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**Citation:** 2015 PSLREB 75



*Public Service Labour Relations Act*

Before an adjudicator

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BETWEEN

**KRISTY HUGHES AND STEPHAN TITCOMB**

Grievors

and

**PARKS CANADA AGENCY**

Employer

Indexed as

*Hughes and Titcomb v. Parks Canada Agency*

In the matter of individual grievances referred to adjudication

**Before:** Linda Gobeil, adjudicator

**For the Grievors:** Wassim Garzouzi, counsel

**For the Employer:** Richard Fader, counsel

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Heard at Banff, Alberta,  
October 7 to 9, 2014.

## REASONS FOR DECISION

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### **I. Individual grievances referred to adjudication**

[1] These two grievances concern the terminations of the employment of Kristy Hughes and Stephan Titcomb (“the grievors”). When they were terminated on September 5, 2013, Ms. Hughes was employed as a seasonal lifeguard at Banff Upper Hot Springs in Banff, Alberta, while Mr. Titcomb was a full-time cashier at the same location. Both worked for the Parks Canada Agency (“the employer”). Ms. Hughes had been an employee of the employer for 30 years, while Mr. Titcomb had been employed for 14 years. I should point out that the grievors are a couple and that they live together.

[2] The reason for their terminations was stated in letters dated September 5, 2013, from Tracy Thiessen, the employer’s Executive Director, Mountain Parks (Exhibits E-31 and E-32, tab 16 to 17). The termination letters are essentially the same for both grievors and allege that they illegally entered the employer’s Cave and Basin National Historic Site (“the Cave and Basin”) after hours on May 18, 2013, and that they swam in a cave pool that was closed under the employer’s regulations to protect an endangered snail species and its habitat.

[3] On September 5, 2013, each grievor filed a grievance challenging the employer’s decision to terminate their employment and requesting reinstatement in their respective positions without the loss of pay and benefits. On January 29, 2014, their grievances were referred to the Public Service Labour Relations Board (“the former Board”) for adjudication under paragraph 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”), namely, with respect to the disciplinary actions resulting in their respective terminations.

[4] On August 18, 2014, I held a pre-hearing conference with the parties’ representatives. The parties agreed that one hearing would be held for both termination grievances, that the evidence would be common to both grievances and that one decision would be issued for both grievances. I should also add that at the hearing, counsel did not distinguish the grievors in terms of their involvement, the circumstances or the remedy sought.

[5] 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 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 *Act* as that *Act* read immediately before that day.

## **II. Summary of the evidence**

[6] At the employer's request, on the first day of the hearing, accompanied by the parties' counsel, the grievors, two of the employer's officials and I visited the Cave and Basin, where the events leading to the terminations occurred (Exhibit E-22, page 4). The Cave and Basin is situated a short distance by car from Banff Upper Hot Springs, an employer site that includes a bathhouse and offers a mineral water pool to which the general public can be admitted to swim. No swimming is allowed at the Cave and Basin (Exhibits E-22, page 4, and E-23, page 4).

[7] While details of what happened will appear later in this decision, it is important to understand that the grievors were accused of entering the Cave and Basin without authorization and of swimming in a concrete underground cave pool located within the Cave and Basin building. The entrance they used to access the Cave and Basin site the night in question leads to a large open air deck with enclosed water (Exhibit E-40), known as the "basin." Although the waters in that basin (Exhibit E-40) are protected and contain endangered species, the grievors did not swim there. As they admitted at the hearing, they swam in an underground cave pool located in the Cave and Basin building that can be accessed only through a tunnel guarded by a locked gate. A picture of the cave pool and its retaining wall is provided in Exhibit E-43. That cave pool is about 12 metres in diameter, and it contains endangered species. At the hearing, the grievors admitted that they entered it.

[8] It is also important to note that in a separate forum, charges were laid against the grievors under the *National Parks General Regulations* (SOR/78-213) about the May 18, 2013, incident. As a result, they hired criminal counsel to advise and represent them before a criminal court.

**A. For the employer****1. Mary Minogue's testimony**

[9] Mary Minogue was the first witness for the employer. She was in the United Kingdom during the hearing and testified over the telephone.

[10] Ms. Minogue indicated that she worked as a lifeguard at Banff Upper Hot Springs from March 2011 until October 2013. She met both grievors there. She indicated that she mainly knew Mr. Titcomb.

[11] In her testimony, Ms. Minogue stated that Jim Van Tassel, a supervisor at Banff Upper Hot Springs, informed her that both grievors went to the Cave and Basin after it had already been closed for years for renovations to swim after hours in the cave pool located there. Ms. Minogue indicated that Mr. Van Tassel reported to her that John Green, a janitor at the Cave and Basin, had told him that the grievors showed up there after hours on the night of May 18, 2013, and that he let them in since he knew them. Once on the premises, the grievors accessed the underground cave pool, removed their clothes and swam in the cave pool.

[12] Ms. Minogue testified that she advised Mr. Van Tassel that he should inform management because it was forbidden to swim in those waters since they were the habitat of protected snails species that were noted as endangered under the *Species at Risk Act* (S.C. 2002, c. 29).

[13] Shortly after that, over a drink with Mr. Titcomb in his backyard, he and Ms. Minogue spoke about what had happened that night. She indicated that he stated that staff let him and Ms. Hughes in after hours and that they went to swim in the cave pool. Ms. Minogue testified that Mr. Titcomb indicated that they knew they were not allowed to swim in that area. Ms. Minogue also testified that the grievors decided nevertheless to swim in the cave pool since there was no camera surveillance. Ms. Minogue stated that Mr. Titcomb seemed very happy about what he and Ms. Hughes had done; he was impressed with himself, and he bragged about it.

[14] Ms. Minogue indicated that she was appalled that the grievors went swimming in the cave pool since everybody knew that doing so was forbidden. She explained that they were told as much in their "Quality Visitors Experience" (QVE) training.

[15] Ms. Minogue stated that she raised the matter with the Banff Upper Hot Springs manager, Lynn Barrett, who was the grievor's supervisor, and that Ms. Barrett did not do anything with the information. Ms. Minogue gave a written statement on July 9, 2013 (Employer's Book of Exhibits, tab 3, page 106, and Exhibit 5, tab 3, pages 24 to 27).

## **2. Brenda DeMone's testimony**

[16] At the time of the incident, Brenda DeMone was Acting Field Unit Superintendent at Mount Revelstoke and Glacier National Parks, both employer sites. She indicated that she has worked for the employer for over 21 years and that she has been a public servant for 32 years.

[17] Ms. DeMone testified that in August 2013 she was asked to conduct a fact finding investigation into the allegation that the grievors entered the Cave and Basin premises after hours and that while inside, they swam in the cave pool, which is the habitat of a protected species of snails (Exhibits E-25 and E-26). She specified that her task was to interview those involved by visiting the Cave and Basin and then to submit her report to Ms. Thiessen for a decision. Ms. DeMone also mentioned that in parallel to her administrative investigation, the Park superintendent, Sharon Woods, was also investigating the matter pursuant to the *National Parks General Regulations* (SOR/78-213). Ms. DeMone indicated that Renée Lamontagne, from the employer's human resources (HR) branch, was also part of her investigation.

[18] Ms. DeMone stated that she finalized her report on August 15, 2013, and that she submitted it to Ms. Thiessen for a decision. The report's contents and its attachments were filed as exhibits (Employer's Book of Exhibits, tab 3).

[19] Ms. DeMone explained that the Cave and Basin is the birthplace of Canada's national parks and that it was designated an historic site in 1981. It offers a habitat for rare plants, invertebrates and fish. For instance, one endemic snail, the *Physella johnsoni*, can be found only at some specific Parks Canada sites, such as the Cave and Basin. The Committee on the Status of Endangered Wildlife in Canada lists species like that one as endangered. The Cave and Basin cave pool is one of its habitats. The snails are also protected from any form of human disturbance by the 2007 *Superintendent Roulet Order* ("the *Roulet Order*"), which specifies that the public can observe the cave pool, the basin and the thermal springs at the Cave and Basin only during operating

hours and only from the walkways around it (Employer's Book of Exhibits, tab 3, pages 12 and 13).

[20] Ms. DeMone explained that at the time of the events at issue, the Cave and Basin had been closed to the public for about five years in order to revitalize and improve it with a \$13.8 million investment. On May 17, 2013, dignitaries officially reopened the site. The next day, Saturday, May 18, 2013, after operating hours, when the site was closed to the public, the grievors entered without authorization and swam into the protected waters of its cave pool.

[21] The cave pool being the endangered snail's habitat, Ms. DeMone stated that several signs are posted at the Cave and Basin entrance, at the outside basin, in the tunnel leading to the cave pool and on the walls of the cave pool itself reminding people that they cannot dip their hands or swim in any of the protected waters (Employer's Book of Exhibits, tab 3, pages 15 to 21, and Exhibits E-40 and 43).

[22] During her testimony, Ms. DeMone referred to her report dated August 15, 2013, that she submitted to Ms. Thiessen on August 16, 2013, following the administrative investigation. It contains the notes and summaries of each interview and Ms. DeMone's analysis and conclusion based on her fact finding (Employer's Book of Exhibits, tab 3, pages 3 to 108).

[23] Ms. DeMone explained that on August 8, 2013, she and Ms. Lamontagne, who took notes during the investigation, interviewed Mr. Green, Ms. Minogue, Ms. Barrett and the two grievors separately and that the grievors' bargaining agent representative, Jaison Van Tine, was present.

[24] Ms. DeMone indicated that the purpose of the investigation was to determine whether on May 18, 2013, the two grievors entered the Cave and Basin site after hours and whether they swam in the cave pool.

[25] Ms. DeMone concluded that the grievors did "...disregard the restricted Activity Order and enter the cavepool" (Employer's Book of Exhibits, tab 3, page 8). She explained that she based her findings on the interviews with the witnesses.

[26] Ms. DeMone specified that Mr. Green appeared credible when she met with him. He indicated that on the night of May 18, 2013, after the building had been closed to the public, he saw the grievors removing a construction fence to gain access to the

Cave and Basin facility and that once on the premises, they managed to make their way to the cave pool, where they removed their clothes and entered the protected waters. Ms. DeMone indicated that while Mr. Green knew the grievors, he did not feel he had the authority to stop them from their unauthorized entry (Exhibit E-4, tab 3, pages 22 and 23).

[27] Ms. DeMone testified that she also interviewed Ms. Minogue, who was the grievors' colleague at the Banff Upper Hot Springs facility. Ms. Minogue told her that Mr. Van Tassel had informed her of the fact that the grievors had entered the facility and had swum in the cave pool. Mr. Titcomb had confirmed as much; he had been boasting about what he and Ms. Hughes had done (Exhibit E-5, tab 3, pages 24 to 27).

[28] Ms. DeMone also interviewed Ms. Barrett, who indicated that she had been made aware of the allegations against the grievors but that she had discussed it with them and had reported it to Chief Operating Officer Ken Fisher. Ms. Barrett also stated that staff were informed about protecting the snail species and that the grievors had never before been disciplined (Employer's Book of Exhibits, tab 3, pages 28 to 30).

[29] Ms. DeMone stated that during the August 8, 2013, interview, while Ms. Hughes admitted entering the Cave and Basin on Mr. Green's invitation on the night of May 18, 2013, she read from a prepared statement that she refused to answer the specific question of whether she and Mr. Titcomb swam in the cave pool that night. She indicated that she was acting on the advice of her criminal lawyer, who was representing both grievors against the charges under the *National Parks General Regulations*.

[30] Ms. DeMone indicated that Ms. Hughes appeared anxious and evasive during the interview. Ms. DeMone stated that Ms. Hughes told her that on the night of May 18, 2013, after dinner, she and Mr. Titcomb decided to go for a bike ride to the Cave and Basin to see the years-long renovations, during which it had been closed to the public. Ms. DeMone indicated that Ms. Hughes stated that she and Mr. Titcomb did not enter through the main entrance but via the side, that they walked on the deck and that Mr. Green invited them to tour the facility. Ms. Hughes denied that the grievors removed any fencing to enter the facility and that since it was dark, they did not see the restricted-area notice. Ms. Hughes also indicated that she had little knowledge of the Cave and Basin and that she did not know about the *Roulet Order* (Exhibit E-6, tab 3, pages 31 to 39).

[31] Ms. DeMone also interviewed Mr. Titcomb on the same day. He was also accompanied by Mr. Van Tine. Mr. Titcomb indicated that the Cave and Basin had not been open to the public but that Mr. Green invited him and Ms. Hughes inside. Mr. Titcomb indicated that they entered the facility by the deck and that they walked by the open basin (Exhibit E-40). He denied removing a barrier or construction fence to enter the site. He acknowledged that he knew that swimming was not allowed at the Cave and Basin and admitted that he was aware of the *Roulet Order* that was in place to protect the endangered snails. However, he indicated that in his opinion no snails were in the cave pool and that he did not recall seeing any restricted-activity notice. Ms. DeMone indicated that Mr. Titcomb also declined answering whether he and Ms. Hughes swam in the cave pool that night based on his criminal lawyer's advice (Exhibit E-7, tab 3, pages 40 to 49).

[32] Ms. DeMone testified that after hearing the witnesses, she concluded that the grievors had not respected the *Roulet Order* about the Banff Springs snail's habitat and that they had entered the cave pool (Exhibit Employer's book, tab 3, page 12). She explained that despite the fact that both grievors denied seeing any restricted activity notice, it was more reasonable to conclude that as experienced employees, they knew about the restricted areas and that swimming in the cave pool was prohibited. Ms. DeMone stated that at the Cave and Basin and specifically in the tunnel leading to and at the cave pool itself, the *Roulet Order* is posted (Employer's Book of Exhibits, tab 3, pages 15 to 21). She indicated that under the circumstances, it was reasonable to assume that because of their years of service, the grievors knew that the only place anyone was allowed to swim, and under supervision, was at their workplace: Banff Upper Hot Springs.

[33] Ms. DeMone also pointed out that contrary to what the grievors stated, she did not believe that they effortlessly entered the Cave and Basin on the night of May 18, 2013. Ms. DeMone relied on a statement made by Steve Malins, the employer's cultural resources manager, who indicated that the area was secured by construction fences and that the only way to access the deck was using effort to remove a secured barrier. When asked about an email sent by Glen Exley, the employer's Technical Services Co-ordinator, about site entries at night, Ms. DeMone indicated that she did not include Mr. Exley's concern in her report since his email arrived after she submitted her report to Ms. Thiessen (Employer's Book of Exhibits, tab 3, page 67).



[34] Ms. DeMone also testified that while Mr. Green knew the grievors, she believed him when he said that he did not grant them permission to enter the cave pool. Ms. DeMone explained that before becoming a cashier, Mr. Titcomb had also been a janitor, and as such, he and Ms. Hughes were part of a panel that recruited Mr. Green as a janitor in 2011 (Employer's Book of Exhibits, tab 3, page 57). Ms. DeMone explained that the grievors should have known that Mr. Green had no authority to let them onto the deck of the Cave and Basin building and later to access the cave pool.

[35] Ms. DeMone stated that she concluded in her investigation that both grievors were familiar with the employer's "Code of Ethics" and that by accessing a closed area and entering the waters of the cave pool, they both showed a lack of professional and ethical qualities. She also indicated that she felt that the grievors were not forthcoming and that they had the opportunity to admit their mistake but decided not to. According to Ms. DeMone, the grievors followed a script by which they refused to answer specific questions, and in addition, they remained vague in their answers. For Ms. DeMone, the grievors did not realize the seriousness of their actions; nor did they express any remorse. The reference to any "regrets" Ms. Hughes mentioned in her statement had more to do with the time spent on the matter than with regretting what she and Mr. Titcomb had done (Employer's Book of Exhibits, tab 3, pages 9 and 38).

[36] Ms. DeMone testified that when she submitted her report, she did not know that a video existed showing the grievors at the Cave and Basin on the night of May 18, 2013. She indicated that she saw the video only the day before the hearing.

### **3. Ms. Lamontagne's testimony**

[37] Ms. Lamontagne is currently an advisor to the Mountain Park Executive. At the time of the event at issue, she was an HR manager for the employer.

[38] Ms. Lamontagne indicated that in July 2013, she was informed about an alleged incident involving employees entering the Cave and Basin after hours and swimming in its cave pool. She reported the matter to a law enforcement officer in accordance with procedure.

[39] Ms. Lamontagne testified that in August 2013, management launched an administrative investigation to be led by Ms. DeMone into the allegation against the grievors.

[40] Ms. Lamontagne indicated that as the HR manager, she was also involved in the investigation, that she attended the interviews led by Ms. DeMone and that she took handwritten notes during the interviews (Employer's Book of Exhibits, tab 3).

[41] Specifically, Ms. Lamontagne indicated that Exhibit E-6, tab 3, pages 31 to 39, and Exhibit E-7, tab 3, pages 40 to 49, contain the notes she took when Ms. DeMone interviewed the grievors separately on August 8, 2013; Mr. Van Tine was present during these interviews.

[42] Ms. Lamontagne testified that both grievors admitted attending the Cave and Basin site after hours on May 18, 2013, but that both denied removing any barriers and indicated that Mr. Green had invited them in. Ms. Lamontagne also mentioned that when asked specifically whether at some point they removed their clothes and swam in the cave pool, both grievors read from a prepared written statement that they were not at liberty to answer that question since a legal action was pending in a different forum. According to Ms. Lamontagne, the grievors indicated that they were acting on the advice of their criminal lawyer (Exhibits E-6, page 32, and E-7, page 42).

[43] Ms. Lamontagne testified that in August 2013, both grievors were put on leave with pay pending the investigation and that on August 30, 2013, they were invited to attend a meeting with Ms. Thiessen on September 3, 2013. Thirty minutes before the meeting with Ms. Thiessen, the grievors were provided with a statement of facts that had been prepared after Ms. DeMone had finished her investigation (Exhibit E-11, tabs 9, 11 and 12). Ms. Lamontagne indicated that the purpose of the meeting with Ms. Thiessen was to give the grievors a final opportunity to comment or clarify or to explain the circumstances of May 18, 2013. The September 3, 2013, meeting was to be followed by another meeting, at which Ms. Thiessen was to provide the grievors with her decision (Exhibits E-27 and E-28, tab 3, pages 117 and 118).

[44] Ms. Lamontagne testified that on September 3, 2013, she and Ms. Thiessen held a follow-up interview with Mr. Green (Exhibit E-10, tab 7). During that interview, Mr. Green reiterated that on the night of May 18, 2013, he heard a noise of a barrier being rattled and saw Mr. Titcomb pushing his way into and helping Ms. Hughes enter the Cave and Basin premises. Mr. Green stated that while he knew the grievors, he never invited them in. He indicated that they toured the facility and that Mr. Titcomb asked whether there were any cameras. Once in the cave, Mr. Green indicated that Mr. Titcomb removed his clothes and dove in the pool. Mr. Green said he was not

comfortable with it and that he told the grievors they would have 45 minutes, and he then left. Mr. Green said that when he came back, Ms. Hughes also had removed her clothes and was swimming along with Mr. Titcomb in the cave pool. Mr. Green indicated that when Mr. Titcomb came out he whispered that he had just made love with Ms. Hughes. Mr. Green indicated that he reported what happened to Mr. Van Tassel.

[45] Ms. Lamontagne testified that on the same day, September 3, 2013, she, Ms. Thiessen and Mr. Van Tine also met with Mr. Titcomb, who had just received a copy of the statement of facts prepared by Ms. DeMone (Exhibit E-11, tab 9). Ms. Lamontagne indicated that Mr. Titcomb was upset with the statement of facts and that he refuted Mr. Green's and Ms. Minogue's statements as being completely false and insisted that he and Ms. Hughes did not force their entry or remove any barrier. Mr. Titcomb stated that a flimsy little construction fence had been wide open and that no signs had warned against entering. He indicated that the grievors entered and just walked on the deck. Mr. Green then invited them for a tour of the facility. Mr. Titcomb maintained that he had no idea that there were snails on the premises and that he did not know about the *Roulet Order*. He insisted that he never asked about cameras. He denied that he and Ms. Hughes skinny-dipped in the cave pool. He indicated that Mr. Green was with them in the cave pool and that he left for a few minutes, during which he and Ms. Hughes had a romantic moment that involved only kissing and hugging (Exhibit E-12, tab 8).

[46] Ms. Lamontagne testified that they also met with Ms. Hughes on September 3, 2013. She was provided with the same statement of facts prepared by Ms. DeMone (Exhibits E-13, tab 11, and E-14, tab 12). Ms. Lamontagne indicated that again, she took handwritten notes of the interview (Exhibit E-15, tab 10). Ms. Hughes stated that Mr. Green's statement was inaccurate and that on the night of May 18, 2013, she and Mr. Titcomb decided to go for a bike ride; they wanted to see the improvements done to the Cave and Basin. Ms. Hughes indicated that a construction fence was open, which was how she and Mr. Titcomb entered. She stated that she and Mr. Titcomb did not touch the fence to enter. Ms. Lamontagne testified that Ms. Hughes told them that Mr. Green invited them inside and that he had the key to the barrier leading to the tunnel to the cave pool. Ms. Lamontagne stated that Ms. Hughes indicated that Mr. Green then invited them to go for a swim in the cave pool but that she told him she had just had surgery. Mr. Green then left for a few

minutes while she and Mr. Titcomb sat on a bench near the cave pool enjoying the ambiance.

[47] Ms. Lamontagne indicated that Ms. Hughes declined to answer the question as to whether she and Mr. Titcomb swam in the cave pool on the basis that their criminal lawyer had advised them not to comment. Ms. Hughes also indicated that she had received training about the Cave and Basin but that it had been long ago. She insisted that in all her years as an employee, she had never been disciplined. Finally, she stated that she regretted the situation and that she felt that it had been blown out of proportion.

[48] During her testimony, Ms. Lamontagne also testified about another incident that happened after the two grievors were informed in a September 5, 2013, letter from Ms. Thiessen that their employment was terminated. Ms. Lamontagne explained that in October 2013, Pat Thomsen had replaced Ms. Thiessen as Executive Director of Mountain Parks. Ms. Lamontagne indicated that on October 16, 2013, she was informed that the two grievors had shown up at their former employment location, the Banff Upper Hot Springs facility, while for maintenance purposes the pool was closed to the public. Ms. Lamontagne testified that both grievors had entered the premises and that while Mr. Titcomb was talking to some of the staff, Ms. Hughes had entered a small office where personnel files were kept and had removed some files containing time sheets. Ms. Lamontagne indicated that the law enforcement team was involved and that it had been decided to send both grievors a notice prohibiting them from showing up on the premises again (Exhibits E-17, tab 20, and E-18, tab 21).

#### **4. Mr. Green's testimony**

[49] Mr. Green currently works in the private sector. On the night of May 18, 2013, he was working as a janitor for the employer at the Cave and Basin location. He explained that it was his second day on the job and that he knew the grievors on a professional level since they were on the selection board when he successfully applied for the janitor position in 2012.

[50] Mr. Green explained that May 18, 2013, was the Saturday night following the grand reopening of the Cave and Basin facility the day before after five years of being closed for major renovations. He testified that on that night he was working after hours when he heard a noise and went to investigate. He stated that he saw the two

grievors inside the facility. He indicated that he saw the grievors' bikes on the curb and that the premises were barricaded. According to him, the grievors entered through a construction fence about four to five feet high that had been sealed before their entry. He admitted that he did not see the grievors removing the barrier and that he saw them going through that barrier only when they left.

[51] Mr. Green testified that he had no concerns with the grievors being on-site since they were long-standing government employees. He explained that he showed them around the site and that when he opened the gate that led to the tunnel to the cave pool, he turned on the tunnel lights.

[52] Mr. Green testified that once in the cave pool, Ms. Hughes sat on a bench near the pool and that Mr. Titcomb asked if there were any cameras. Mr. Green indicated that cameras were located outside the cave pool. He testified that he was taken aback and was shocked by Mr. Titcomb's decision to dive into the cave pool and that he told the grievors that he was giving them 45 minutes before he walked away. Mr. Green stated that he felt that he had been taken advantage of.

[53] Mr. Green testified that after 20 to 25 minutes, he went back to the cave and saw that Ms. Hughes was also in the pool. She and Mr. Titcomb were swimming. Mr. Green indicated that he stepped out again and that the grievors came out with their clothes on. Mr. Green indicated that on his way out Mr. Titcomb whispered to him that he had just had sex with Ms. Hughes. Mr. Green indicated that on their way out, Mr. Titcomb just dragged the construction barrier back in place with not much effort (Exhibit E-19, tab 3, page 108).

[54] Mr. Green testified that a few weeks after the incident, he thought that the matter would be in the open and decided to confide in Mr. Van Tassel about it. A month later, Lorne Davidson, a supervisor at Banff Upper Hot Springs, approached Mr. Green and insisted that he bring it forward. Mr. Green then wrote a statement about the incident (Exhibit E-19, tab 3, page 108).

[55] In his testimony, Mr. Green denied that he invited the grievors to enter the premises or to swim in the pool on the night of May 18, 2013. He insisted that the grievors swam in the cave pool.

[56] Mr. Green indicated that before testifying, Mr. Titcomb approached him at a liquor store and told him that “someone would need to go to jail for this.” Mr. Green stated that he felt threatened by the remark.

[57] In cross-examination, Mr. Green admitted that contrary to what he said in his original statement, he realized that he did not see Mr. Titcomb removing the construction barrier to gain entry. Mr. Green indicated that on the day before the hearing, when viewing a video taken on the night of the event, he realized that the grievors were already on the deck when he first saw them. He admitted that he did not know when he gave his statement that a video existed showing the grievors already on the premises when he first saw them. He testified that he probably meant that he saw the grievors exiting through the construction barrier but that he did not see them entering (see the video; Exhibit E-42). Mr. Green explained that when he gave his statements, he focused more on what happened in the cave pool than on how the grievors entered the site. He also admitted that the night before the incident, two wardens entered the site but did not swim in the cave pool.

[58] Mr. Green stated that while he was not disciplined for what happened on May 18, 2013, his contract with the employer was not renewed. He also admitted that in his previous employment at Via Rail and Air Canada, issues arose between him and other employees and unions.

##### **5. Mr. Malins’ testimony**

[59] Mr. Malins explained that he was in charge of the Cave and Basins renovation project and that the site reopened the day before the incident, on May 17, 2013. He explained that he oversaw the renovation, which cost \$13.8 million and involved the historic pavilion and its exhibits. He emphasized the Cave and Basin’s importance since it is the birthplace of Parks Canada, going back to 1885, and was the first area in Canada that was designated as protected. He explained that the thermal springs at the Cave and Basin, including in the cave pool, are the critical habitat of snails recognized as endangered. The waters, such as in the cave pool, are simply not to be disturbed in any fashion (Exhibits E-21 and E-22).

[60] Mr. Malins testified that he was surprised to hear that the grievors swam in the protected water since all staff knew about the snails and their water being protected.

[61] Mr. Malins stated that while he admitted that he was not there on the night of May 18, 2013, to the best of his knowledge that night a fence was in place that the grievors moved to enter the site and that while that barrier was temporary, it was clear that it was not to be removed to get in. According to him, the barrier was not flimsy; he described it as a standard six-foot-by-eight-foot panel and that it must have been fairly awkward and heavy to move.

[62] Mr. Malins testified that once on the premises, all along the path leading to the cave pool, signs were in place around the basin and on the west side of the bathing pavilion of the basin explaining that it was forbidden to swim or even dip a hand in those waters because of the presence of protected snails (Exhibit E-40).

[63] Mr. Malins explained that three large signs are in the tunnel leading to the cave pool indicating the presence of protected snails in the waters (Employer's Book of Exhibits, tab 3, pages 15 to 21). In addition, signs are on the side of the pool indicating that the waters should not be disturbed (Exhibit E-43). According to Mr. Malins, lights line the tunnel, but even without turning them on, it is not too dark in the tunnel and cave to see the prohibition signs.

[64] Mr. Malins explained that while there was no camera in the cave pool, only between August and December 2013 did he discover that one of the cameras on the outside, near the basin, had recorded part of the grievors' presence on-site. He testified that he had thought that none of the cameras had been hooked up. He said that when he found out that there was a video of the grievors being on the site on May 18, 2013, he then informed the law enforcement branch and management. The video was shown as part of the employer's evidence (Exhibit E-42).

[65] The video shows the grievors already within the Cave and Basin building on May 18, 2013, when Mr. Green sees them for the first time. It does not show how they got in. It also shows them looking around and reading the signs along the basin (Exhibit E-42).

## **6. Ms. Thiessen's testimony**

[66] Ms. Thiessen was the employer's last witness. She stated that at the time of the May 18, 2013, incident and until August 2013, she was the employer's Executive Director, Mountain Parks and, as such, she was in charge of its facilities, including the

Cave and Basin and Banff Upper Hot Springs. At the time, Mr. Fisher reported to her. Ms. Thiessen explained that as the executive director, she had the authority to take action following the incident involving the grievors.

[67] Ms. Thiessen testified that HR informed her of the incident and that she decided to investigate it. She explained that following the interviews with Mses. DeMone and Lamontagne, she wanted to hear from the grievors, so she met with each of them on September 3, 2013 (Exhibit E-27, tab 5 and Exhibit E-28, tab 6).

[68] Ms. Thiessen testified that on that same day, she also met with Mr. Green, to test his credibility. She indicated that she used her managerial skill to test Mr. Green's version and concluded that he was telling the truth (Exhibit E-10, tab 7). She stated that after meeting with the grievors and Mr. Green on September 3, 2013, she made up her mind about the grievors' actions and their consequences (Exhibits E-29, tab 13; E-30, tab 14; E-31, tab 16; and E-32, tab 17).

[69] In her testimony, Ms. Thiessen reviewed the contents of the termination letters (Exhibits E-31 and E-32, tabs 16 and 17). She explained that the primary reason for the dismissals was the fact that the grievors went to the Cave and Basin facility after hours, which was completely inappropriate, and that despite the many signs forbidding any swimming and the fact that both grievors were experienced employees who should have known better, they swam in protected waters that contained an endangered species of snail.

[70] Ms. Thiessen stated that by their actions, the grievors violated the employer's Code of Ethics (Exhibit E-33, tab 24, page 178) and acted against its mandate, which is to protect and preserve cultural and natural resources and to be the steward of Canadian Heritage. The grievors were well aware of that. Ms. Thiessen insisted that they failed to uphold the employer's policies and decisions to protect endangered species and that by their conduct, they undermined public respect towards their employer (Exhibit E-33, tab 24, page 183).

[71] Ms. Thiessen insisted that the grievors were experienced and that they received all the necessary training, such as the QVE training and a module on the snails and their habitat, and that they were both aware that no one is allowed to disturb the snail's waters and habitat (Exhibits E-34, tab 27; E-35, tab 26; E-36, tab 28; E-37, tab 30; E-38, tab 31; and E-39, tab 32).



[72] Ms. Thiessen testified that she felt that in this case, discharge was the appropriate disciplinary measure given the fact that both grievors refused to answer the question as to whether they swam in the cave pool when asked during the investigation and that they also blamed their colleagues Mr. Green and Ms. Minogue instead of admitting to their mistakes. Ms. Thiessen indicated that she was worried about the grievors' credibility.

[73] Ms. Thiessen insisted that in the case of Ms. Hughes, the fact that she had 30 years of service constituted an aggravating factor in that she should have realized that her actions constituted a complete lack of respect for her employer and its mandate. As for Mr. Titcomb, the fact that he had 14 years of service with the employer should have made him understand that his decision to enter the Cave and Basin facility unauthorized after hours and to swim in protected waters was completely inappropriate. According to Ms. Thiessen, both grievors never expressed any remorse for their actions; on the contrary, they blamed Mr. Green and Ms. Minogue.

## **B. For the grievors**

### **1. Mr. Titcomb's testimony**

[74] Mr. Titcomb testified that he had worked for the employer since 1999; first as a term cleaner and then as a cashier at Banff Upper Hot Springs, where his job consisted mainly of greeting the public at the reception desk, handling its cash and showing them the locker rooms. He indicated that his job also included informing the public about the employer's other sites, such as the Cave and Basin, and that he informed them that swimming was not allowed at the Cave and Basin site (Exhibit G-2, tab 3, page 93).

[75] As for the events leading to his and Ms. Hughes' discharge, Mr. Titcomb stated that on Saturday night, May 18, 2013, they decided to take a bike ride after dinner. They chose the Cave and Basin as their destination, which had just reopened the day before, because they were curious to see the renovations that had been done to the site while it had been closed to the public for a few years.

[76] Mr. Titcomb explained that they rode to the side of the Cave and Basin building until they got to the back, where they saw a gate that was open about two or three feet.

At that moment, he and Ms. Hughes decided to go in to “check it out.” He admitted that he knew that the site was closed and that it was after hours. He indicated that he had a look at the basin (Exhibit E-40) and that he was ready to enter when Mr. Green contacted Ms. Hughes and invited both of them for a tour of the site to show them the renovations. Mr. Titcomb indicated that they both knew Mr. Green since he worked at Banff Upper Hot Springs and that he and Ms. Hughes were on the selection board that hired Mr. Green as a janitor. Mr. Green was happy that he and Ms. Hughes got him that job.

[77] Mr. Titcomb testified that Mr. Green guided them to the Belvedere Room, where the cave pool is located, but that to access it, first a locked gate must be opened and then a tunnel taken. He testified that Mr. Green had the keys to the gate leading to the tunnel and that he opened that gate to lead them to the cave pool (Employer’s Book of Exhibits, tab 25, pages 210 to 212, and tab 33). While Mr. Titcomb stated that he did not see any prohibition signs when he was in the cave since the light was dim and they were talking, he admitted that he knew that he could not swim in the cave pool and that he should have known better, with or without prohibition signs.

[78] Mr. Titcomb testified that once in the cave, he and Ms. Hughes sat on a bench and chitchatted with Mr. Green for 5 to 10 minutes and that Mr. Green kept suggesting that they could swim in the pool if they wanted to since no cameras were in the cave. Mr. Titcomb indicated that Mr. Green left for 10 to 20 minutes, during which he and Ms. Hughes entered the pool and just floated and enjoyed the serenity and the moment. He indicated that neither had brought a bathing suit or towel since they did not intend to swim in the cave pool when they left home.

[79] During his testimony, Mr. Titcomb denied that he and Ms. Hughes had sex in the pool or that he said so to Mr. Green. Mr. Titcomb stated that entering the water was the “biggest mistake of [his] life,” that he was remorseful about what he did and that he told management as much during the investigation.

[80] Mr. Titcomb testified that the next time he heard about the incident was when he and Ms. Hughes returned from holiday in the early hours of August 7, 2013. He indicated that they were awakened by Steve Anderson, who told them that the park warden wanted to talk to them at 11:00 that morning at her office (Exhibit E-1, tabs 3 and 4).

[81] Mr. Titcomb said that his interview with the park warden, Ms. Woods, lasted about 20 minutes and that he was not offered the opportunity to be accompanied by a bargaining agent representative or counsel. He indicated that the meeting went well and that he admitted to Ms. Woods that he and Ms. Hughes had entered the cave pool waters on the night of May 18, 2013 (Exhibit E-1, tab 4, pages 13 and 14). He testified that at the end of the interview, Ms. Woods give him a summons to appear in court for violating the *National Parks General Regulations*. The fine, were he found guilty, could reach \$25 000. He testified that she also informed him that Ms. Lamontagne would contact him with respect to the administrative investigation.

[82] Mr. Titcomb indicated that on that same day, August 7, 2013, he and Ms. Hughes, in the absence of their bargaining agent representative, also met with Ms. Lamontagne and Mr. Fisher, who handed them letters of suspension with pay pending the results of the administrative investigation. Mr. Titcomb testified that he and Ms. Hughes then contacted a criminal lawyer who advised them to “shut up and not to speak” about entering the cave and basin pool. Mr. Titcomb stated that Mr. Van Tine also gave them the same advice.

[83] Mr. Titcomb testified that still on August 7, he and Ms. Hughes were summoned to an administrative investigation meeting with Ms. DeMone scheduled for the following day, August 8, 2013 (Exhibit E-26, tab 2). Mr. Titcomb indicated that the meeting with Mses. DeMone and Lamontagne went well and that when asked whether he entered the cave pool waters, he followed his criminal lawyer’s direction and said that he was not at liberty to discuss it.

[84] Mr. Titcomb explained that the meeting of August 7, 2013, was followed by another on September 3, 2013, involving Mses. Thiessen and Lamontagne and Mr. Van Tine. Mr. Titcomb stated that he was given 30 minutes before the start of the meeting to review the statement of facts prepared by Ms. DeMone (Exhibit E-11, tab 9). He indicated that he was upset with the statement of facts since most of it was lies. He did not understand why Ms. Minogue made such a statement since she was a friend.

[85] Mr. Titcomb testified that while he admitted to swimming in the cave pool, he did not admit to it at that meeting because of the advice from his criminal lawyer and bargaining agent representative not to say anything about that allegation (Exhibit E-12, tab 8). Mr. Titcomb admitted that he knew about the prohibition to swim because of the snails; however, he nevertheless insisted that Mr. Green invited him and

Ms. Hughes inside and that he never asked about the presence of cameras. Mr. Titcomb indicated that the meeting was difficult and that he felt that the writing was on the wall.

[86] Mr. Titcomb testified that a final meeting with Mses. Thiessen and Lamontagne took place on September 5, 2013, at which he and Ms. Hughes were handed termination letters (Exhibit E-32, tab 17). He testified that the loss of his job had a major impact on his life; former colleagues ostracized him and Ms. Hughes, and they had to sell their house in Banff and find other employment. He indicated that they relocated to Ontario, where he now works as a waiter. He indicated that he felt remorse about the incident and that he apologized to Mses. Woods and DeMone. He stated that the May 18, 2013, incident was the biggest mistake of his life.

[87] Mr. Titcomb testified that after he lost his employment, he met Mr. Green at the liquor store and that Mr. Green told him that he had no choice when approached by the employer about the May 18, 2013, incident but in his words to “cover my ass” and that if Mr. Titcomb had not bragged about it to Ms. Minogue, things would have been different. Mr. Titcomb stated that he then said that Mr. Green’s statement about the grievors opening the fence was not true and that if it went to trial, someone could go to jail for perjury.

[88] Finally, with respect to the allegation that Mr. Titcomb and Ms. Hughes trespassed on October 2013 by returning to Banff Upper Hot Springs, their former workplace, Mr. Titcomb indicated that he and Ms. Hughes wanted letters of reference and that Ms. Lamontagne had told them to try to obtain one from their former supervisor.

[89] Mr. Titcomb indicated that on that day, he and Ms. Hughes decided to drive to Banff Upper Hot Springs to obtain a letter and to go for a swim at the same time. He testified that they did not know that the swimming pool was closed for the season since it closed on a different date every year. He stated that when they realized the pool was closed, they decided to try anyway to get a reference letter since the spa and gift shop were still open to the public. Once inside, he and Ms. Hughes spoke to former colleagues, and they asked Mr. Van Tassel for a reference. Afterward, Mr. Titcomb went to get a card laminated while Ms. Hughes went to a little office to get a copy of her lifeguard certification. At that point, Karen Smith told them to leave the premises.

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## **2. Ms. Hughes' testimony**

[90] Ms. Hughes was the last witness. She testified that beginning in 1982, she had always worked at Banff Upper Hot Springs and that she became a permanent employee in 1993. At the time of her discharge, she explained that she worked as a lifeguard, which meant supervising the pool, cleaning the facility and occasionally helping at the cash register. She stated that before being discharged, she had never been disciplined in her 31 years of service (Exhibit G-3).

[91] On the night of the incident, May 18, 2013, Ms. Hughes explained that after dinner, she and Mr. Titcomb decided to go for a bike ride to the Cave and Basin. She explained that they chose that destination since she had had surgery on her foot and the road to the Cave and Basin was flat and that they also wanted to see the renovations there. She testified that she did not know that the Cave and Basin would be open or closed at that time of day.

[92] Ms. Hughes indicated that when they arrived at the Cave and Basin facility, they went to the side of the building and saw an open construction fence. She affirmed that neither she nor Mr. Titcomb had to remove the fence. They then went in and walked on the deck surrounding the basin, which is where she noticed Mr. Green (Exhibit E-40). She explained that she knew Mr. Green since she and Mr. Titcomb had been part of the staffing board that had hired him as a cleaner.

[93] Ms. Hughes testified that Mr. Green offered them a tour of the newly renovated facility. She stated that Mr. Green guided them to the tunnel leading to the cave pool and that he opened the locked gate leading to that tunnel (Employer's Book of Exhibits, tab 25, page 212). She stated that while entering the tunnel, she did not see any prohibition signs since the lights were very dim and she was busy chatting with Messrs. Titcomb and Green. She also indicated that she was generally aware of the *Roulet Order* (Employer's Book of Exhibits, tab 3, page 12).

[94] Ms. Hughes testified that once in the cave pool (Exhibit E-43), Mr. Green suggested that she and Mr. Titcomb take a dip in the pool since there was no camera. While she insisted that she and Mr. Titcomb did not raise the issue of the presence of the camera and that Mr. Green suggested that they get in the pool, she admitted that it was her and Mr. Titcomb's error and that she took responsibility for it.

[95] Ms. Hughes testified that Mr. Green left for about 15 minutes, during which time she and Mr. Titcomb removed their clothes and entered the cave pool. She indicated that they did not bring swimsuits or towels since they did not plan to enter the pool when they left their house. She said that while in the pool, they floated and cuddled but did not have sex. In cross-examination, when asked whether she admitted to swimming in the cave pool, Ms. Hughes insisted that what she and Mr. Titcomb did was to “take the water” in the cave pool as opposed to “swam into the water.”

[96] Ms. Hughes testified that on August 7, 2013, after returning late from a holiday, she and Mr. Titcomb were asked to go to the warden’s office. Ms. Hughes explained that she met first with Ms. Woods while Mr. Titcomb waited in another office. Ms. Hughes indicated that she was tired since they had returned from their trip only at 03:00 that very morning (Exhibit E-2, Employer’s Book of Exhibits, Production Order Documents, tab 5).

[97] Ms. Hughes mentioned that Ms. Woods asked her about what had happened on May 18, 2013, specifically whether she and Mr. Titcomb had entered the waters of the cave pool. Ms. Hughes testified that she felt nervous and that she did not want to get in trouble and lose her job, which is why she first just denied entering the waters of the cave pool. In her testimony, she indicated that that was a mistake (Exhibit E-2, tab 5, Employer’s Book of Exhibits, Production Order Documents, pages 12, 13, 19, 21, 22, 52 and 61). Ms. Hughes indicated that later in the interview with Ms. Woods she admitted to “taking the water” (Exhibit E-2, page 69). She indicated that at the end of the meeting, Ms. Woods served her with a summons to appear in court for violating the employer’s regulations.

[98] Just like Mr. Titcomb, Ms. Hughes indicated that they met with Ms. Lamontagne and Mr. Fisher on the afternoon of August 7, 2013, when they received letters of suspension with pay pending the investigation (Exhibit E-25, tab 1). In her testimony, Ms. Hughes also mentioned that she and Mr. Titcomb were advised by their criminal lawyer not to talk about entering the waters of the cave pool and that they followed his advice when they met with Mses. DeMone and Lamontagne on August 8, 2013. Ms. Hughes indicated that she felt ashamed about what happened and that she tried to express that to Mses. DeMone and Lamontagne.

[99] As for the meeting of September 3, 2013, involving Mses. Thiessen and Lamontagne, Ms. Hughes indicated that she was shocked when she read the statement

presented to her, especially the part where Mr. Green affirmed that she and Mr. Titcomb removed the barrier to access the building (Exhibits E-13, E-14 and E-15, Employer's Book of Exhibits, tabs 10, 11 and 12).

[100] Although at the September 3, 2013, meeting, Ms. Hughes admitted that again on the advice of their criminal lawyer, she did not answer questions about whether she and Mr. Titcomb entered the cave pool on the night of May 18, 2013, she admitted at the hearing that they did. She testified that on September 5, 2013, she and Mr. Titcomb were called to another meeting with Mses. Thiessen and Lamontagne, at which they were handed termination letters (Exhibits E-30 and E-31, Employer's Book of Exhibits, tabs 14 and 16).

[101] Ms. Hughes testified that after being discharged, she and Mr. Titcomb wanted letters of reference from the employer and that she also needed proof of her award for first-aid recertification. She stated that Ms. Lamontagne told them that they should speak to the manager at Banff Upper Hot Springs.

[102] Ms. Hughes testified that on October 16, 2013, she and Mr. Titcomb decided to go to their former workplace to obtain their documents and to swim. Ms. Hughes testified that while they saw a sign before reaching Banff Upper Hot Springs they decided to go ahead anyway since the facility remained open. She indicated that once they were in the building, she went to the first-aid room to gather her recertification information and that Ms. Smith told them to leave. The next day, they both received a no-trespassing letter from the employer (Exhibits E-17 and E-18, tabs 20 and 21).

[103] Ms. Hughes affirmed that her discharge had a massive impact on her life, that as of the hearing she had not been able to find another job and that she is a 54-year-old with a high school diploma. She stated that after her father passed away in August, she sold her business in Banff, the Creekside Country Inn (Exhibit E-41), at a lower cost and moved with Mr. Titcomb to be closer to her mother in Ontario.

### **III. Summary of the arguments**

#### **A. For the employer**

[104] At the start of the hearing, counsel for the employer stated that this case is very important since it affects the employer's mandate to protect Canada's natural heritage.

Therefore, reinstating the grievors would send the wrong message and would impinge on the employer's ability to deliver its mandate.

[105] Counsel for the employer argued this case has two parts: the grievors' actions and their lies.

[106] As for the facts, counsel for the employer argued that clearly the employer proved that the grievors had no right to be in the Cave and Basin on the night of May 18, 2013, and that they entered the site after hours without authorization. Counsel argued that even if the grievors maintained that they did not remove any barrier to get in, the undisputed fact remains that they knew they had no business being on the premises at that time. On that point, counsel for the employer maintained that despite the fact that Mr. Green had originally stated that he had seen Mr. Titcomb remove the barrier to get in and that after seeing the video (Exhibit E-42) he testified that it probably shows the grievors leaving, I should nevertheless prefer his testimony to those of the grievors and conclude that their entry to the facility on the night of May 18, 2013, was unauthorized and that they forced their way in to the premises. In support of this argument, counsel for the employer indicated that I should also consider Mr. Malins' testimony, as he had seen the installation and had stated that the gate had not been open, and to his knowledge, the grievors must have pushed the construction fence aside to get in.

[107] Counsel for the employer argued that not only did the grievors knowingly trespass on the night of May 18, 2013, but that they also swam in the cave pool waters, in clear violation of the employer's mandate and regulations and their own code of conduct. Counsel argued that the grievors could not invoke the fact that they acted on the spur of the moment to explain their conduct. Counsel maintained that by their admission, the grievors indicated that they floated for 20 minutes in the protected waters. They had time to think about the fact that what they were doing was not right. Instead, they claimed the moment was magical and wonderful. They could not argue at the hearing that it was done on the spur of the moment.

[108] Counsel for the employer insisted on the seriousness of the grievors' actions, taking into account that the employer's mandate is to protect Canada's natural heritage and that the fact that the Cave and Basin location is the birthplace of Canada's national parks. Moreover, counsel argued that the cave pool in which the grievors swam is the natural habitat of a protected species of snails, and that, as explained by



Mr. Malins, the cave pool waters simply cannot be disturbed. Counsel insisted that what the grievors did was a clear and intentional contemptuous act against their employer. Not only did they do it, but Mr. Titcomb was also proud of it: he bragged about it.

[109] Counsel for the employer disputed the grievors' claim that they did not notice the prohibition signs once in the facility. Counsel maintained that in the video (Exhibit E-42), the grievors can clearly be seen reading the signs along the deck. Moreover, they were experienced employees; they were trained, and for sure they knew that it was prohibited to swim in those protected waters.

[110] For counsel for the employer, the fact that the grievors stated that they did not notice the signs goes to their credibility.

[111] Counsel for the employer insisted that the grievors' conduct was outrageous and that they violated their code of conduct. Their job was to protect their employer's property and to ensure that they acted in a manner that would hold to public scrutiny. In this case, they did just the opposite; they showed complete disrespect towards the employer's properties and its very values, which they were to protect. Counsel considered their actions akin to vandalizing a memorial. Counsel also compared their actions to those of a tax officer who cheats on his or her tax return or to a Department of Fisheries and Oceans officer poaching lobster. Counsel referred me to the following decisions: *McKenzie v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 26, at paras 75 to 81; *Lau v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File No. 166-2-15388 (19871222), at 12; and *Yensen v. Treasury Board (Revenue Canada - Taxation)*, 2000 PSSRB 6, at 9.

[112] Counsel for the employer argued that not only were the grievors' actions injurious to the employer's core values and mandate, but they also had many opportunities to come clean to their employer and to admit what they did. Instead, they continued to deny and to choose to not fully cooperate with the investigation. They refused to answer legitimate questions. Therefore, counsel argued, not only were the grievors' actions contemptuous, bold, deliberate and wrong, but also their credibility was seriously impaired. As a result, they broke the bond of trust with their employer. In other words, the employer can no longer trust the grievors; therefore, they cannot be reinstated. Counsel also maintained that it was too late at the hearing to come up with excuses. In support of his arguments, counsel referred me to the

following decisions: *Francis v. Treasury Board (Solicitor General - Correctional Service Canada)*, PSSRB File No. 166-02-24111 (19931007), at 17; *Dutil v. Treasury Board (Employment and Immigration)*, PSSRB File No. 166-2-14391 (19840307), at 10 and 11; *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62, at 34 and 35; and *Way v. Canada Revenue Agency*, 2008 PSLRB 39, at 13 and 14.

[113] Counsel for the employer argued that not only was the grievors' conduct completely inappropriate and that they showed a complete lack of respect by entering the premises after hours and swimming in waters that protected an endangered species, but also that I should consider the fact that they lied to cover their actions. Counsel insisted that despite the fact that Mr. Green first thought that he saw the grievors moving the fence to access the site and that later, after seeing the video, he realized that he was mistaken and that he probably saw the grievors moving the fence on their way out, I should nevertheless prefer his version when he testified that he did not invite them for a swim in the cave pool and that Mr. Titcomb asked about cameras in the cave. Counsel also noted that Mr. Malins' testimony corroborated the fact that the grievors must have moved the fence to access the building.

[114] For counsel for the employer, not only were the grievors not forthcoming during the investigation, by refusing for instance to answer questions or denying seeing the prohibition signs, but also they continued to be dishonest even during their testimonies at the hearing. In addition, he submitted that the grievors never accepted responsibility, preferring instead to shift the blame to others, like Mr. Green and Ms. Minogue.

[115] Counsel for the employer insisted that by the grievors' conduct on May 18, 2013, and by their refusals to accept blame for what happened, the employer was right to claim that the bond of trust was broken and that they should not be reinstated.

## **B. For the grievors**

[116] From the start of the hearing, counsel for the grievors indicated that I should not lose sight of the fact that this case is about a lifeguard who spent 30 years working for the employer without receiving any discipline and a cashier who spent 14 years with the employer also without receiving any discipline. In the circumstances, counsel

argued that it would be wrong to compare them to auditors with the Canada Revenue Agency (CRA) and that if a work or level comparison were made, it should be with a more junior position, such as a receptionist or a telephonist at the CRA, not an auditor.

[117] Counsel for the grievors argued that while the grievors' termination letters referred to the fact that their numerous years of service were taken into account, after hearing the employer's evidence, it is clear that if anything, their lengthy years of service were not considered as mitigating factors but to the contrary were used against the grievors. The employer's position is that the grievors should have known better.

[118] Counsel for the grievors insisted that the facts of this case are unique; therefore, none of the jurisprudence cited by the employer applies. Counsel maintained that it is not in dispute that when they left their home on the night of May 18, 2013, the grievors did not intend to enter the Cave and Basin building; nor did they intend to swim in the cave pool. They did not bring any swimming gear. However, counsel insisted that if it was not for Mr. Green's intervention, the grievors would never have had access to the cave pool since the door to the tunnel that leads there was locked and only Mr. Green had the keys (Employer's Book of Exhibits, tab 25, page 212). Counsel pointed out that the evidence showed that despite the fact that Mr. Green let the grievors (and wardens the night before) access the Cave and Basin building after hours, he never received any discipline for it. Counsel also insisted that others accessed the Cave and Basin building at night, which the employer did not consider (Employer's Book of Exhibits, tab 3, page 67).

[119] Counsel for the grievors questioned the credibility of Mr. Green's version when first he stated that he saw the grievors pushing the barrier to access the building but then recanted that after seeing a video the day before the hearing. Counsel insisted that at any rate, the evidence is clear that it was a widespread practice for people to access the building after hours with the employer's knowledge and that it was unfair to make it an issue with the grievors.

[120] Counsel for the grievors urged me to believe their explanation that while they admitted that there were prohibition signs, they did not pay attention to them. Counsel argued that what is important is that both grievors admitted that they swam in the pool and that they took full responsibility for doing so.

[121] Counsel for the grievors argued that the facts of this case show clearly that the grievors acted on the spur of the moment. There is absolutely no evidence that when they left their home, they intended to enter the Cave and Basin building and to swim in the cave pool. Counsel argued that the facts of this case differ from those in a decision that the employer cited in which an employee was discharged after his premeditated actions and then accusing a colleague (*Horne v. Parks Canada Agency*, 2014 PSLRB 30).

[122] Counsel for the grievors strongly disagreed with the employer's argument that the grievors' actions could be compared to vandalizing a war memorial and insisted that in this case, the employer did not adduce evidence that the fact that the grievors swam in the cave pool caused any harm to the snails.

[123] For counsel for the grievors, the grievors should be disciplined for their poor judgment taking into account that what they did was not premeditated, they had no ill motive and there is no evidence that they caused harm.

[124] As for the grievors' cooperation during the investigation, their counsel also disagreed with the employer's proposition that they did not admit to and lied about entering the cave pool on the night of May 18, 2013. Counsel submitted that the grievors admitted to swimming in the cave pool at the meeting with Ms. Woods on August 7, 2013. Counsel explained that while at the beginning of that meeting, Ms. Hughes denied entering the water, she admitted it at the end of the interview. As for Mr. Titcomb, he admitted it immediately to Ms. Woods (Exhibits E-2, tab 5, page 69, and E-1, tab 1, page 16, Employer's Book of Exhibits, Production Order Documents). Counsel submitted that at the subsequent meetings with the employer, the grievors did not lie about entering the cave pool. While they admitted to entering the premises, they simply did not answer the question about entering the water based on advice from their criminal lawyer.

[125] Counsel for the grievors distinguished this matter from those covered by the decisions that the employer cited. Counsel argued that the employer's jurisprudence deals with cases in which employees showed either premeditation or were part of cover-ups or did not show remorse or in which they continued to deny their actions, even at the adjudication hearing. Counsel suggested that this case is different and that the grievors actions were not premeditated; they acted on their lawyer's advice, and they showed remorse. In addition, counsel indicated that while the grievors' versions

might have differed from Mr. Green's, it was not because they wanted to shift the blame on others but rather because that was what really happened.

[126] Counsel for the grievors indicated that instead of the case law that the employer cited, I should consider the following decisions, with the difference being that in these cases, premeditation occurred, which did not in this case. Counsel referred me to *Andrews v. Deputy Head (Department of Citizenship and Immigration)*, 2011 PSLRB 100, at paras 93, 94 and 97). Counsel argued that while the offence of watching pornography at work is more serious than what the grievors did, the adjudicator in that case reinstated Mr. Andrews after considering that he had lengthy service, that he had no disciplinary record and that he showed remorse. Counsel also referred me to *Friole v. Treasury Board (Solicitor General of Canada - Correctional Service)*, 2002 PSSRB 85, in which the grievor was reinstated and the length of service was considered a mitigating factor. In *Girard v. Treasury Board (Revenue Canada)*, PSSRB File No. 166-02-12726 (19820720), in which a collections officer was discharged for falsifying his travel claim, the adjudicator rescinded the discharge and substituted a 15-month suspension based on the grievor's lengthy service and clean disciplinary record.

[127] The following decisions were also cited in support of the argument that I should consider the grievors' length of service and the fact that they did not receive discipline in the past: *Lodba v. Treasury Board (Revenue Canada - Customs & Excise)*, PSSRB File No. 166-02-21819 (19920225), *McManus v. Treasury Board (Revenue Canada, Customs and Excise)*, PSSRB File Nos. 166-02-8048 and 8078 (19800310), and *Gatien v. Deputy Head (Department of Human Resources and Skills Development)*, 2013 PSLRB 101.

[128] Counsel for the grievors summed up by stating that the grievors should be reinstated based on the fact that the event occurred in a location different from their workplace and that it was not premeditated in that they acted on the spur of the moment. Counsel insisted that I consider their lengthy years of service and that they never received any discipline. Counsel asked me to consider that another player in the matter, Mr. Green, was not disciplined for guiding the grievors to the cave pool and letting them in and that others have accessed the Cave and Basin building after hours without any consequences. Counsel submitted that the grievors admitted not only to entering the Cave and Basin building but also that on the first occasion, they admitted to Ms. Woods to entering the cave pool.

[129] Counsel for the grievors concluded that the impact of the grievors' terminations has been very severe and that a clear message has been sent. Counsel submitted that given the circumstances, the terminations were far too severe and that a 20-day suspension would have the same deterrent effect.

#### **IV. Reasons**

[130] In its termination letters of September 5, 2013, the employer alleged that both grievors illegally entered the Cave and Basin and swam in its protected waters on the night of May 18, 2013.

[131] After hearing the evidence, I conclude that the employer proved the allegations at the hearing. Despite the fact that there was a dispute as to whether the grievors forced their entry into the building that night and that a witness, Mr. Green, recanted his version at the hearing after seeing a video, I conclude nevertheless that the grievors entered the Cave and Basin building on May 18, 2013, after hours. The grievors were experienced employees and knew or should have known that they had no business being on the premises on a Saturday night after hours. The fact that once they were inside, Mr. Green invited them on a tour, does not change that finding. The grievors knew that Mr. Green was a janitor, since they were on the staffing board that hired him. They knew he did not have the authority to let them in. In his testimony, Mr. Titcomb indicated that Mr. Green was happy that the grievors got him his janitor job. It appears to me that Mr. Green was grateful to the grievors.

[132] In the circumstances, I find that the grievors entered the premises that night knowing that they should not have. In his testimony, Mr. Titcomb indicated that the fence was ajar, so they just walked in. Even if this was true, to me, this was not an invitation to enter the building. The grievors knew that; they took a chance.

[133] Turning now to the other allegation, which is that they swam in protected waters that happened to be the habitat of endangered snails. While initially Mr. Titcomb admitted to Ms. Woods that he and Ms. Hughes swam in the cave pool, both grievors decided later in the investigation not to answer questions about whether they swam in the water. Nevertheless, they admitted to it at the hearing.

[134] Having decided that the employer proved the allegations, I now turn to whether termination was the appropriate remedy or if, in the circumstances, the penalty should be rescinded. The factors considered by the jurisprudence cited by counsel to assess

whether, given the circumstances, termination was appropriate or whether it should be mitigated are essentially an employee's years of service, his or her disciplinary record, whether more than one incident occurred, the employee's conduct during the investigation, and whether he or she showed remorse for his or her actions. To those factors, I would also add, given the circumstances of this matter, the impact of the grievors' misconduct on the employer.

[135] As I will explain, taking into account important mitigating factors in this case, I have decided to rescind the terminations. While I think that the grievors' actions were very serious and contemptuous and that they deserve a serious penalty, nevertheless, I think that the terminations, which were imposed for a single unplanned event and on employees with lengthy years of service without incident, were not appropriate.

[136] Counsel for the grievors argued that the grievors were long-term employees who were never disciplined in their careers. Counsel also insisted that the grievors showed momentary poor judgement, that their actions were not premeditated, that they acted on the spur of the moment, that they cooperated during the investigation, and finally, that they expressed remorse for what they did. Counsel submitted that in the circumstances, a penalty of a 20-day suspension would be more appropriate.

[137] For his part, counsel for the employer maintained that as experienced employees, the grievors had no excuse for what they did and that their actions were contemptuous towards their employer and its mandate to protect, among other things, endangered species. As for the spur of the moment argument, counsel argued that they were in the water for 20 minutes, which made it an impromptu incident no longer. Counsel insisted that the grievors showed no remorse about what they did and that they bragged about it. Essentially, they broke the bond of trust with their employer and even had the audacity to show up at the workplace after being discharged.

[138] While I agree with counsel for the employer that as experienced employees, the grievors should have known better, nevertheless, as the adjudicators did in *Andrews*, at page 17, *Friole*, at page 44, and *Girard*, at page 12, I must consider as an extenuating factor that Ms. Hughes had over 30 years of service without any discipline and that Mr. Titcomb had 14 years of service and a clean disciplinary record.

[139] Another mitigating factor in this case is the fact that it is clearly about one incident that was not premeditated. The evidence is clear that the grievors never

intended to enter the Cave and Basin facility that night or planned to swim in the protected waters. They did not bring any swimming suits or towels or other clothes. I agree with their counsel that they acted on the spur of the moment and that what happened on the night of May 18, 2013, was never planned. Moreover, it is also clear that what they did that night they did only once and never repeated it.

[140] Even if the grievors' lengthy clean years of service coupled with the fact that there was one single offence mitigates their penalty to one lesser than a discharge, I must point out that the facts of this case are obviously unique and that in other circumstances, an employee's lengthy years of service and a single incident may lead an adjudicator to an entirely different conclusion.

[141] While I consider that the grievors' lengthy years of service, that they were never disciplined in the past and that they acted on the spur of the moment are mitigating factors to their terminations, nevertheless, I am very troubled by what they did and their conduct throughout the investigation, and I am not convinced that they realize the impact of what they did. Although I find that the terminations are too severe a penalty in this case, I find that what the grievors did is significant and that their conduct deserves a serious penalty.

[142] I found it very disturbing that the grievors chose not to cooperate during the investigation in that they refused to answer whether they swam in the cave pool and that they admitted it only at the hearing. While the circumstances are obviously different, I agree with the following principles, set out in the *Oliver v. Canada Customs and Revenue Agency*, 2003 PSSRB 43, and *Brazeau* decisions:

*[103] The recognition of culpability or some responsibility for his or her actions is a critical factor in assessing the appropriateness of the discipline. This is because the rehabilitative potential of the grievor is built on a foundation of trust, and trust starts with the truth. If a grievor has misled his employer, failed to cooperate with the legitimate investigation of allegations of conflict of interest, and refuses to admit any responsibility in the face of evidence showing wrongdoing, then re-establishing the trust necessary for an employment relationship is impossible.*

[*Oliver*, at para 103]

...



*[184] With respect to the grievor's admission of responsibility regarding the conflict of interest issue, I find that it came too late in the process to be considered as a mitigation factor. . . .*

*[Brazeau, at para 184]*

[143] The fact that their criminal lawyer and bargaining agent representative might have advised the grievors not to answer a question could not remove their obligation to cooperate fully during the investigation. In my opinion, they consciously decided to take their criminal lawyer's advice, which had been made in a different context and forum. In my view, it could not remove their obligation to fully cooperate with an administrative investigation. When the employer made a decision at the end of the investigation, it relied on the information that the grievors provided. The result might have been different had the grievors chosen a different approach. Instead, they chose not to disclose all the facts to their employer. The fact that they received different advice from their criminal counsel could not exonerate them from their obligation of being frank and truthful with their employer.

[144] I am also convinced after hearing the evidence that the grievors knew that swimming in the waters was prohibited. Again, they were experienced employees who had always worked for the same employer. In that context, it is hard to understand that they were not aware that it was forbidden to enter the protected waters. I do not believe Ms. Hughes' version at the hearing that she was not aware of the *Roulet Order* and that she did not see the prohibition signs. For me, it is clear that she knew about the prohibition, especially after seeing the video in which both grievors, upon their arrival on the site, can be seen reading some of the signs. As for Mr. Titcomb, even if he indicated during the investigation that he doubted that there were snails in the cave pool, he admitted that he knew swimming was prohibited. That said, I agree with counsel for the grievors that there was no evidence that the grievors' actions harmed the snails. While that needs to be considered and tends to mitigate the impact of their actions, nevertheless, it remains that the waters they swam in were protected and should not have been disturbed.

[145] The grievors maintained at the hearing that they swam at Mr. Green's invitation and that they never intended to. Mr. Green disputed that; he testified that while he offered them a tour, he never invited them to enter the waters and that they acted on their own, to his surprise. I believe that the grievors decided on their own to enter the waters. In my view, even if it was at Mr. Green's suggestion, the grievors, being

experienced employees, knew very well that it was prohibited. They did it; nobody pushed them in those waters. They knew what they were doing, and they should suffer the consequences of their actions. They cannot place the blame on Mr. Green, regardless of whether he suggested they enter the waters. As for Mr. Green, counsel for the grievors argued that contrary to the grievors, Mr. Green was not disciplined for his actions that night. I would point out only that the undisputed evidence was that as a result, Mr. Green's contract was not renewed and that he then ceased to work for the employer.

[146] In addition to those disturbing factors, I also find that the grievors acted wilfully and that by their actions, they showed a complete lack of respect towards their employer's core mandate. I am not convinced that they have genuine remorse for what they did. I believe Ms. Minogue when she testified that Mr. Titcomb seemed very happy about what he and Ms. Hughes had done and that he bragged about it. I also agree with Ms. DeMone that Ms. Hughes was sorrier about the impact that the incident had on her life than admitting that what she and Mr. Titcomb did was wrong. During the investigation, at one point Mr. Titcomb indicated that he knew that swimming was forbidden in the waters because of the protected snails but added that he doubted there were any snails there. I also find troubling that when questioned by counsel for the employer, Ms. Hughes insisted on describing their actions in the water as "taking the water" instead of admitting that they entered into and swam in the waters. By describing her actions as "taking the water," Ms. Hughes tried to make the infraction seem less serious.

[147] To me, the grievors, by swimming in the cave pool, showed a complete lack of respect for the mandate and the values that their employer promotes; by doing so, they undermined their employer's role, which is to preserve natural resources.

[148] While I find that, given the fact that the grievors had lengthy years of service with clean disciplinary records and that it was an isolated incident, the terminations were too severe, I also find that, because of the grievors' conduct during the investigation, their absence of genuine remorse and the fact that I find their actions were contemptuous of their employer, the 20-day suspension suggested by their counsel is inappropriate.

[149] In my view, the grievors need to clearly understand that what they did was serious and that it was certainly not something to be proud of or to brag about. The

*Andrews* decision, cited by the grievors' counsel, involved a grievor who over a long period used the employer's equipment to mainly view pornographic material. While the facts of that case are completely different from this one, the adjudicator decided to reinstate the grievor and to substitute a 21-month suspension (time served) for the grievor's termination. In mitigating the penalty, the adjudicator considered the grievor's lengthy years of service and the fact that he had a clean disciplinary record. The adjudicator also decided that the grievor had genuine remorse about what happened.

[150] In this case, while the grievors also had lengthy years of service without discipline, and contrary to the *Andrews* decision, they acted on the spur of the moment, I am not convinced that they expressed genuine remorse for what they did. In the circumstances, just like in *Andrews*, I am reluctant to impose a disciplinary penalty that would result in them being paid for time not worked. Therefore, I order the grievors reinstated effective the date of this decision but with no retroactive pay.

[151] I realize that the grievors had a serious and lengthy suspension. However, I believe that a clear signal should be sent to them that their actions that night were completely inappropriate and that what they did undermined their employer's mandate to preserve natural resources.

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

*(The Order appears on the next page)*

**V. Order**

[153] The grievors are to be reinstated in their positions effective the date of this decision, without any retroactive pay.

August 21, 2015.

**Linda Gobeil,  
adjudicator**