initially received. He indicated that it is often difficult to decide whether to release information due to privacy legislation and protocols between agencies. There was, however, no explanation given explaining the particular problems faced by the investigators. There was apparently some informal contact between a police officer and the investigators. Mr. Brown also conceded that it is within one's legal rights to refuse to provide a DNA sample.

[65] Mr. Brown does not recall signing any document extending the time for the disciplinary investigation. Mr. Brown indicated that the usual process during an investigation is to request that the employee attend an interview and that a time, date and place are set for it. It is also clear that Mr. Brown never considered Mr. Basra's performance in the context of his decision to continue the suspension.



[66] As Mr. Scott was not called as a witness, and there are no records confirming that he reviewed Mr. Basra's record, I find as a fact that Mr. Scott did not consider Mr. Basra's record while deciding to impose the suspension. Mr. Brown admitted that while CX-01s are peace officers, by policy they are limited in the exercise of their powers of arrest and use of force. Generally, there has to be approval from a supervisor before a CX-01 can exercise the power of arrest.

[67] Mr. Brown conceded that a CX-01 would not necessarily have access to inmate information exchanged between the RCMP and the Internal Prevention and Security Office ("the IPSO"). The personal files of inmates are kept in a locked file room and a CX-01 would not have access to it. As a CX-01, Mr. Basra would not have access to the electronic Offender Management System ("the OMS"). Very few CX-01s at Matsqui Institution have access to the OMS. Access can be removed by Mr. Brown. The protection of inmates' information is taken very seriously.

[68] Generally, security information observed by a CX-01 is reported to the Correctional Supervisor (CX-02), who then reports the information to the IPSO.

[69] It appears from Mr. Brown's evidence on cross-examination that there would be no opportunity for Mr. Basra, while on mobile patrol, to have unsupervised access to female inmates from the Fraser Valley Institution, which is located near Matsqui Institution. There is infrequent access between drivers of other vehicles and CX-01s on mobile patrol. If Mr. Basra worked a graveyard shift, there would be no opportunity for him to have contact with female visitors or staff. Mr. Basra has frequently worked an armed post, but there has never been an incident involving inappropriate use of a firearm. Mr. Brown admitted that there was no risk of Mr. Basra assaulting a staff member with a firearm.

[70] All correctional officers carry a radio or personal alarm device and may have access to a fixed-point alarm. Inmates are confined in their cells between 23:00 and 07:00. During those hours inmates are allowed out a maximum of two at a time on the living units to use washrooms. Between 06:00 and 07:00, a small number of inmates are let out as they are scheduled to help in the kitchen.

[71] During Mr. Brown's cross-examination, a chronology of events was filed as Exhibit G-6. Mr. Brown did not prepare that document and only saw it a week before the hearing. The respondent did not call the person who prepared the document and it does not appear to be complete, so I place no reliance on it.

[72] At present, there is a correctional officer working at Matsqui Institution in an armed perimeter post who is being investigated for sexual assault but who has not yet been charged. As Mr. Brown put it, there is no evidentiary test of the Crown counsel approving the charge. I note that the test used by the Crown counsel in approving charges is not before me in evidence.

[73] Mr. Brown has a concern that a date-rape drug was used by Mr. Basra. However, Mr. Brown admits that there is no laboratory proof of this, and no allegation of a date-rape drug was made in the Crown counsel's letter to him.

[74] Mr. Brown admitted in cross-examination that he is aware of no publicity or media attention related to this case.

[75] Mr. Basra did not give evidence but called Bill Virk, Sherry Enns and Gaalen Joe as witnesses. Mr. Virk is a CX-01 who has acted as a CX-02 at Matsqui Institution. He has been employed there since 1999. He testified that there are a number of posts worked by CX-01s at Matsqui Institution that involve limited interaction with members of the public or the RCMP. He has worked all of those posts and has first-hand experience.

[76] One of those posts is a motorized patrol. The duties are set out in "Security Post Instruction S.P.I. 831.17" (Exhibit G-24). There are two motorized patrols, and the post operates 24 hours per day, 7 days per week. The CX-01 staffing the post is armed. The main duties are to observe and provide security for the perimeter of Matsqui Institution by driving around outside the perimeter. The main purpose is to stop inmates from escaping. There is no contact with inmates, unless they are escaping. The CX-01 working at this post does not work in the rehabilitation of inmates. The motorized patrol has no contact with female inmates at the nearby Fraser Valley Institution. It is possible for Central Control to monitor the activities of the motorized patrol. I was asked by the parties not to reveal the details of security at Matsqui Institution, and I have not provided that information in this decision.

[77] Mr. Virk has also worked the Central Control Post. The duties are set out in “Security Post Instruction S.P.I. 831.06” (Exhibit G-22). This is also known as the count desk. The CX-01 operating this post is under the direction of a CX-02. The main duties are opening and closing unit barriers, opening cells doors and obtaining and receiving identification cards that permit an inmate to move to the Visits and Correspondence Centre. There is minimal contact with inmates. There is no contact with members of the public or inmate visitors. The main concern of the CX-01 in this position is monitoring an inmate’s location. There is limited opportunity to influence or interact with inmates.

[78] Mr. Virk has also worked the Living Unit Control Post. The duties for this position are set out in “Security Post Instruction S.P.I. 831.08” (Exhibit G-23). This generally involves work in the “bubble” and there is a limited amount of interaction with inmates. A typical type of interaction is “Hey boss, open the door, door 27.” The CX-01 opens the doors and barriers on each of the ranges. The interaction is limited to responding to an inmate’s request to open a door. The CX-01 also provides visual security from the “bubble” for the CX-02s who do range walks. The CX-01 has very limited interaction with inmates because there is an inmate “code” and they do not willingly share information or interact with correctional officers. From 23:00 to 07:00, the role is limited to letting two inmates at a time out of those cells that are not equipped with toilets. The CX-01 does rounds when the inmates are locked in their cells, five times per day. Contact with inmates is limited.

[79] No CX-01 has unrestricted access to inmate files located in the IPSO. A correctional officer at the CX-01 group and level does not have an inmate caseload. A CX-01 does not have access to the RADAR system, which requires an account code, an access code and a security code. Generally, it is only IPSO officers who have access to it.

[80] Mr. Virk has also worked as a living unit coordinator. The duties for this position are set out in “Security Post Instruction S.P.I. 831.09” (Exhibit G-24). This is a midnight-shift position. The main job duties are working from the “bubble” and controlling access for the CX-01s who work in the range doing two counts, which involves walking around the range and counting inmates in cells. The coordinator has no contact with the inmates.

[81] Mr. Virk testified that CX-01s who work the graveyard shift in the Special Containment Unit have no contact with inmates. The CX-01 works from the “bubble” and provides visual security for the CX-02, who interacts with the inmates by ensuring that they have showers and get exercise in the yard. There is no contact with the inmates and no contact with the inmate visitors.

[82] Mr. Virk has known Mr. Basra since they both began working at the CSC, which was at about the same time. He has worked on the same crew as Mr. Basra for three or four years. Mr. Virk says that Mr. Basra performs all aspects of the job, and he has full confidence in Mr. Basra. He described Mr. Basra as an average guy who does his work with no complaints from anybody. He treats the female staff with respect. To Mr. Virk’s knowledge, Mr. Basra has had no inappropriate dealings with any staff or visitors. Mr. Virk testified that many of the CX-01s eat at their post and do not go to the staff lunchroom to take their breaks, and therefore there is often limited exposure to persons other than correctional officers during a shift. He confirmed that CX-01s can be moved to different duties while on a shift. The tenure of this evidence is that a CX-01 has limited exposure to females, other than other correctional officers during a shift.

[83] Ms. Enns, a CX-02, testified on behalf of Mr. Basra. As well as working at Matsqui Institution she is Local President of the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN, Mr. Basra’s bargaining agent. She testified that in her experience when the CSC wishes to talk to an employee about a disciplinary matter, it sends the employee a letter and also sends a copy to the bargaining agent. The CSC usually gives 48 hours’ notice, and sets a time, date and place for a meeting. Other than grievance meetings, Ms. Enns is not aware of any investigation or disciplinary meetings called by the CSC concerning Mr. Basra in which the bargaining agent was asked to participate; she is only aware of grievance meetings.

[84] Ms. Enns has worked with Mr. Basra and is familiar with his work. She characterizes him as an excellent officer. She is aware of the allegation against him and has never felt threatened by him.

[85] Mr. Basra also called Mr. Joe, a CX-02, as a witness. Mr. Joe was the grievance officer who handled Mr. Basra’s grievance. He was present at a meeting where Mr. Basra’s bargaining agent representative put forward a number of options for

Mr. Basra's placement, including working the graveyard shift, working at the regional supply depot or transferring to another institution.

[86] It appears that it will be many months before the criminal charge will be finally dealt with by the Courts. By the time of the adjudication hearing, seven months had passed, and there was no evidence that a date for a preliminary inquiry had been set.

### **Summary of the arguments**

[87] The respondent said that suspending Mr. Basra indefinitely was an appropriate administrative decision. The respondent said that in considering the peculiar facts of the case, an indefinite suspension is justified. The respondent relied on the criteria set out in *Larson*. In *Larson*, the adjudicator relied upon the approach in *Ontario Jockey Club v. Mutuel Employees' Association, Service Employees' International Union, Local 528* (1977), 17 L.A.C. (2d) 176, and *Hamilton Regional Cancer Centre v. Canadian Union of Public Employees, Local 3566* (2000), 91 L.A.C. (4th) 333. In *Larson*, the adjudicator quoted and relied on the *Ontario Jockey Club* test.

[88] The CSC assessed the facts and determined that Mr. Basra's presence presented a reasonably serious and immediate risk to its legitimate concerns. The CSC is part of the criminal justice system. A sexual assault charge is serious and these allegations include predatory and coercive conduct. This could have a reasonable impact on the CSC's integrity. Mr. Basra is a peace officer and has to be held to a higher standard. Given that there was a police investigation, the respondent has a lesser burden. Many attempts were made to contact Mr. Basra, and he did not respond. The CSC continued to assess the risk.

[89] Mr. Basra said that he was suspended in April 2006 and that the respondent will not reinstate him without a ruling from an adjudicator. The CSC has not respected the test set out in *Larson*. Mr Basra has said in particular that his suspension is clearly disciplinary, since the CSC violated the third standard in the *Larson* test by failing to investigate the criminal charge to the best of its abilities in a genuine attempt to assess the risk of his continued employment. There is a balance to be struck between an employee's right to earn a living and the respondent's right to a safe and secure workplace. The assessment of risk has to be based on a "real hardship to the employer." It is a test of "quality" and not "quantity." The fact that the CSC has written a number of letters is not sufficient.

[90] The CSC quickly concluded that Mr. Basra was a risk without talking to his co-workers or supervisors. The incident was well in the past and there was no indication of a risk being present. There were no complaints from either inmates or staff. No issue was raised by the RCMP about Mr. Basra remaining in the workplace. The CSC simply overreacted to the nature of the charge. There has been no media publicity impacting Matsqui Institution's reputation. The simple fact of being charged with an off-duty criminal offence is not sufficient to justify an indefinite suspension. Mr. Basra has worked with female employees and with firearms for years without any problems. The respondent has not put forward any facts to suggest that Mr. Basra is a risk to anyone in the workplace or that his presence would interrupt or interfere with the operations at Matsqui Institution. There is no immediate and certain risk based on real and tangible evidence.

[91] Mr. Basra has put forward a number of placement options; it is clear that the CSC has not investigated them to the best of its ability. Mr. Basra has never been required to attend an interview, and the CSC never obtained his side of the story. The CSC's own policy is that investigations should be conducted on a timely basis and that the investigator should get the employee's side of the story. Mr. Basra says that 30 days should have been sufficient for the CSC to conduct its investigation based on its own policy.

[92] The CSC had Mr. Basra's information for some time when the charge arose and did not consider the evidence. This clearly is a disciplinary matter. The CSC did not treat Mr. Basra fairly and in particular did not investigate in a timely manner and did not obtain his side of the story.

[93] Mr. Basra relied on *Blackburn v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 49, for the proposition that an indefinite suspension pending an investigation requires that the investigation be completed in a timely manner. The CSC is required to investigate and obtain the employee's version of events, as in *Clarendon Foundation (Cheshire Homes) Inc. v. Ontario Public Service Employees Union, Local 593* (1995), 50 L.A.C. (4th) 17, and *Alberta v. Alberta Union of Provincial Employees* (1995), 51 L.A.C. (4th) 248. Mr. Basra asks for interest under paragraph 226(1)(i) of the *Act*. He asks that I remain seized over the manner of the terms of his reintegration at work and of the implementation of this decision.

[94] In reply the respondent argued that Mr. Basra has been charged with a serious indictable offence. The CSC concluded that there was a serious risk given the nature of the charge, and there is no new information that dissipates the risk. Mr. Brown's ability to investigate the offence is limited as the matter is before the courts. The investigators genuinely attempted to follow up on the proceedings. Mr. Basra must be aware that the CSC is happy to meet with him, but he has refused to do so.

[95] The CSC will continue to assess the risk, and the respondent has not yet imposed discipline. The indefinite suspension should be maintained.

### **Reasons**

[96] Mr. Basra has filed his grievance under paragraph 209(1)(b) of the *Act* alleging that his indefinite suspension without pay is a disciplinary action. Section 209 of the *Act* provides as follows:

*209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*

...

*(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*

...

[97] This is a case that involves a protracted period while Mr. Basra's criminal case proceeds through the criminal court system. The respondent has argued that it has taken appropriate administrative action and says that its suspension decision is justified based on the unique facts in this case.

[98] The respondent submitted that the suspension was an appropriate administrative measure. Although the respondent did not directly argue the point, in order for me to have jurisdiction over this grievance I must conclude that there is a disciplinary component to the decision. In this case, the respondent claims that it has yet to make a disciplinary decision concerning Mr. Basra.

[99] I note that paragraph 209(1)(b) of the *Act* uses the words “disciplinary action” and not “disciplinary decision.” The word “action” is broader than “decision” and is a word capable of embracing the CSC’s decision to appoint investigators and indefinitely suspend an employee as part of that investigation. The CSC has suspended Mr. Basra indefinitely based on an allegation of a serious wrongdoing that the CSC determined must be investigated. Clearly, the decision to suspend was part of a disciplinary process, although the CSC has not yet convened a disciplinary hearing or reached a final conclusion on discipline. The respondent’s documents establish that an investigator was appointed to convene a disciplinary investigation (Exhibit E-8).

[100] Also, an indefinite suspension prevents an employee from working. It is an interruption of the employee’s right to work. In this case the disruption of work, as well as the loss of wages, are penalties; they are disciplinary actions that flow directly from the CSC’s decision to convene an investigation and suspend Mr. Basra without pay: *Massip v. Canada* (1985), 61 N.R. 114 (F.C.A.); *Lavigne v. Treasury Board (Public Works)*, PSSRB File Nos. 166-02-16452 to 16454, 16623, 16624 and 16650 (19881014); and *Côté v. Treasury Board (Employment and Immigration Canada)*, PSSRB File Nos. 166-02-9811 to 9813 and 10178 (19831017).

[101] For the above reasons, it is my view that there is jurisdiction to review this indefinite suspension under paragraph 209(1)(b) of the *Act*. I shall now address whether the CSC’s decision to suspend Mr. Basra indefinitely without pay is justified in the circumstances.

[102] Employees have a right to work. It is a right that should not be lightly interfered with, and it is up to the respondent to demonstrate that a continued suspension without pay is justified. The CSC has not terminated Mr. Basra but is preventing him from earning a living. Other than penalizing Mr. Basra, it is difficult to see what benefit would accrue from a suspension until a court resolves the issue of his guilt or innocence. By the date of the adjudication hearing, more than seven months had elapsed since Mr. Basra was charged with an offence. It is now more than two years since the date of the alleged sexual assault. There is no clear indication of when Mr. Basra’s case will be finally resolved by the courts. The wheels of justice appear to have moved slowly.

[103] The main issue before me is whether an indefinite suspension is justified based on the *Larson* and *Ontario Jockey Club* criteria. Those criteria are:



- Does Mr. Basra's presence as an employee present a reasonably serious and immediate risk to the legitimate concerns of the CSC?
- The respondent has the onus to satisfy the adjudicator of the existence of the risk. The simple fact that a criminal charge was laid is not sufficient. The nature of the charge must be that it is potentially harmful, detrimental or adverse to the CSC's reputation or product, that it will render Mr. Basra unable to perform his duties, that it will have a harmful effect on other employees, or that it will harm the general reputation of the CSC.
- The respondent must show that the CSC investigated the criminal charge to the best of its abilities in a genuine attempt to assess the risk of continued employment. The burden is considerably less where the police have investigated the matter and acquired evidence to lay the charge than when the CSC initiates the proceedings.
- There is a further onus on the respondent to show that the CSC has taken reasonable steps to ascertain whether the risk of continued employment might be mitigated through closer supervision or transfer to another position.
- There is a continued onus on the CSC during the suspension period to objectively consider the possibility of reinstatement within a reasonable period following the suspension in light of new facts or circumstances coming to its attention. These matters must be evaluated in light of the existence of a reasonable risk to the legitimate interest of the CSC.

[104] As a starting point, I note that the burden of proof rests with the respondent and not with Mr. Basra to establish the justification for the CSC's actions. The standard is the ordinary civil standard of the balance of probabilities.

[105] As an adjudicator, it is not my function to weigh the strength of the Crown's case, or probability of conviction, in the criminal proceedings. Indeed, it is impossible for me to weigh the strength of the Crown's case, even if it was within my mandate, because the CSC appears to have obtained so little information. I am not certain how the CSC could have come to any reasonable risk decision based on the extremely limited material before it.

[106] From the evidence before me, Mr. Basra was not aware of the criminal charge until he was suspended by the CSC. In his evidence, Mr. Brown referred to “a strict interpretation” of the *Code of Discipline* and compared Mr. Basra’s attitude to a fuller disclosure position adopted by some correctional officers facing criminal charges. In my view, there is only one possible interpretation of the *Code of Discipline*. In it, there is a duty to disclose charges; there is no duty to disclose the possibility that a charge might be laid. The duty on the correctional officer arises on being charged, and knowing that he is charged. If the CSC wished by policy to impose a duty to disclose allegations arising before charges are laid, a duty to disclose allegations could have been articulated in the *Code of Discipline*. The fact that other correctional officers, who were not called to give evidence and whose situations were not fully explained in the evidence, may have taken a different approach with the CSC is irrelevant to my task.

[107] I take adjudicative notice that, under the *Criminal Code*, sexual assault is a hybrid offence that may be charged as a summary conviction or indictable offence (subsection 271(1)). There was a substantial, unexplained delay between the date that the offence is alleged to have occurred and the date that the Crown counsel approved the criminal charge. While this offence is charged as an indictable offence, I do not know whether that decision was made by Crown counsel simply to avoid the effect of the six-month limitation period for summary conviction offences (subsection 786(2) of the *Criminal Code*). There is no evidence before me that explains the Crown counsel’s charging process or his decision to proceed by indictment. I am not prepared to infer, in the absence of information and in light of the 18-month pre-charge delay, that the reason for proceeding by indictment was that the seriousness of the offence merited this procedural approach.

[108] This is a serious charge regardless of the Crown counsel’s choice of charging procedure. Ultimately, that choice may have a substantial impact on any disciplinary decision of the CSC concerning Mr. Basra. A conviction for an indictable offence is a ground for discipline under the *Code of Discipline*. That issue is not before me, since Mr. Basra has not been convicted of any offence, and the CSC has not completed its disciplinary decision-making process.

[109] The Crown counsel appears to have chosen to notify the CSC and to have a warrant issued rather than notify Mr. Clements, who was monitoring the case for Mr. Basra, to ensure a voluntary court appearance by Mr. Basra. Why the Crown counsel

took this approach is not explained in the evidence before me. Based on the material before me, the respondent has no case against Mr. Basra on the point of whether he went to work without informing the CSC of the charge. The evidence establishes that the CSC learned of the charge before Mr. Basra did. Deception, lack of forthrightness and lack of honesty in telling the CSC of the offence were key factors for Mr. Brown in maintaining the suspension. There is absolutely no basis in the evidence supporting such conclusions. This is particularly so as there is no duty to disclose until a charge is laid. I also note that the CSC did not schedule an interview with Mr. Basra after it learned of the charge.

[110] When I reviewed the authorities provided to me by both parties, it was clear that the adjudicator or arbitrator in each of those cases had substantially more information than was provided to me, and the CSC had conducted a more thorough investigation than in the present case. In most of the cases, the adjudicator heard directly from the CSC's investigator.

[111] I am not satisfied that the respondent has shown under the third and fifth *Larson* criteria that the CSC has done its best to ascertain the facts in order to make a risk assessment concerning Mr. Basra. While Mr. Scott appointed investigators in a timely way, I am concerned that the investigation did not yield sufficiently reliable information to make a risk assessment decision. The problem seems to be with the quality of the investigation undertaken by the CSC. It seems that in terms of investigating the disciplinary matter, the investigators did little more than attend court, request information from the RCMP, which never was received, and possibly ask Mr. Clements at court to tell Mr. Basra that the investigators wished to speak to him. I use the word "possibly" since the investigators were not called to give evidence as to what they did or did not do.

[112] I am concerned that the investigators made no attempt to directly contact Mr. Basra to obtain his side of the story. I am not prepared to speculate as to what he may or may not have said had the CSC attempted to contact him. I put no weight on Exhibit E-14, which contains speculation by Ms. Mynott in an email to Ms. Chima that:

...

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*Sometimes in case [sic] such as these lawyers advise their clients not to discussing [sic] disciplinary investigations until the court case has been completed.*

...

[113] The investigators had the power to set a meeting with Mr. Basra, advise him of the time and place of the meeting and notify him that he could bring a bargaining agent representative with him. This was never done, and no explanation was given as to why. The investigators were never called as witnesses to explain what they did. I draw an adverse inference against the respondent for failing to call the investigators to explain their investigation.

[114] Mr. Basra did provide some information to Mr. Scott at the meeting where Mr. Basra was suspended. Mr. Basra also had Mr. Clements provide information as to when he became aware of the charge. Mr. Scott also informed Mr. Basra, both orally and in writing, that an investigation had commenced and that the investigators would talk to him. It appears that the investigators did not bother to contact Mr. Basra directly. They have not even reported on their findings.

[115] This is not a case where Mr. Basra instructed the CSC not to deal with him directly but to deal with his lawyer. In my view, in the absence of this instruction, there is no duty on the CSC to deal only with the employee's lawyer.

[116] The respondent's point is that the CSC attempted to get Mr. Basra's story by contacting Mr. Clements. This is a significant and fundamental underpinning to the respondent's case. Proof of this point rests entirely on hearsay evidence. In the emails, there is some indication that the investigators told Mr. Brown that they had contacted Mr. Clements at court. Mr. Brown believed this. The investigators were not called to give evidence of their investigation. While Mr. Brown may have believed they contacted Mr. Clements, Mr. Brown's beliefs are not proof that the investigators did in fact contact Mr. Clements.

[117] The respondent argued that it was sufficient for its investigators to have spoken to Mr. Clements at a court appearance indicating that they wanted to talk to Mr. Basra and for Mr. Brown to send letters indicating that he would be willing to hear from Mr. Basra. It seems odd that Mr. Brown knew that he had to write to Mr. Basra directly to inform him that the suspension continued, rather than writing to Mr. Clements,

when the respondent claimed that an attempt to talk to Mr. Clements was sufficient to discharge its investigative responsibilities concerning Mr. Basra.

[118] From the evidence before me, I am not prepared to conclude that Mr. Clements was anything other than a criminal lawyer retained by Mr. Basra in connection with the pending criminal charge. I am not prepared to assume that Mr. Clements was a lawyer on general retainer for Mr. Basra. He did not represent Mr. Basra in this hearing. There is no evidence before me of Mr. Clements having any involvement in this employment matter other than having written a letter on April 27, 2006, saying that he was retained for a criminal matter.

[119] Hearsay evidence is admissible in an administrative law hearing. It may be used to establish what Mr. Brown considered when deciding to continue the suspension. While Mr. Brown's hearsay evidence is admissible for the "proof of Mr. Brown's state of mind," I do not accept hearsay evidence to prove that Mr. Basra refused to provide evidence or information to the CSC. Particularly, this hearsay evidence contradicts other evidence that Mr. Basra did volunteer information when he met with Mr. Scott, that he was told and informed in writing that he would be contacted and that the CSC took no steps to contact him.

[120] While the rules of evidence are relaxed in an adjudication hearing under the *Act*, in my view it would be an adjudicative error to use hearsay evidence to prove a fundamental material fact. Some of the evidence before me is double and triple hearsay. A good example of that is an email from Ms. Tyler to Louise Costello, a staff relations advisor at National Headquarters (Exhibit 19). It purports to contain facts that are not contained in the letter from Crown counsel and that are not documented in any written investigators' report, and there is no indication where Ms. Tyler obtained her information. She was not the investigator. It is clear, however, that this cannot be first hand information. It is not reliable information that I can consider in determining whether continuation of the suspension is justified. The weight that can be attached to hearsay evidence for establishing material disputed facts is minimal, and I place no weight on the hearsay evidence for establishing facts.

[121] The investigators do not appear to have talked to any of Mr. Basra's co-workers or supervisors. This may have been of considerable assistance in assessing the risk to Mr. Basra, other staff members, visitors and inmates and to the CSC's information system. In the course of his evidence, Mr. Brown raised the risk to the information

system as a reason supporting the continued indeterminate suspension of Mr. Basra. It is difficult to understand how Mr. Basra constituted a risk given that in his position he had limited access to the CSC's information system and there is no indication that he has compromised the system in the past. There is nothing in the nature of the offence that would suggest that he presents any risk to the CSC's information system.

[122] Further, I am concerned with the quality of the evidence provided by the respondent in this adjudication hearing. The respondent called Mr. Brown, who is ultimately the person responsible for running Matsqui Institution. He was absent from Matsqui Institution during critical time periods, and Mr. Scott, who was Acting Warden in Mr. Brown's absence, was not called as a witness. Mr. Brown was the one who made the decisions continuing the suspension, but he was not the one who made the original decision or investigated the facts.

[123] The *Larson* test requires more than establishing the good faith of the decision maker and what the decision maker considered; there must be proof of the underlying facts used to make the decision. I would have thought that, at minimum, the respondent would have called the investigators, tendered an investigative report and either called the police officer investigating the offence or tendered the police report.

[124] The totality of the evidence setting out the allegation is a précis or summary of a police report from a Crown counsel, along with a copy of the charge contained in the sworn information. I have the Crown counsel's characterization of the information that he reviewed to make the charging decision. I do not have the evidence before me that the Crown counsel considered in his decision to lay the charge. What I have at best is a brief description from Crown counsel, which is second hand or double hearsay because it is the Crown counsel's view of a police report. This is also combined with various emails from the investigators to Mr. Brown as to what they heard a police officer say.

[125] I cannot determine on the evidence before me that the police officer to whom the investigators spoke at court or elsewhere was the police officer who investigated the criminal charge. Mr. Brown speculated that the officer was the investigating officer rather than a court liaison officer, but I cannot accept this speculation as evidence. He did not have the original police report naming the investigating police officer, and the investigating police officer is not named in the letter from Crown counsel.

[126] There appear to be mistakes made by Mr. Brown in the facts that underlay his decision. Particularly, he seems to have incorrectly assumed that Mr. Basra was aware of the charge and failed to report it. He makes a significant issue that Mr. Basra breached a trust by failing to report the charge, yet the clear obligation in the *Code of Discipline* is to report a charge, not a potential charge. In this case, the charge was reported by Crown counsel to Mr. Brown before Mr. Basra knew that he had been charged. Mr. Brown seems to be under the impression that an accused person has a duty to cooperate with the police and to plead guilty. He seems to have been under the mistaken impression that Mr. Basra misled the police. Mr. Basra faces a charge of sexual assault and not obstruction of justice or public mischief.

[127] I find it surprising that the CSC did not speak to Mr. Basra and his co-workers or supervisors to gather information to assist in its risk assessment. While an immediate suspension might be temporarily justified without a full investigation on an urgency argument, the CSC has had more than six months to assess the risk, and has not seen fit to obtain and consider this information. This suggests to me that the CSC was more concerned with the fact that a charge was laid, with the nature of the allegations, and with the impact on its reputation rather than assessing whether Mr. Basra presented a risk to its legitimate concerns, including the safety of Mr. Basra, co-workers, visitors or inmates, the integrity of the CSC's information system, or its liaisons with outside law enforcement agencies. While Mr. Brown alleges these problems, it is difficult to understand how he came to these conclusions based on the limited information available to him.

[128] It is difficult to accept the rationale put forward by Mr. Brown as risk assessment in light of the failure to obtain and consider a factual underpinning, as risk cannot be assessed in the abstract. The authorities make it clear that the CSC has the duty to obtain and assess information, as detailed in *Larson, Ontario Jockey Club* and *Alberta*. Since the limited information from the Crown counsel shows that Mr. Basra was arrested on the charge after it was laid, I must also conclude that Mr. Basra is on some form of judicial interim release or release by an officer-in-charge. The particulars of the release terms were not gathered by the CSC. The release terms may have been of some assistance under the *Larson* test in assessing risk to the CSC's legitimate concerns. The only inference available to me is that Mr. Basra is not a significant danger to members of the public, as he would otherwise have been detained in custody, rather than being left at large pending his criminal trial.

[129] Mr. Basra worked at Matsqui Institution for an 18-month period after the alleged facts and before the charge was laid, with an unblemished work record. As a CX-01, he does not have unrestricted access to confidential information, he is not a liaison officer with the RCMP and he does not have unsupervised access with visitors, and many of the posts he works involve little inmate interaction. He is a guard, and is not involved in the rehabilitative work with inmates, except in a very general sense of being part of Matsqui Institution. I accept the evidence of Mr. Virk, in preference to the evidence of Mr. Brown, that inmates do not come forward to guards or CX-01s to discuss their problems. Mr. Virk is an experienced CX-01. In reviewing Mr. Brown's evidence, it is clear that he has not worked as a CX-01 at Matsqui Institution. There is no evidence that Mr. Basra deceived the police in their investigation. There is no duty on him to "take responsibility," if in fact he is innocent of the offence, and he is presumed innocent until proven guilty. At best, the respondent's case is that it is a serious charge and it looks bad for the CSC to allow a correctional officer with a serious charge against him to continue working. I do not accept as credible that the police would refuse to pass on information to Matsqui Institution or to assist correctional officers, including Mr. Basra, at Matsqui Institution if called upon to do so. It was not explained in the evidence how Mr. Basra would present a risk to himself or others if he continues to work in a CX-01 position.

[130] There was clear and cogent evidence led by Mr. Basra in this case of a number of positions available to a CX-01 such that there is minimum contact with visitors, female staff and inmates. I would have expected that some of those options would be palatable to the CSC and would minimize any reasonably perceived risk. I am not satisfied that the CSC has fully or properly explored all available options. In particular, there were at least three positions available for scheduling a CX-01 in which Mr. Basra would have had no contact with visitors, female staff or inmates. Any of the evening positions would involve little contact with female staff other than correctional officers. The respondent has not produced any evidence that suggests that female correctional officers would be unwilling to work with Mr. Basra or feel that their safety would be jeopardized. I accept the evidence of Ms. Enns, an experienced CX-02, that she would not have any concerns working with Mr. Basra.

[131] The *Larson* test involves the weighing of risk. In my view, given the lengthy period before the charge was laid while Mr. Basra was at Matsqui Institution, the fact that he appears to be at large on some form of release would suggest that he knows



that he must be on his best behaviour if he is returned to work. There seems to be little or no risk of him committing a sexual assault in the workplace on female staff or female visitors.

[132] Which legitimate concerns of the CSC need to be considered in assessing the risk? It is important to assess the nature of the CSC's business. One of the substantial concerns in *Ontario Jockey Club* was that the employee was charged with a gaming offence under the *Criminal Code*, allowing premises to be used as a common betting house. The business of the employer in that case involved gaming and it was important to the continued business status of the employer that persons connected with illegal gaming not be on its premises. In this case, the CSC is engaged on the corrections side of the justice system. Matsqui Institution is in the business of holding male inmates and protecting society from them while they work on their rehabilitation. Matsqui Institution provides an environment including programs to assist in an inmate's rehabilitation. The inmates are more "hardcore" criminals than one would find in a minimum-security environment. Mr. Basra's job is to guard the inmates rather than assisting in their rehabilitation. His function is security, principally static security, and it is difficult to see how his ability to perform the security function has been impacted by the criminal charge filed against him. Unlike the facts in *Ontario Jockey Club*, a federal penitentiary's ability to carry on its business will not be impacted by the presence of an employee accused of a criminal offence.

[133] Clearly, the criminal charge that Mr. Basra faces is serious, and the manipulative aspects of the alleged offence are a concern. The safety of inmates and staff is a legitimate interest. In my view, given the 18 months during which Mr. Basra continued to work after the alleged offence occurred, there is little risk to staff or visitors. Risk is often dissipated by time: *Clarendon Foundation*. That Mr. Basra continues working at Matsqui Institution constitutes no risk to male inmates. Rehabilitation of inmates is an important interest; however, a CX-01 has little inmate contact and is not involved in rehabilitation. There is no evidence that there is a safety risk to a CX-01, as generally a CX-01 works in a secure post, has a radio and often has access to an alarm. The CSC's reputation is important, but one of the fundamental tenets of the justice system, of which the CSC is an important part, is the presumption of innocence. The CSC's decision presumes not only that Mr. Basra is guilty of the alleged offence but also that he deceived the CSC and the investigators. There is no basis for the conclusion that

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Mr. Basra deceived the CSC or the investigators, and he is entitled to be presumed innocent until he is found guilty in a court of law.

[134] Although not directly argued by counsel, a point stressed by Mr. Brown in his evidence was that a suspension was necessary to ensure the integrity of the CSC's information system, and this was a risk factor that justified a continuing suspension. The integrity of the CSC's information system is important. The evidence, however, does not support this as a "real risk." The evidence is that a CX-01 does not have unrestricted access to the information system. The respondent has proven no risk to the CSC's information system. Interagency cooperation is an important and legitimate concern, but it is hard to see how employing Mr. Basra while he is facing a charge will impact police providing information to the IPSO or assisting at Matsqui Institution if necessary. It is a more hypothetical or speculative concern rather than a probable risk.

[135] Based on the evidence before me, I find that the CSC was not justified in extending Mr. Basra's suspension without pay. Because of its failure to adequately investigate the facts over a lengthy period, the CSC's original administrative decision became disciplinary action against Mr. Basra: *Larson*.

[136] I accept the approach in *Larson*, in which the adjudicator struggled with the length of time required for an investigation and referred to paragraph E.1(a) of "A Guide to Staff Discipline and Non Disciplinary Demotion or Termination of Employment for Cause" (Exhibit G-25), which provides that disciplinary action should be taken within a month of the infraction. This is the time frame set in Mr. Scott's direction to the investigators, and it seems that the CSC considered this a reasonable amount of time to investigate the case involving Mr. Basra. In this case, this one-month period ended on May 3, 2006, which would have provided ample time for the collection of information and preparation of an investigation report. It also would have been ample time for the CSC to schedule an interview with Mr. Basra or other employees in the workplace to obtain information related to its concerns.

[137] When the CSC makes a decision to suspend an employee pending a disciplinary investigation where criminal charges are laid for off-duty conduct, it is incumbent on the CSC to "get on and conclude" an investigation in a timely manner. The CSC is not automatically entitled to suspend an employee simply because of a criminal charge. To suspend an employee without pay until a criminal charge is resolved, the CSC must engage in a risk analysis based on facts collected during an investigation. A lengthy

suspension can work a real injustice to an employee, particularly if the investigators do not conduct an investigation that generates a sufficient factual basis for the CSC to make a decision in a timely manner. An employee should not have to bear the wage loss impact of an investigation that is not concluded in a timely way. Mr. Basra is entitled to his pay, retroactive to May 3, 2006.

[138] The parties have made no submissions with respect to the rate of interest or prevailing period under paragraph 226(1)(i) of the *Act*. The period that I consider appropriate for the interest calculation is from May 3, 2006, to the date of Mr. Basra's reporting to work. I will retain jurisdiction for 90 days over the implementation of this decision, especially over the determination of interest on the monies owed Mr. Basra as a result of this decision if the parties are unable to agree on an appropriate interest rate and calculation of interest.

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

*(The Order appears on the next page)*

**Order**

[140] The grievance is upheld. Mr. Basra is ordered reinstated to his position as a CX-01 effective May 3, 2006, with back pay, full benefits and with interest. I reserve jurisdiction over the implementation of this decision for a period of 90 days.

July 11, 2007.

**Paul Love,  
adjudicator**