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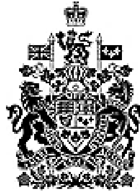

Public Service Labour Relations Act Before an adjudicator

BETWEEN

DONALD JAMES SATHER

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Sather v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: William H. Kydd, adjudicator

For the Grievor: Michael J. Prokosh, counsel

For the Respondent: Barry Benkendorf, counsel

Heard at Prince Albert, Saskatchewan,
August 26 to 28, 2013,
and at Saskatoon, Saskatchewan,
December 4, 2013.

I. Introduction

[1] On April 26, 2011, Donald James Sather ("the grievor") filed a grievance challenging the Correctional Service of Canada's ("the CSC") decision on April 20, 2011, to terminate his employment for allegedly sexually assaulting another of its employees. The grievance was referred to adjudication under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*). The grievor was represented by the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent").

[2] In his grievance, the grievor requested that his termination be declared null and void and that he be reimbursed all salary, monies and rights lost as a result of the termination.

[3] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *PSLRA* as that Act read immediately before that day.

II. Preliminary matters

[4] The adjudication was initially set down for a hearing in Saskatoon, Saskatchewan, from March 12 to 15, 2013. On March 4, 2013, a pre-hearing teleconference was held to discuss sharing documents and procedural issues. During the teleconference, counsel for the bargaining agent advised that before the grievor's termination, the CSC had completed and relied on a disciplinary investigation report, dated March 9, 2011. The grievor was given a copy of it, and the bargaining agent's counsel advised that the vast majority of 53 pages of the grievor's copy had been significantly redacted. After hearing counsel's submissions, I issued a production order on March 4, 2013, ordering the CSC to produce and provide copies of a number of

documents, including a complete, unredacted copy of the disciplinary investigation report.

[5] On March 7, 2013, the bargaining agent advised me that it had received the unredacted version of the disciplinary investigation report and that it disclosed information relevant to the grievor's ability to properly prepare his case. That information included witness names; relevant observations made on the night and morning in question about the actions, demeanour and statements of a complainant whom the grievor allegedly sexually assaulted (and who will be referred to throughout this decision as "the complainant"); the name of the restaurant that the complainant allegedly visited on the night in question; a statement from a witness allegedly contradicting the complainant's version of events and observations; and statements made by other individuals that allegedly supported the grievor's case. I allowed the bargaining agent's request for a postponement of the hearing, which was rescheduled for August 26 to 30, 2013, in Prince Albert, Saskatchewan.

[6] On May 22, 2013, the bargaining agent applied to the former Board for further documents, mainly related to the vetting and redaction of the disciplinary investigation report. Written submissions were received, and on August 8, 2013, I issued a decision ordering the production and disclosure of additional documents.

III. The hearing

[7] The hearing of the substantive issues took place in Prince Albert on August 26, 27 and 28, 2013, and in Saskatoon on December 4, 2013.

[8] At the start of the hearing, it was agreed that, for reasons of confidentiality, the complainant who allegedly was sexually assaulted would have her name anonymized, as mentioned earlier in this decision.

[9] Counsel for the CSC also submitted that the complainant said she feared the grievor and that she asked that a screen be used when she gave evidence to prevent her and him having eye contact. Counsel for the bargaining agent strongly opposed that submission and cited *R. v. N.S.*, 2012 SCC 72, which considered whether the complainant in a sexual assault case, who was a Muslim, should be permitted to testify wearing her niqab, which covered her face. The Supreme Court of Canada sent the case

back to the preliminary inquiry judge with directions on how to balance the competing *Canadian Charter of Rights and Freedoms* ("the *Charter*") protections of the right to a fair trial and the right to freedom of religion. In doing so, the Court commented as follows at paragraph 23:

> *[23] In recent years, Parliament and this Court have confirmed the common law assumption that the accused, the judge and the jury should be able to see the witness as she testifies. To protect child witnesses from trauma, Parliament has passed legislation permitting children to testify via closed-circuit television or from behind a screen so that they cannot see the accused:* Criminal Code, *s. 486.2(1). This Court has upheld these testimonial aids, relying on the fact that they do not prevent the accused from seeing the witness:* R. v. J.Z.S., *2010 SCC 1, [2010] 1 S.C.R. 3, aff'g 2008 BCCA 401, 261 B.C.A.C. 52*....

[10] In this case, there was no *Charter* protection competing with the grievor's right to a fair hearing. The screen proposed by counsel for the CSC would have prevented the grievor from seeing the witness. Therefore, I denied the application to use a screen as it would have prevented the grievor from having a fair hearing.

[11] At the start of the hearing, the bargaining agent advised that it agreed that I had jurisdiction and agreed that if the grievor were found to have committed the sexual assault, termination was the appropriate discipline.

[12] On behalf of the CSC, I heard the evidence of the following people:

a. the complainant;
b. Lisa Bevill, a friend of the complainant and co-worker at the Saskatchewan Penitentiary;
c. Brent Sorenson, a correctional officer employed at the Saskatchewan Penitentiary;
d. Devin Murphy, a correctional officer employed at the Saskatchewan Penitentiary;
e. Connie Johannson, Deputy Warden, Rockwood Institution, Winnipeg, Manitoba; and
f. Sean Bird, Acting Warden of the Saskatchewan Penitentiary in January 2011.

[13] The bargaining agent did not call the grievor to give evidence. Its only witness was Alisa Moan, who was the manager of Rogue's Tavern ("the tavern") in Prince Albert in January 2011.

IV. **Background**

[14] In January 2011, the complainant was employed at the Saskatchewan Penitentiary in Prince Albert. On January 12, 2011, she and four co-workers had a meal and some drinks at a pizzeria and then attended a hockey game, where more drinking took place.

[15] When the complainant and her group arrived at the game, they saw the grievor for a moment; he said, "Oh look, the pucks have arrived," to the amusement of her group. At the game, the complainant briefly met and talked to the grievor. They all worked at the penitentiary where the grievor was a correctional officer. The complainant was single and knew that the grievor was married. She described him as a friend. She and her friends then watched the game. The grievor did not sit with them. The evidence is that all of them were drinking at the game.

[16] After the game, the complainant's group went to a local tavern, arriving at approximately 22:00, where they continued to drink. Sometime later, the grievor entered the tavern. He also continued to drink.

[17] As the evening progressed, the complainant stated that she had two or three more beers at the tavern, bringing her total for the evening to about five to six drinks.

[18] The complainant testified that she met the grievor, and she did not contest the suggestion that she was flirting with him. At one point, they moved to the V.L.T. area of the tavern because the grievor said that he wanted to talk to her. She stated that while they were in that area, the grievor asked her if she wanted to "hook up." She stated that she responded by saying: "No, I don't do that, you are married, you have a girlfriend, I am with somebody." She got up and left, and she stated that she could see that he was "mad" at her response.

[19] The complainant said that at that point, the grievor was "obnoxiously drunk." In terms of her own level of intoxication, she said the following: "I was definitely not okay to drive; I do not drive after I've had one."

[20] The complainant testified that she wanted to get some fresh air, so she went outside. She then texted the grievor and asked him to come outside to talk to her, which corresponded with what she wrote in a handwritten statement that she gave to the police on January 12. She stated that the grievor came outside and that she told him, “Don’t be like this,” and that they talked some more. However, on January 13, she told investigators that the grievor had asked her to come outside and talk to him.

[21] Telephone records from SaskTel showed two messages were sent from the complainant’s phone to the grievor’s phone, one at 00:28 and one at 00:30.

[22] The complainant also testified that she never left the bar at the same time as the grievor. Videotapes of the parking lot outside show her leaving the tavern briefly at 00:31 and again at 00:36, and the 00:36 video footage shows her and the grievor passing through the tavern’s outside door together.

[23] The complainant stated that when she first went out, the grievor asked her to start his truck and gave her his keys. He then went back inside the tavern.

[24] At that point, the grievor apparently picked up two beers. Ms. Moan, the tavern manager said that he had been cut off because he was intoxicated and that those beers must have belonged to others.

[25] The complainant was clothed in a summer T-shirt-like sweater and had no coat, hat, mitts or gloves. She had not paid her bar tab.

[26] The complainant testified that when she got in the grievor’s truck and tried the key, a sign stating “key error” kept coming on, and she could not start the truck. She stated that, therefore, she went back into the tavern with the intention of giving him back his keys.

[27] Ms. Moan was also at the hockey game and arrived to work at the tavern around 21:45. The bar was full and busy. She stated that it slowed down around midnight and that she then sat at the front door. She knew the grievor on sight but did not know he was married. She did not know the complainant. She stated that the grievor had two beers in his hands and that he got up to leave. She stated that he appeared very drunk, and so she said, “Whoa, where are you going? You are not driving.” She said the bar staff often drove intoxicated customers home.

[28] Ms. Moan testified that the complainant was with the grievor and that she held keys in the air and stated: "I have his keys; I am driving." In cross-examination, the complainant said that she did not remember if she said that but that it was possible. It was pointed out that on January 25, 2011, she told investigators that she had never waved the keys or said that she would drive anyone. However, it is not clear if her attention was directed to whether she said that to Ms. Moan or to anyone, in general.

[29] Ms. Moan also said that the complainant "looked happy" when she said she had the keys.

[30] Surveillance video showed the complainant exiting the tavern with the grievor following behind her on January 13 at 00:31. Shortly after that, the complainant entered the tavern with the grievor following behind her.

[31] At #14 on the video counter, the complainant is again shown exiting the tavern with the grievor behind her. The grievor is wearing a coat.

[32] At #15 on the counter, Ms. Moan sticks her head out the door.

[33] At #17 on the counter, the grievor re-enters the tavern on his own.

[34] Ms. Moan testified that after the door closed, she did not see the complainant again. She did not know the complainant before the events at issue.

[35] When the grievor came back in with the two beers, he dropped one, which smashed on the floor. Ms. Moan then left to get a broom or mop to clean up the broken bottle and the beer. By the time she returned, the grievor had left.

[36] Apparently alluding to the complainant's allegations, Ms. Moan had also stated to the investigators that they were a "… bunch of junk. The woman knew what she was doing. She was excited about taking his truck. No plan to have someone following." However, in her cross-examination, it emerged that her interaction with and examination of the complainant had taken about three seconds, and it was apparent from her cross-examination that her opinion had been largely derived from subsequent conversations with others.

[37] The complainant stated that after she could not start the truck, she started to go back to the tavern when she met the grievor. He was just coming out of the tavern when she reached the first of the few steps at the entranceway.

[38] The complainant told the grievor that she could not get the truck to start and that the truck had noted that there was a key error. She stated that he did not reply but that he put his left hand on the back of her neck and said, "Let's go."

[39] With his hand on the back of her neck, he led her to the truck. She said that it was not a hard or painful grip and that it was not threatening, but it was not friendly. She stated that once at his truck, he hoisted her by the seat of her pants into the passenger side. She could not remember if he had removed his hand from her neck when he opened the door of the truck.

[40] The complainant said that she was not expecting to leave the tavern, so her coat and purse were still in there. She had only a light sweater on. The grievor had his coat on.

[41] The complainant stated that the grievor then drove the truck behind the tavern and stopped. She said that she became afraid but that for some reason, she was unable to open the door. She did not mention that she had been unable to open the door when she gave the two statements on January 13 and January 14. She also said that the grievor had hold of her arm as she was trying to get out of the truck. That was also not mentioned in the January 13 statement.

[42] The grievor then slid down his pants and underwear to his knees. He insisted that they have sex. The complainant said, "This is not going to happen." The grievor said, "It will happen."

[43] The complainant said she that was extremely frightened at that point and that she repeatedly requested that the grievor return her to the tavern. Instead, she stated, he started the truck and drove to the south of Prince Albert and turned off the highway onto a side road. While en route, she continually asked him to take her back to the bar, stating "I do not want to do this."

[44] The complainant stated that after driving down the road for about a mile, the grievor stopped the truck. She again said, "This is not going to happen," to which he

said, “It is going to happen,” and he wrestled her into the back seat. He then took her shoes, jeans and underwear off and raped her. She said that all the while she was saying that she did not want to and was begging him to stop. When asked in direct examination why she did not fight him, she testified: “He was a lot stronger than I am; I was scared.”

[45] The complainant said that after he finished, he returned to the driver’s seat and began driving while she remained in the back seat, putting her clothes back on. She later reported to investigators that she had only one bruise on her thigh and that it was possible that it was an old bruise.

[46] After driving a short distance, the grievor drove his truck into a ditch and became stuck. The road was covered with snow.

[47] The complainant testified that at that point, she immediately escaped from the truck and began running away. She said she did not know where she was, so she began heading toward some lights.

[48] The evidence is that the temperature was -17°C with a wind chill of -26°C. As previously stated, the complainant was very lightly dressed.

[49] The complainant stated that while she was walking on the road, she messaged Ms. Bevill and Jillian Carleton, two girlfriends whom she had left back at the tavern, seeking help. Ms. Bevill testified that she did not see the message until significantly later. The complainant, Ms. Bevill and Ms. Carleton used BlackBerry phones. BlackBerry confirmed with the investigators that it was not possible to obtain a print record of the times of the messages between BlackBerry devices. At about the same time that the complainant was trying to contact Ms. Bevill and Ms. Carleton she received a text message from Mr. Sorenson. He was concerned because she had not returned to the tavern. His text message was “Where are you?” The complainant replied “nowhere”. Mr. Sorenson did not have a BlackBerry and SaskTel telephone records indicate that at 0051 a telephone identified as belonging to Mr. Sorenson sent a message to the complainant’s BlackBerry.

[50] Mr. Sorenson says that he sent another message to the complainant a short time later. Telephone records indicate this was at 01:11. This time the complainant responded that she needed help and requested that he come and get her.

[51] The telephone records also indicate that at 01:19, a telephone identified as belonging to Wade Swales sent a similar message to the complainant asking if she needed help. The complainant identified Mr. Swales as a correctional officer who was in the bar with Mr. Sorenson. The complainant responded indicating that she needed help.

[52] Mr. Sorenson and Mr. Swales left the tavern in Mr. Sorenson's vehicle. They travelled to the Summit physiotherapy building. It was on a service road running parallel to the highway. Ms. Johannson, one of the two investigators appointed by the CSC, later testified that it was approximately 2 km from where the grievor had become stuck in the ditch. Mr. Sorenson testified that when they found the complainant, she was on her knees because of the cold and was crying hysterically. She told Mr. Sorenson and Mr. Swales that she had been sexually assaulted by the grievor.

[53] Devin Murphy was another correctional officer in the tavern. He stated that he received a phone call from the grievor seeking assistance getting his truck out of a ditch. Mr. Murphy stated that he remembered taking particular note of the time of the call, which he said was at 01:38 or 01:39.

[54] Mr. Murphy testified that while he was on the phone with the grievor attempting to obtain a description of where he was located, a female voice came on the phone. She indicated that she was passing by and had stopped to assist the grievor. Mr. Murphy stated that she gave him directions to the location of the stuck vehicle.

[55] Mr. Murphy also gave a statement to the investigators in which he related that the grievor had told him the woman on the phone was the complainant.

[56] It was not suggested to the complainant in cross-examination that she was the female who spoke on the phone to Mr. Murphy. However she was asked and confirmed the accuracy of her statement to the investigators that "… When the truck got stuck, I immediately left the vehicle. As soon as I got dressed I left right away. At no time did I talk to anyone on the phone when I was in Don's truck." Mr. Murphy indicated that the

grievor called him at 01:38 or 01:39. By then, sometime had passed since 00:51 and 01:11 when Mr. Sorenson and 01:19 when Mr. Swales respectively called the complainant and she indicated she wanted a ride and needed help. It indicates that when the grievor called Mr. Murphy, the complainant had exited the truck at least 47 minutes earlier.

[57] After receiving the grievor's telephone call, Mr. Murphy recruited the help of two friends who were in the tavern, and the three of them drove to seek the location of the grievor and his truck. Mr. Murphy testified that they did not see the complainant en route to the grievor's location.

[58] Mr. Murphy said that he and the two accompanying officers found the grievor in his truck and pulled his vehicle out of the ditch. He estimated that about 15 minutes had elapsed between the time he spoke to the woman on the phone at 01:38 or 01:39 and when they got the truck out of the ditch.

[59] In Mr. Murphy's statement to investigators on January 18, there was no mention of any tire tracks or footprints. In his evidence, he said that he did not know for sure if there were any tire tracks other than from the grievor's vehicle and said that he did not specifically make a point to look for them or footprints.

[60] The investigation report contained evidence of statements by Marc Lavoie and Cam Yager, who had accompanied Mr. Murphy when the grievor's truck was located and pulled from the ditch. Mr. Lavoie said that he remembered looking around for other tire tracks and recalled that the only others apparent were from the grievor's truck skidding into the ditch. He did not recall if there had been enough wind to cover any tracks. Mr. Yager said that he could see the tracks in the snow indicating the grievor had veered to the right and then to the left and noticed that those were the only vehicle tracks on that road. He never noticed any footprints in the snow.

[61] Although in their statements Mr. Lavoie and Mr. Yager say they never saw footprints, and Mr. Yager said the grievor's truck tire tracks were the only tracks on the road, neither testified and so their statements were not scrutinized by cross-examination. The evidence is clear from Mr. Murphy's testimony that he spoke to a woman on the phone during his conversation with the grievor when the grievor said he was in a ditch, so that prior to the arrival of Mr. Lavoie and Mr. Yager there was a

woman in the truck when it was in the ditch, who had later left the truck. For some reason her footprints were either not visible or were not noticed.

[62] The complainant was then driven back to the tavern. Ms. Bevill took her to Mr. Sorenson's, where she was joined by some of her friends who had been in the tavern as well as by Mr. Sorenson, Mr. Swales and Jason Lacorre, who was also a correctional officer. The complainant testified that Mr. Sorenson told her to report what happened, while Mr. Sorenson's evidence was that he told her, "If this happened, [she] should report it."

[63] At about 05:00, the complainant went to the police station and advised that she had been sexually assaulted. At that time, she did not indicate who had committed the assault. Ms. Bevill then drove her to a nearby hospital, followed by the police. At the hospital, she was examined by a physician, who processed a rape kit.

[64] At about 10:00 the grievor went to Mr. Sorenson's home to discuss the events. The grievor told Mr. Sorenson that Mr. Lacorre had called him at about 05:00 and related to him the complainant's allegations.

[65] Later that day, penitentiary management learned of the alleged sexual assault. At 18:30, the acting deputy warden and an assistant warden went to the complainant's residence. She advised them that she had been sexually assaulted by the grievor.

[66] The next day, January 14, 2011, Acting Warden Bird requested Ms. Johannson and Ray Tooley, a CSC parole manager in Saskatoon, to investigate the grievor's conduct with respect to the alleged sexual assault. On the same day, the grievor was advised that he was being suspended with pay while the matter was being investigated.

[67] During its investigation the investigating team allowed the grievor's bargaining agent to record all of the corrections officers' interviews, including the grievor's. The investigating team made its own recordings of its interviews with the grievor but did not record its interviews of the complainant.

[68] At some point the complainant verbally indicated to the discipline investigators that she did not want to be interviewed again.

[69] On January 20, the grievor was charged with sexual assault and forcible confinement.

[70] On January 26, the complainant sent a message to the Prince Albert police service indicating that she did not wish to proceed with charges against the grievor. She advised the investigation team of her wishes in an email as follows:

> *I am sure that I won't be at work on Wed Jan 26/11. I am still up and some things came up in the meeting today that made me second-guess the small details leading up to what happened. I am confused as I have had no sleep and am not eating. I was sure I remembered the small details but they have my head realing [sic]. You can give this to the team as I want to be as honest as possible. I was so hysterical that night that I was not thinking about anything other than what happened. I don't know if I was outside when I texted him to come out and talk to me. Now I am not sure. Maybe we did go outside together but they have me so confused because that's the way it could've happened. But just not the way I remembered. The night it happened I tried so hard to recall all events that led up to what happened. I'm really confused and as a result of the questioning today I have actually emailed CST Ratt and asked for charges to be dropped. I know I should go through with charges I just can't go up against him. My father is also not in good health and I am sure this would kill him to see his daughter go through something like this. He has me so scared. I don't know what else to do. I thought I was stronger than this but I guess I am not.*

[71] In cross-examination it was suggested to the complainant that the grievor's wife, as a member of CSC management, was in one way or the other the complainant's superior. She replied that the grievor's wife had no authority over her, even indirectly. She denied the suggestion that she was motivated by concern that it would become known that she had sex with a member of management's husband.

[72] On March 2, 2011, the complainant sent a message to the investigation team indicating that she would be proceeding with criminal charges.

[73] Mr. Tooley and Ms. Johannson delivered their report on March 9, 2011. It concluded with the following findings:

> *FINDINGS*

> *Section 7 of Commissioner's Directive 060 entitled "Code of Conduct [*this should read "Code of Discipline"*] states that:*
>
> *"Relationships with other staff members must promote mutual respect within the Correctional Service of Canada and improve the quality of service. Staff are expected to contribute to a safe, healthy and secure work environment, free of harassment and discrimination."*
>
> *Section 7 goes on to state that:*
>
> *"An Employee has committed an infraction, if he or she:*
>
> *e. commits any act of personal or sexual harassment against another staff member."*
>
> *Section 6 of Commissioner's Directive 060 states that:*
>
> *"Behaviour both on and off duty, shall reflect positively on the Correctional Service of Canada and on the Public Service generally. All staff are expected to present themselves in a manner that promotes a professional image, both in their words and in their actions…"*
>
> *Section 6 goes on to state that "An employee has committed an infraction, if he or she:*
>
> *c. Acts, while on or off duty, in a manner likely to discredit the Service."*
>
> *No one, including the Investigation Team, was present in the truck when [*the complainant*] alleges that Mr. Sather violently sexually assaulted her. As indicated, the Investigation Team must make a finding based on the information that is [sic] been provided by those interviewed and based on the evidence it has been possible to obtain. The Investigation Team, based on the information available, based on [the complainant's] credibility, and based on the balance of probabilities, is of the opinion that Mr. Sather sexually assaulted [the complainant] and committed infractions specified in Commissioner's Directive 060 as stated above.*

[74] On March 11, Mr. Bird provided the grievor with a vetted copy of the disciplinary investigation report and asked him to provide a rebuttal or additional information no later than April 11, 2011. Mr. Bird advised him that a disciplinary hearing had been scheduled for Tuesday, April 12, 2011, at 10:00 to provide the grievor with an opportunity to present his comments and any additional information. In cross-examination Mr. Bird could give no reasonable explanation for his refusal to

reject the request for postponing the disciplinary hearing that the grievor's counsel had made on April 7. He replied on the morning of April 12 that he had rescheduled the hearing to take place at 14:00 that afternoon. His excuse was that there were two separate processes, criminal and disciplinary, and that it was not reasonable to adjourn the hearing as the CSC needed to conclude it as quickly as possible.

[75] Article 17 of the collective agreement contains disciplinary procedures and includes the following provisions:

> *17.07 Subject to the Access to Information and Privacy Act [sic], the Employer shall provide the employee access to the information used during the disciplinary investigation.*

[76] Appendix "J" of the collective agreement is a letter of agreement with the following operative provisions:

> …
>
> *The present letter is pursuant to the discussions held between the parties regarding the application of article 17.07 of the collective agreement for the Correctional Services group. For reference purposes, the text of this provision is reproduced below:*
>
> …
>
> *It is agreed that this provision is designed to provide the employee who was subject to a disciplinary investigation, access to the information and/or document (s) that have been used in the course of said investigation in accordance with the Access to Information Act and the Privacy Act, without the employee having to make an application for said information under the Access to Information Act. The access provided in paragraph 17.07 should be provided promptly within the framework of the disciplinary hearing.*
>
> *The present letter of agreement shall expire on May 31, 2010.*
>
> …

[77] On April 7, 2011, the grievor's lawyer wrote the following to Mr. Bird:

> *Please be advised that we have been consulted by Mr. Sather with respect to the above-noted matter.*
>
> *We would respectfully request the complete and unvetted copy of the Disciplinary Investigation Report with respect to this matter and would further respectfully request that any*

> *hearing of this matter be adjourned, on a* sin die *basis, to allow sufficient opportunity to properly review and reply to this matter and, further, to avoid prejudice to Mr. Sather with respect to the criminal proceedings related to this matter.*
>
> *We trust the above is satisfactory, and look forward to hearing from you at your convenience.*

[78] By letter dated April 12, 2011, Mr. Bird rejected the request. The meeting was rescheduled for 14:00 on that day. At the hearing of this grievance, Mr. Bird acknowledged that the redacted report was 72 pages long (plus appendices) and that 53 of those 72 pages were heavily redacted.

[79] In redirect, Mr. Bird stated that the reason he rejected the request was that there were two separate processes, a) disciplinary and b) criminal. He also said that it would not have been reasonable to adjourn the hearing; it needed to be concluded as soon as possible. He also said that the letter from the grievor's lawyer on April 7, 2011, did not provide an alternate date for the hearing.

[80] On April 20, 2011, the grievor was provided a letter from Mr. Bird, terminating his employment. Its relevant provisions read as follows:

> *The purpose of this letter is to advise you of the outcome of the Disciplinary Investigation concerning the allegation that you sexually assaulted* [the complainant] *on or about January 12, 2011 or January 13, 2011.*
>
> *In determining the level of disciplinary action warranted in this case, I have taken into consideration the information gathered during the Disciplinary Investigation and subsequent Disciplinary Hearing held on April 12, 2011.*
>
> *The Disciplinary Hearing resulted in your refusal to give any rebuttal to the allegations, or response to the questions posed to you in that hearing.*
>
> *I have accepted the findings of the Disciplinary Investigation report dated March 9, 2011, that you "sexually assaulted* [the complainant] *and committed infractions specified in Commissioner's Directive 060 as stated above."*
>
> *After careful consideration of the findings of the disciplinary investigation, as well as any mitigating factors, including your length of service and discipline-free record, I have determined that you do not display the values and ethics required of a Correctional Service Canada employee as outlined in*

> *Correctional Service Canada's Mission Statement. By your actions you have irreparably damaged and compromised the relationship of trust, integrity, confidence and credibility which must exist between you and the Correctional Service of Canada. I am therefore unable to maintain confidence in your ability to remain an employee of the Correctional Service of Canada.*
>
> *Accordingly, given the seriousness of your misconduct, a decision has been made to terminate your employment for disciplinary reasons. Therefore, pursuant to paragraph 12 (1) (c) of the Financial Administration Act and by the authority delegated to me by the Deputy Minister, I am terminating your employment with the Correctional Service of Canada effective April 20, 2011.*

[81] On April 26, 2011, the grievor filed a grievance grieving the termination of his employment. As corrective action, he requested that his termination be declared null and void and that he be reimbursed all salaries, monies and rights lost as a result of his termination.

[82] On October 3, 2011, a preliminary hearing was held into the criminal sexual assault charge. Sometime prior to the preliminary hearing the grievor was provided with the criminal disclosure evidence by the Crown.

[83] On April 11, 2012, the Attorney General of Saskatchewan issued a stay of proceedings of the indictment for the unlawful confinement and sexual assault charges.

V. <u>Submissions</u>

A. <u>For the CSC</u>

1. <u>Proof of the sexual assault</u>

[84] In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court stated unequivocally that there is only one civil standard of proof at common law — proof on a balance of probabilities.

[85] The test for sexual assault is set out in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para 25 and 26, as follows:

...

> *25 The* actus reus *of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent… It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any* mens rea *with respect to the sexual nature of his or her behaviour ....*
>
> *26 The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred ....*

[86] In this case, the only reasonable finding is to conclude that the complainant probably did not subjectively consent to being sexually touched by the grievor.

[87] The Supreme Court recently reaffirmed *Ewanchuk* in *R. v. J.A.*, 2011 SCC 28, at para 34. The Court found as follows:

> *[34] Consent for the purposes of sexual assault is defined in s. 273.1(1) as "the voluntary agreement of the complainant to engage <u>in the sexual activity in question</u>". This suggests that the consent of the complainant must be specifically directed to each and every sexual act, negating the argument that broad advance consent is what Parliament had in mind. As discussed below, this Court has also interpreted this provision as requiring the complainant to consent to the activity "at the time it occur[s]" ....*
>
> [Emphasis in the original]

[88] The Supreme Court also found that "[t]he only relevant period of time for the complainant's consent is while the touching is occurring… The complainant's views towards the touching before or after are not directly relevant."

[89] In this case, if the grievor argued that the complainant's flirty relationship or ambiguous conduct earlier on the night in question gave him a basis for believing that there was consent, it was contrary to law.

[90] In this case, any previous flirty or ambiguous conduct was not sufficient to give the grievor a basis for believing that there was consent as that is contrary to law. See *R. v. Lavergne-Bowkett*, 2013 BCSC 1737.

[91] The only way the CSC could not have met its onus to establish that the sexual assault took place would be if I had determined that the complainant has no credibility whatsoever.

[92] Minor inconsistencies and even denials or minimizations of earlier provocative behavior do not diminish the necessity of examining the complainant's evidence in its entirety and in the context of the evidence as a whole, when determining whether there was consent. See *R. v. Saadatmandi*, 2008 BCSC 250.

[93] Additionally, in this case the complainant's credibility must be balanced against the grievor's failure to testify. The grievor could not use the presumption of innocence as a justification for not testifying. That presumption arises only in criminal matters due to subsection 4(6) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, which provides that "[t]he failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution." In civil cases, such as this one, there is no presumption of innocence. See *McDougall*.

[94] The grievor's failure to testify in this case should result in an adverse inference. Brown and Beatty, in *Canadian Labour Arbitration* (4th Edition), set out as follows at para 3:5120:

> *Arbitrators generally have adopted the same view as the civil courts with respect to the conclusions to be drawn from the failure of a person to be called as a witness who could have been called and who could have given evidence of matters within his knowledge. Thus, where a party can, by his own testimony, throw light on a matter and fails to do so, an arbitrator is entitled to infer that such evidence would not have supported his position. As well, failure to call a witness who is available to be called, where the evidence is material, can lead to the same inference being drawn and the uncontradicted evidence by the other party accepted. Moreover, where a witness's testimony is only rebutted by hearsay evidence when it could have been directly met, the arbitrator may accept the less than satisfactory direct evidence.*

[95] The former Board has drawn adverse inferences in disciplinary grievances in cases such as *Ayangma v. Treasury Board of Canada (Department of Health)*,

2006 PSLRB 64, and *Baptiste v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 127.

[96] The grievor's failure to testify means that I should infer that any of his evidence with respect to the sexual assault would not be helpful to his case.

[97] While the ongoing presence of criminal proceedings might be a justification for silence during the investigation and disciplinary processes, the threat of criminal proceedings no longer existed. There was no reason for the grievor not to provide his version of events during the hearing other than that he would have been subject to cross-examination.

[98] The rule in *Browne v. Dunn* (1894), 6 R. 67 (H.L.) also applies in this case. The rule provides that "… if Counsel is considering the impeachment of the credibility of a witness by calling independent evidence, the witness must be confronted with this evidence in cross-examination while he or she is still in the witness box" (see Sopinka, Lederman & Bryant, *The Law of Evidence in Canada,* 3rd Edition, at 116).

[99] While the complainant was challenged to some extent with respect to her version of events at the bar and in the parking lot, nothing was done to challenge her assertion that she repeatedly and clearly indicated that she did not consent to the grievor's sexual advances. Counsel for the grievor ought to have challenged the complainant with something along the lines of the following: "You consented to having sex with the grievor didn't you?" and then provided her with an alternative version of events, which he would then have asserted to be the case. Counsel's failure to do that prevented him from then suggesting that the complainant should not be believed on the issue of consent or on any of the issues in which her evidence had not been significantly challenged.

[100] The complainant's evidence showed that she repeatedly told the grievor that she did not wish to have sexual relations with him. She did so in the V.L.T. area in the bar, when he pulled his pants down in his parked truck behind the tavern, when they were driving to the outskirts of town, when they parked on the side road and while he was sexually assaulting her.

[101] When asked in direct examination why she did not fight the grievor, the complainant testified that he was a lot stronger than she was and that she was scared.

[102] The only way the grievor could have overcome this uncontradicted evidence of lack of consent would have been to try to show that the complainant is devoid of any credibility and therefore that all her evidence should have been rejected.

[103] The case law, such as the often-quoted test for credibility in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, states that the best way to judge a complainant's credibility is to judge it against the "preponderance of probabilities" and the surrounding circumstances. In this case, there is a significant amount of corroborating evidence, which confirms the complainant's story and undermines what little hearsay evidence the grievor provided to investigators.

[104] On the other hand, the evidence showed that the grievor's exculpatory remarks to Correctional Officer Murphy were not truthful. Officer Murphy testified that the grievor told him that the woman who calmly spoke to him on the grievor's phone from the ditch was in fact the complainant. The evidence shows that this was impossible. The complainant and Mr. Sorenson testified that, as verified by the phone records, the complainant was picked up by 01:29. Officer Murphy testified that he got the call from the grievor, during which he spoke to a woman, at 01:38 to 01:39. Officer Murphy testified he was quite certain about the time of the call, which was corroborated by the fact that he and the other members of the rescue party left shortly after that call and were seen leaving the bar on the videos at 01:54.

[105] Officer Murphy also testified that the grievor admitted to him that he had sex with the complainant in his truck.

2. Alleged bad faith

[106] The grievor has alleged that the CSC exercised bad faith and breached clause 17.07 of the collective agreement by failing to provide him with an unvetted version of the investigation report.

[107] In its response, the CSC stated that clause 17.07 and Appendix "J" of the collective agreement both specifically indicate that the CSC shall provide its employees

with access to the information used during a disciplinary investigation subject to the *Access to Information Act* (R.S.C. 1985, c. A-1) and the *Privacy Act* (R.S.C. 1985, c. P-21).

[108] Secondly, even if procedural unfairness did occur, it was wholly cured by the hearing *de novo* before me at which the grievor had full notice of the allegations against him and full opportunity to respond; see *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (F.C.A.)(QL), which was followed recently in *Richer v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 10, at para 113.

[109] It is clear that the grievor was always fully apprised of the allegations against him, and the notion that he was somehow disadvantaged is fanciful. Evidence of this includes the following:

a) The grievor received a call around 05:00 on January 13, 2011, from another correctional officer who had been speaking to the complainant, who had told him her allegations. Later that day, that correctional officer and another one went to the grievor's house to relate what they had heard from the complainant.
b) The grievor and Mr. Sorenson discussed Mr. Sorenson's involvement at 10:00 on January 13.
c) On January 14, 2011, the grievor received notice from Mr. Bird advising him that he was under investigation for sexual assault.
d) On January 27, 2011, the grievor reviewed the complainant's statement of the day before with the police as part of the Crown's disclosure.
e) He received the criminal allegation disclosure from the Crown.
f) He had multiple discussions with his fellow correctional officers about the allegations starting pretty much from the time of the incident.
g) A preliminary inquiry was held on October 3, 2011, at which he was able to cross-examine the complainant.
h) The bargaining agent recorded all the correctional officers' interviews and its representative was present at all times.

[110] Given that the grievor had spoken to all the key players, he would not have had any doubts of the issue.

[111] The grievor did not testify about any prejudice or difficulties that he might have suffered.

[112] Finally, there is no evidence of how the grievor was prejudiced or suffered as a result of any bad faith.

3. Sealing order

[113] The CSC requested that the sealing order be issued with respect to all of the exhibits that refer to the complainant.

B. For the grievor

1. Proof of the sexual assault

[114] Counsel for the grievor agreed with the CSC that the current standard of proof is as cited in *McDougall* but also referred to the former Board's decision in *Basra v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 53, which also dealt with an allegation of sexual assault. In that case, the adjudicator stated that the employer must always prove by ". . . sufficiently clear, convincing and cogent evidence all the elements of its case on a balance of probabilities . . . ."

[115] Counsel for the grievor also agreed that the tests for assessing a witness's credibility are as stated in *Faryna*.

[116] Counsel for the grievor submitted that despite the fact that the standard of proof in criminal cases is proof beyond a reasonable doubt and is therefore different from the standard of proof in civil cases, certain principles from criminal cases involving allegations of sexual assault are relevant.

[117] Reference was made to *R v. Annett*, 2007 BCSC 1279, in which the complainant in a criminal sexual assault case was confronted with a number of prior inconsistent statements as well as the consistency of other witnesses who lent support to the accused's account of what had transpired. The Court found that the complainant's attempt to explain the inconsistencies was not credible and that it reflected an attempt to cover up her lack of recollection about what had actually occurred, due to intoxication. The Court was unable to conclude that the Crown had established beyond

a reasonable doubt that the complainant did not consent to the sexual activity. On that point, *Annett* relied on the test in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

[118] At paragraph 34 of *Annett*, the Court states as follows:

> *[34]* W.D. *requires the Court to undertake the following analysis when an accused testifies. If the Court believes the accused, the issue should be resolved in his favour. Even if the Court does not believe the accused but is left with a reasonable doubt as a result of his evidence, the issue should be resolved in his favour. Thirdly, even if the accused is not believed and the Court does not have a reasonable doubt as a result of his evidence, if after considering the remainder of the evidence it is left with a reasonable doubt it must decide the issue in favour of the accused. Lastly,* R. v. H. (C.W.) *(1991), 3 B.C.A.C. 205, adds a fourth requirement: if the Court is unable to decide whom to believe, the accused must be acquitted.*

[119] At paragraph 43 of *Annett*, the Court concluded that "[b]ased on the totality of the evidence … the Crown had not established beyond a reasonable doubt that [the complainant] did not consent to the sexual activity."

[120] Obviously, the results differ from case to case, but the principles are similar. In this case, the complainant made many inconsistent statements. The burden may be different from the criminal law, but the burden still lies on the employer, and inconsistencies, especially when significant, cannot be disregarded. The issue of consent, as stated in *Annett*, should be based on the totality of the evidence.

[121] Counsel for the grievor also cited *R. v. Mosher*, 2007 NSSC 189, which referred to the statement in *Ewanchuk* that "… the credibility of the claim that [the complainant] did not want or consent to the intercourse must still be assessed in light of all the evidence, including her words and actions before and during the incident."

[122] The Nova Scotia Supreme Court then went on to examine in detail the complainant's description of the alleged sexual assault and found that her description of both the time spent with the accused and her description of the sex act "was improbable" and that "[t]his evidence leaves open the possibility that the complainant may have consented to sex with the accused, and [being afraid of a friend who was the mother of the accused's son] and knowing how she felt, was afraid to admit that the event was consensual ...." The Court went on to state that after considering the

independent physical evidence, it did not show conclusive evidence of a lack of consent. The Court summarized that it was not satisfied beyond a reasonable doubt on all the evidence that the complainant did not consent and that the accused was entitled to the benefit of that doubt.

[123] Counsel for the grievor also referred to *R. v. L.H.*, [2007] O.J. No. 1588 (QL), which summarized a number of principles extracted from the case law, as follows, commencing at paragraph 87:

> *87 The court must be satisfied beyond a reasonable doubt on the issue of credibility where the case turns on the evidence of two conflicting witnesses:* Regina v. Selles *(1997), 101 O.A.C. 193 (C.A.) at 207-8* per *Finlayson J.A.;* M.(N.) v. The Queen, *[1994] O.J. No. 1715 (C.A.) (affirmed [1995] 2 S.C.R. 415). Where there are significant inconsistencies or contradictions within a complainant's testimony, or when considered against conflicting evidence in the case, the trier-of-fact must carefully assess the evidence before concluding that guilt has been established:* Regina v. S.W. *(1994), 18 O.R. (3d) 509 (C.A.) at 517* per *Finlayson J.A. (leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 290, [1994] 2 S.C.R. x),;* Regina v. Oziel, *[1997] O.J. No. 1185 (C.A.) at para. 8, 9,* per curiam; Regina v. Norman *(1993), 87 C.C.C. (3d) 153 (Ont. C.A.) at 172-4* per *Finlayson J.A. para 87.*
>
> *88 Demeanor evidence alone cannot suffice to found a finding of guilt:* Regina v. K.(A.) *(1999), 123 O.A.C. 161 (C.A.) at 172* per *Rosenberg J.A.*
>
> …
>
> *90 The fact that a complainant pursues a complaint cannot of course be a piece of evidence bolstering his or her credibility – otherwise it could have the effect of reversing the onus of proof:* Regina v. A.(G.R.) *(1994), 35 C.R. (4th) 340 (Ont. C.A.) at para. 3* per curiam; R. v. Islam, *[1999] 1 Cr. App. R. 22 (C.A.) at 27. It may be that in the circumstances of a particular case, the defence wishes to raise the issue of delayed complaint as counting against the veracity of the complainant's account of assault. The significance or evidentiary relevance, if any, of the complainant's failure to make such a complaint is contextual and will vary from case to case depending upon the trier of fact's assessment of the evidence relevant to the failure to make a contemporaneous complaint:* The Queen v. D.(D.) *(2000), 148 C.C.C. (3d) 41 (S.C.C.) at 64-7* per *Major J.;* Regina v. M.(P.S.) *(1993), 77 C.C.C. (3d) 402 (Ont. C.A.)* per *Doherty J.A. at 408-409.*

…

> *94 The existence or absence of a motive by the complainant to fabricate is a relevant factor to be considered:* The Queen v. K.G.B. *(1993), 79 C.C.C. (3d) 257 (S.C.C.) at 300* per *Lamer C.J.C.;* R. v. Prasad, *[2007] A.J. N0. 139 (C.A.) at para. 2-8;* Regina v. K.(A.), supra *at 173;* Regina v. M.(W.M.), *[1998] O.J. No. 4847 (C.A.) at para. 3* per curiam*;* Regina v. Jackson, *[1995] O.J. No. 2471 (C.A.) at para. 4, 5* per curiam. *I make this observation, sensitive to the fact that the burden of production and persuasion is upon the prosecution and that an accused need not prove a motive to fabricate on the part of a principal Crown witness. Evidence of a witness' motive to lie is relevant as well to the accused* qua *witness:* Regina v. Murray *(1997), 99 O.A.C. 103 (C.A.) at para. 11-14* per *Charron J.A.*

…

[124] In this case, both Ms. Johannson as the investigator and the CSC in its argument have submitted that the fact that the complainant filed a complaint bolsters her credibility, while the quotation in the last paragraph, at its paragraph 90, states that that is contrary to law.

[125] With respect to paragraph 94 of that quotation, although the complainant testified that the grievor's wife had no direct authority over her, it is not credible that she was not concerned about being discovered having sex with the husband of a penitentiary manager.

[126] A comparison of the complainant's evidence, her several statements made in the course of the investigation and her evidence at the preliminary hearing shows many inconsistencies from one statement to the next and things that are not really plausible, in terms of what she described. A number of times, she could not explain why she had not telephoned or texted earlier and requested help. She indicated that the truck door on the passenger side was locked when it was acknowledged that it could not be locked from the inside, and she replied to Mr. Sorenson's initial query about where she was with, "Nowhere."

[127] All the above are relevant considerations with respect to the complainant's credibility and with whether the CSC has proven the absence of consent. The grievor stated that she is not credible.

[128] One example of false evidence from the complainant was her story that no one was present when the grievor grabbed the back of her neck and led her across the parking lot to his truck. The video shows that after the grievor left the tavern, he was followed by five other individuals.

[129] Another example is that the only set of tire tracks near the truck and the ditch belonged to Mr. Sather's truck, which shows that the woman who spoke to Mr. Murphy on the grievor's phone was not in a different car — she was the complainant.

[130] The idea that a woman would stop in the middle of the night to offer assistance and then go on the grievor's phone to give directions does not pass the preponderance of probability test.

2. <u>Remedy for loss of employment</u>

[131] The grievor advised that he was not seeking reinstatement but rather damages in lieu. *Hay River Health and Social Services Authority v. Public Service Alliance of Canada*, (2010) CLAD No. 407 ("Hay River") (QL), was referred to as an authority on how to calculate damages. *Lâm v. Deputy Head (Public Health Agency of Canada)*, 2012 PSLRB 96, was also referenced, which cited the *Hay River* decision with approval.

3. <u>Bad faith and malicious conduct</u>

[132] Mr. Bird attempted to justify the redactions in the investigation reports by stating that they were authorized by Appendix "J" of the collective agreement. However, that appendix does not give the CSC the right to overreact.

[133] Mr. Bird indicated it that he had no control over what was redacted. He said that the document went to the Access to Information and Privacy (ATIP), which made those decisions.

[134] In *Robitaille v. Deputy Head (Department of Transport),* 2010 PSLRB 70, the former Board reasoned that the Supreme Court had ruled that the whole of a dispute, the essence of which arises from the interpretation, administration or violation of a collective agreement, falls within an adjudicator's jurisdiction. The former Board concluded that for that approach to become a reality, adjudicators must also have the

power to order relief that reflects their expanded jurisdiction, including the power to award punitive damages if appropriate.

[135] The concept of punitive damages is well documented in common law. The conduct must be harsh, vindictive, reprehensible and malicious. However, there is no specific test for determining what constitutes malice. In *Honda Canada Inc. v. Keays*, 2008 SCC 39, at para 62, the Supreme Court stated that punitive damages are restricted to "… advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own." Thus, punitive damages are awarded in the case of a wrongful act that on its own gives recourse to legal action.

[136] In *Keays,* the Supreme Court cautioned that the discretion to award such damages should be exercised most cautiously and only in exceptional cases. For example, the Federal Court of Appeal refused to award such damages in *Canada (Attorney General) v. Bédirian*, 2007 FCA 221.

[137] In *Robitaille*, the former Board found the facts established that the employer in that case or its representative acted deliberately and with malice towards the grievor in that case by launching an investigation without verifying the facts, not informing the grievor of key elements of the complaint until just a few days before the investigation began, not informing him of the complaint, not informing him of the document containing the chronology of events prepared in support of the allegations and a long list of other actions. The former Board concluded that those acts were intended to harm the grievor, that they were not simply the consequence of an investigation or discipline, and that they constituted malicious conduct in and of themselves. Furthermore, the employer did not provide any reasonable explanation for its actions. Therefore, the former Board ordered the employer to pay the grievor $50 000 in punitive damages.

[138] In this case, of the 70 pages in the report, 53 had redactions. So much was redacted that a reader could not understand the document. The redactions included facts, names, allegations, sections of synopsis, analyses, headings, etc.

[139] Some specific redactions were of items that would have been helpful to the grievor. Ms. Moan's name was redacted as were the names of two waitresses at the tavern. No link was shown to justify those redactions under the *Privacy Act*.

[140] The redactions indicate not only incompetence but also maliciousness. The CSC's representatives should have known what was appropriate to redact, and a strong argument could be made that the choice of redactions was deliberate. The selections that were made indicate that the person making those decisions acted with the idea of prejudicing the grievor.

[141] What happened indicates that the thinking was that there was a mandate to conclude that a sexual assault had been committed and that the CSC was attempting to prevent the grievor from mounting a proper defence. For example, the fact that the complainant drank alcohol was redacted over and over again. The grievor's consumption of alcohol was fair game, but not the complainant's. The statement by one of the correctional officers who was in the tavern that night that the complainant was "grabbing his ass" was redacted.

[142] Putting aside the issue of whether the investigators found him credible or otherwise, the grievor was entitled to know that a claim was being made. The fact that the complainant verbally indicated that she did not want the discipline investigators to interview her again was redacted. Ms. Moan's statement in the body of the report that the complainant was "happy" when she was holding up the keys was redacted. Mr. Murphy's statement that the woman he spoke to on the phone was calm for someone who was throwing out allegations was redacted.

[143] It seems obvious in examining these redactions as a group that someone had turned his or her mind to redact those points that would help the grievor's case.

[144] Similarly, the CSC's refusal to share the information that it had gathered as of the grievor's interview date on January 20 also goes to bad faith.

[145] *Tipple v. Treasury Board (Revenue Canada, Customs & Excise)*, PSSRB File No. 166-02-14758 (19850128), does not apply to this case. It refers to procedural errors.

[146] In this case, while the grievor had the right to a full defence during this adjudication, it did not mean that the CSC had a free pass with respect to bad faith or malicious conduct. If bad faith or malicious conduct occurred, then *Robitaille* is still good law.

[147] A couple of the grievor's colleagues informing him of things informally was not a substitute for a formal notification from the CSC that the allegation was made and of the details of the allegation and its supporting facts contained in the unredacted report.

4. Sealing order

[148] The CSC has requested that a sealing order be issued with respect to all the exhibits that refer to the complainant. The bargaining agent has indicated its agreement provided that any of the parties can gain access to the exhibits if they wish to.

5. Adverse inference

[149] No adverse inference should be drawn with respect to the grievor not testifying as the burden was on the CSC. The grievor was not required to respond to completely contrary statements and speculations stemming from the numerous inconsistencies of the CSC's chief witness.

6. *Browne v. Dunn*

[150] It is obvious that consent is the issue involved in this case. The grievor's counsel called only one witness. During the complainant's testimony, Ms. Moan's statements were specifically put to the complainant so that she could comment on the evidence that would be called.

VI. Analysis and decision

A. The alleged sexual assault

[151] The parties agreed that if I find that the grievor sexually assaulted the complainant, then his behaviour warranted the termination. The issue is simply determining whether the CSC established that the grievor sexually assaulted the complainant.

[152] There is the notion in some of the older case law that the standard of proof in serious disciplinary matters is higher than the balance of probabilities or that the employer's evidence should be more closely scrutinized, but that is no longer the case.

In *McDougall*, the Supreme Court stated unequivocally as follows at paragraph 40: "Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities."

[153] The Court continued as follows:

> …
>
> *[44] … In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.*
>
> *[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.*
>
> …

[154] The leading case with respect to the test for sexual assault is the Supreme Court's decision in *Ewanchuk*. The Supreme Court found as follows in that decision:

> …
>
> *25 The* actus reus *of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any* mens rea *with respect to the sexual nature of his or her behaviour ….*
>
> *26 The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred ….*
>
> …
>
> *31… the trier of fact may only come to one of two conclusions: the complainant either consented or not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly*

her conduct may contradict that claim, the absence of consent is established and the third component of the actus reus *of sexual assault is proven. The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them....*

…

32 In this case, the trial judge accepted the evidence of the complainant that she did not consent. That being so, he then misdirected himself when he considered the actions of the complainant, and not her subjective mental state, in determining the question of consent. As a result, he disregarded his previous finding that all the accused's sexual touching was unwanted. Instead he treated what he perceived as her ambiguous conduct as a failure by the Crown to prove the absence of consent.

…

39 The question is not whether the complainant would have preferred not to engage in the sexual activity, but whether she believed herself to have only two choices: to comply or to be harmed. If the complainant agrees to sexual activity solely because she honestly believes that she will otherwise suffer physical violence, the law deems an absence of consent, and the third component of the actus reus *of sexual assault is established. The trier of fact has to find that the complainant did not want to be touched sexually and made her decision to permit or participate in sexual activity as a result of an honestly held fear. The complainant's fear need not be reasonable, nor must it be communicated to the accused in order for consent to be vitiated. While the plausibility of the alleged fear, and any overt expressions of it, are obviously relevant to assessing the credibility of the complainant's claim that she consented out of fear, the approach is subjective.*

…

46 . . . [i]n order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant <u>communicated consent to engage in the sexual activity in question</u>....

…

49 … "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity ....

…

[Emphasis in the original]

[155] Further, in analyzing the honest but mistaken belief defence, the Supreme Court held as follows at paragraph 52:

> *52 Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters". Continuing sexual conduct after someone has said "No" is, at a minimum, reckless conduct which is not excusable....*

[156] The Supreme Court recently reaffirmed *Ewanchuk* in *J.A.* It found as follows:

…

> *34 Consent for the purposes of sexual assault is defined in s. 273.1(1) as "the voluntary agreement of the complainant to engage <u>in the sexual activity in question</u>". This suggests that the consent of the complainant must be specifically directed to each and every sexual act, negating the argument that broad advance consent is what Parliament had in mind. As discussed below, this Court has also interpreted this provision as requiring the complainant to consent to the activity "at the time it occur[s]" ....*

…

> *46 The only relevant period of time for the complainant's consent is while the touching is occurring… The complainant's views towards the touching before or after her not directly relevant....*

…

> *47… that there is no substitute for the complainant's actual consent to the sexual activity at the time it occurred. It is not open to the defendant to argue that the complainant's consent was implied by the circumstances, or by the relationship between the accused and the complainant. There is no defense of implied consent to sexual assault ....*

…

[157] As an example, in *Lavergne-Bowkett*, evidence was adduced with respect to the willingness of the complainant in that case to stay with the accused at a bar after he began rubbing against her, her agreement to returning to her apartment, and her behaviour in putting on a sexy nurse's outfit and orange nightgown, as well as nonsexual events such as watching television and playing a guitar, were analyzed as part of the defence of an honest but mistaken belief in consent. None were found to have vitiated the fact that there was no evidence that the accused took reasonable steps to ascertain that the complainant was consenting.

[158] In analyzing that case, the Court found the accused guilty beyond a reasonable doubt. Although the complainant's credibility was challenged, the elements of the sexual assault test were established. There was no evidence that the complainant subjectively consented. The Court specifically found that not resisting is not consent.

[159] In this case, the complainant's flirty relationship or ambiguous conduct with Mr. Sather leading up to when she first was in his truck cannot be taken as indicating consent to the subsequent sexual activity. That would be contrary to law. I include the controversy about whether the complainant held up the keys and in Ms. Moan's eye seemed to be a willing participant to leave with Mr. Sather in his truck. Once the complainant was in the truck, the only evidence is that she became quite frightened about the grievor's intentions and that she repeatedly indicated to Mr. Sather that she did not want to have sex with him. At no time did she change her mind and grant consent.

[160] The complainant's evidence is uncontradicted as only she and the grievor were in the truck and he did not testify. It follows that the only way the CSC could not have met its onus to establish that the sexual assault took place was if the evidence disclosed that the complainant lacked credibility. Even though a complainant's testimony may lack credibility on some issues, her testimony on the substance of the allegations may pass scrutiny. She can be believed on some matters and not believed on others while still warranting a finding that she was assaulted.

[161] The grievor's counsel did a thorough job of extracting inconsistencies from the complainant's several statements and preliminary-hearing testimony. It would be strange and suspicious if there were no inconsistencies. A total absence of

inconsistencies would probably be indicative of a concocted story. What is more important is the nature of the inconsistencies. Some, such as whether Mr. Sorenson said to the complainant, “You should report this,” or, “If this is true, you should report it,” are understandable given the complainant’s probable state of mind when the statement was made. Leaving out a detail in one statement that is included in another statement is also understandable. In some cases, the details may be prompted by questions. What is more important is that when important details in different statements conflict, they perhaps expose deliberate untruths.

[162] Apparently, in this case, there is a problem with the complainant’s account of the events in the parking lot. The videotapes indicate that at 00:31, the complainant leaves the tavern with the grievor and that a short time later both of them come back in. At #14 on the video counter on the same videotape, the complainant again leaves the tavern with grievor. At #15, Ms. Moan briefly sticks her head out the door, which appears to coincide with her testimony that she told the grievor to stop because he was carrying two beers and was obviously intoxicated, and she was concerned about him driving. At that point, Ms. Moan stated that the complainant held up the keys and said that she was driving.

[163] At #17, the videotape shows the grievor entering the tavern, which coincides with Ms. Moan’s evidence that he came back in holding the two beers. He then dropped one on the floor. Ms. Moan left to get something to clean up the glass and beer. By the time she returned, the grievor had left. I accept Ms. Moan’s testimony on that point. The complainant testified that what Ms. Moan said about the complainant stating she had the keys and was driving, was possibly true but that she had no recollection of it.

[164] The videotape indicates that at #17, the grievor enters the tavern alone, leaving the complainant outside. She probably tried to start the truck at that point, saw the key lock error sign and went back into the tavern to tell the grievor that she could not start it. She then met the grievor when he exited the tavern, as shown at 00:38 on the videotape, followed shortly by five others.

[165] I think that the evidence indicates that the complainant was probably a willing participant being led to the truck. The grievor might have had his hand on the back of her neck, but I think it was probably playful rather than forceful. Therefore, I do not

think that the evidence supports her story that she was forced into the truck. I think that it's more probable and consistent with her admission that she was being "flirty" and that the grievor did not use force in getting her into the truck.

[166] However, I find the complainant's evidence credible once she was in the truck and the grievor started to drive. It was 17 below, and she was lightly dressed and had left her purse in the bar. Her evidence is that she immediately started demanding that the grievor stop and let her return to the bar. Her evidence is clear that she was not consenting to any sexual activity.

[167] The test for credibility that has often been quoted and that both parties cited is that set out in the British Columbia Court of Appeal decision in *Faryna* as follows:

…

> *If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combined to produce what is called credibility… A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent case in which a witness is caught in a clumsy lie.*
>
> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

…

[168] The grievor's counsel submitted that in this case, it was improbable that in the middle of the night, a woman would stop to assist the grievor, so the calm woman who spoke to Mr. Murphy had to have been the complainant, which destroyed her credibility. I disagree. While I agree that a significant number of women might be too timid or wary to stop and help, I also think that a significant number would stop to help someone who had gone off the road into a ditch, given that it was the middle of the night and it was 17 below.

[169] Mr. Murphy stated that the grievor told him that the woman who calmly spoke to him on the grievor's phone was in fact the complainant. The evidence indicates that this was impossible. The complainant and Mr. Sorenson testified that, as verified by the phone records, the complainant was picked up by 01:29. The evidence indicates that the complainant was picked up close to one mile from where the grievor went into the ditch. Mr. Murphy testified that he received the call from the grievor, during which he spoke to the woman, at 01:38 to 01:39. Mr. Murphy was quite certain about this time, which is corroborated by the fact that he and other members of the rescue party left shortly after the call and were seen leaving the bar.

[170] After considering all the evidence, I accept as credible that the complainant's evidence shows that on the balance of probabilities, she was sexually assaulted by the grievor.

[171] Minor inconsistencies and even denials or minimizations of earlier provocative behavior do not diminish the necessity of examining the complainant's evidence in its entirety and in the context of the evidence as a whole, when determining whether there was consent. See *Saadatmandi*.

[172] As noted earlier in this decision, there is no presumption of innocence in civil cases.

[173] The grievor's failure to testify in this case should result in an adverse inference, as set out in Brown and Beatty at para 3:5120.

[174] The former Board has drawn adverse inferences in disciplinary grievances in cases such as *Ayangma* and *Baptiste*.

[175] The grievor's failure to testify means that I should infer that any of his evidence with respect to the sexual assault would not be helpful to his case.

[176] While the ongoing presence of criminal proceedings might be a justification for silence during the investigation and disciplinary process, the threat of a criminal proceedings no longer existed. There was no reason for the grievor not to provide his version of events during the hearing, other than that he would have been subject to cross-examination.

[177] I conclude that the evidence shows that the sexual assault has been proved and that the termination of the grievor's employment was justified.

B. <u>The alleged bad faith and malicious conduct</u>

[178] Aside from the issue of whether the CSC was guilty of bad faith and malicious conduct, the law is clear that procedural defects that might have occurred are wholly cured by a *de novo* hearing before an adjudicator: see *Tipple*.

[179] The grievor submitted that the CSC was guilty of bad faith and malicious conduct in what was an apparent attempt to obstruct his ability to defend himself against the complainant's allegations that she was sexually assaulted. The grievor stated that the bad faith and malicious conduct was shown by the extent of the redactions in the copy of the disciplinary investigation report initially provided to him and was shown by Mr. Bird's conduct of failing to give the grievor reasonable notice to allow him to properly prepare for the hearing on April 12, 2011.

[180] Of the 70 pages in the disciplinary investigation report, 53 had redactions. I agree with the grievor's submission that the redactions indicated a bias in favour of protecting the complainant from the disclosure of information that would have been helpful to the grievor while the same protection was not afforded to him. For example, references to the complainant drinking earlier in the evening were redacted, while those referring to the grievor drinking were not.

[181] I was frankly astounded by the extent of the redactions. The CSC and Mr. Bird attempted to justify them by saying that they were authorized by clause 17.07 and Appendix "J" of the collective agreement. For ease of reference, those provisions state as follows:

> *17.07 Subject to the Access to Information and Privacy Act [sic], the Employer shall provide the employee access to the information used during the disciplinary investigation.*
>
> …
>
> *Appendix J*
>
> *The present letter is pursuant to the discussions held between the parties regarding the application of article 17.07 of the collective agreement for the Correctional Services group. For reference purposes, the text of this provision is reproduced below:*
>
> …
>
> *It is agreed that this provision is designed to provide the employee who was subject to a disciplinary investigation, access to the information and/or document (s) that have been used in the course of said investigation in accordance with the Access to Information Act and the Privacy Act, without the employee having to make an application for said information under the Access to Information Act. The access provided in paragraph 17.07 should be provided promptly within the framework of the disciplinary hearing.*
>
> *The present letter of agreement shall expire on May 31, 2010.*
>
> …

[182] Mr. Bird stated that the report was sent for vetting and that the CSC had no control over the extent of the redactions. None of the submissions to me dealt with the provisions of the *Privacy Act*, and so I am unable to comment on the legality of the extent of the redactions. I ordered the production of an unredacted copy of the report in the pre-hearing proceedings of this adjudication. That resulted in my decision of August 8, 2013, to which I referred earlier in this decision. I had the power to make such an order under specific legislation, namely, paragraph 226(1)(*e*) of the *PSLRA*, which grants me the authority as the appointed adjudicator ". . . to compel at any stage of a proceeding, any person to produce the documents and things that may be relevant."

[183] However, before an adjudicator is appointed, an employee's ability to gain access to information used in a disciplinary proceeding is governed by clause 17.07 of

the collective agreement, which means that it is subject to the *Access to Information Act* and the *Privacy Act*, which would include the redactions authorized by those Act.

[184] No evidence was presented on which I could make a finding that the CSC displayed malice by making the redactions.

[185] Turning to the April 12 hearing, Mr. Bird could give no reasonable explanation for his refusal to reject the request for postponing it that the grievor's counsel made on April 7. Mr. Bird replied on the morning of April 12 that he had rescheduled the hearing to take place at 14:00 that afternoon. His excuse was that there were two separate processes, criminal and disciplinary, and that it was not reasonable to put the hearing in adjournment as the CSC needed to conclude it as quickly as possible. He gave no reason to support the latter assertion, and his response in total makes no sense.

[186] In submitting a claim for punitive damages for bad faith, the grievor cited *Robitaille*, in which the former Board found that an employer's conduct towards a grievor was harsh, vindictive, reprehensible and malicious, such that the advertent wrongful acts were so malicious and outrageous that they were "deserving of punishment on their own," as per *Keays*. The Supreme Court of Canada in *Keays*, supra, held that "punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own." I understand malice in the context of advertent acts to mean the actor was motivated by an intent to harm or injure. The evidence did not link Mr. Bird to making the redaction decisions. The only evidence suggesting that Mr. Bird personally might have been out to get the grievor was the decision to deny the postponement. Rather than malice, I think it was more probable that Mr. Bird was motivated by a misplaced desire to speed ahead with the hearing for reasons of efficiency or expediency, deciding in the process to ignore the grievor's rights. His actions therefore lack the intent to qualify as outrageously malicious and do not meet the test required for punitive damages.

C. <u>Sealing order</u>

[187] In *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, the Supreme Court of Canada used the following test to deciding in which circumstances an exhibit may be sealed:

> *(a) Is the order necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk?; and*
>
> *(b) Do the salutary effects of the order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings?*

[188] In the present case the evidence justifies the conclusion that it is an important and overriding interest to protect the identity of the complainant, justifying the sealing of all exhibits that refer to the complainant in order to protect her identity.

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

(The Order appears on the next page)

VII. Order

[190] The grievance is dismissed.

[191] All of the exhibits in this matter that refer to the complainant are to be sealed, with the provision that either of the parties are entitled to access the sealed exhibits.

May 14, 2015.

William H. Kydd,
adjudicator