Files: 166-2-27845
166-2-28240

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

DANIEL C. MCLEOD

Grievor

and

TREASURY BOARD
(Canadian Heritage)

Employer

Before: Joseph W. Potter, Deputy Chairperson

For the Grievor: David Landry, Public Service Alliance of Canada

For the Employer: Richard Fader, Articling-Student

Heard at Saskatoon, Saskatchewan, August 19 to 21, 1998,
and at Prince Albert, Saskatchewan, January 19 to 21, 1999.

This adjudication concerns two grievances filed by Mr. Daniel McLeod, a member of the General Labour and Trades Group bargaining unit with Parks Canada. In April 1996, following an undercover operation, the grievor was charged with 12 violations of the Saskatchewan *Wildlife Act* and two violations of the *National Parks Act*. On May 13, 1996, the employer informed the grievor that he was suspended indefinitely pending an investigation into the matter. That is the subject of the first grievance (Board file 166-2-27845).

On April 14, 1997, the grievor was found guilty of eight of the charges filed against him; however, he appealed this decision. The Court of Appeal upheld a conviction on four charges, and additionally the grievor had pleaded guilty to one other charge. All of these were under the Saskatchewan *Wildlife Act*.

On April 22, 1997, the grievor was discharged from his position, and that is the subject of the second grievance (Board file 166-2-28240). The discharge letter reads as follows (Exhibit E-12):

> *This refers to a recommendation for termination of employment as a result of the investigation of charges laid and the eventual judgement against you on several counts under the Wildlife Act and Regulations. Included in the eight guilty verdicts were five counts for trafficking in wildlife, two for hunting without a license and one for unlawful possession of wildlife.*
>
> *Evidence collected by our investigators led management to believe that a number of the wildlife parts in question came from Prince Albert National Park and were collected with the use of government vehicles and equipment. These offences are extremely serious when weighed against the relationship to your duties as an employee of Prince Albert National Park, consequently the bond of trust between employer and employee has been broken.*
>
> *For the above reasons and in accordance with the powers and functions delegated to me pursuant to Section 11 of the Financial Administration Act, you are hereby advised of my decision to terminate your employment from the Public Service of Canada for cause. The cessation of your employment will take effect from the date of this letter.*
>
> *In accordance with Section 91 of the Public Service Staff Relations Act, you have the right to grieve my decision.*

The indefinite suspension (Board file 166-2-27845) was referred to adjudication on May 16, 1997 and the discharge grievance (Board file 166-2-28240) was referred on December 12, 1997. Both cases were originally scheduled to be heard from March 24 to 27, 1998 but were postponed at the request of the employer. They then came on for a hearing as scheduled in August 1998.

Preliminary Issue

By letter dated August 10, 1998, Mr. Richard Fader, the employer's representative, informed the Public Service Staff Relations Board (PSSRB) that the employer would be "raising an objection to jurisdiction based on the doctrine of abuse of process".

Mr. Fader wrote that the Appeal Court (the Saskatchewan Court of Queen's Bench) had upheld four of the seven convictions rendered against the grievor. (As well, the grievor had pleaded guilty to an additional charge.) Mr. Fader claimed, at page 2 of his letter:

> *It would be an abuse of process for these grievances to be heard at adjudication, as they are merely collateral attacks on the above noted convictions....*

Further on he wrote:

> *... It is now trite law to say that a conviction is prima facie proof of the facts underlying a specific charge....*

He cited jurisprudence in support of this proposition which included the case of *Demeter v. British Pacific Life Insurance Co. and two other actions* (1983), 43 O.R. (2d) 33.

A copy of Mr. Fader's letter was sent to Mr. David Landry, the grievor's representative, for his information. Both parties were instructed to raise any jurisdictional issues with the adjudicator at the commencement of the hearing.

Accordingly, when the hearing began, Mr. Fader stated that an adjudicator appointed under the *Public Service Staff Relations Act (PSSRA)* was bound by law to accept, as fact, the findings of the Criminal Court with respect to the charges laid against Mr. McLeod. It was not open to the grievor's representative to attempt to

relitigate these issues. The Certificate of Conviction should be sufficient *prima facie* proof that the actions the grievor was accused of did occur. Furthermore, any findings of fact by the Court, with respect to the criminal charges, can not now be relitigated.

In reply, Mr. Landry agreed that it would be an abuse of process to relitigate a criminal conviction. However, the grievor's representative stated the issue here is not whether the grievor was convicted, but whether the grievor's actions warranted discharge. That, it was argued, was certainly within an adjudicator's jurisdiction. Mr. Landry stated that the grievor did not remove antlers from the Park, as alleged by the employer, and furthermore, this action did not form part of the conviction. In addition, the penalty of discharge was too severe for the offense the grievor was convicted of.

Mr. Fader replied that Exhibit E-2, the judgment of the Provincial Court of Saskatchewan in the criminal matter, at page 2 of the decision, finds as a fact that antlers were removed from the Park. The decision reads:

> *… The accused admitted to the undercover officer that he had picked up the shed antlers in the park….*

This, Mr. Fader argued, can not now be relitigated. It is an abuse of process to relitigate issues that were decisions of the Court. While the grievor has the right to attempt to justify his actions, he can not now say he did not take antlers that were shed in the Park, as this is a finding of fact.

After deliberating on the matter and reviewing the submissions made by both parties, I ruled as follows:

> *The Certificate of Conviction and corresponding appeal will be prima facie evidence of a finding of guilt with respect to the charges laid. If there are transcripts that elaborate on the findings of guilt, these can be introduced. The employer will not be required to be put to the test to reprove those charges.*
>
> *The grievor can address any or all of the charges and advance whatever explanation he feels he wishes to make to mitigate the penalty. The certificate and transcripts are subject to rebuttal.*

> *Regardless of the findings of guilt, it is always open to the grievor's representative to argue mitigation with respect to the penalty.*

Following this ruling, the employer's representative introduced Exhibit E-3, the judgment of the Saskatchewan Court of Queen's Bench with respect to the appeal; Exhibits E-4 to E-8 inclusive, which were copies of the certificates of conviction for each of the charges the grievor was found guilty of; Exhibit E-9, which was a transcript of the Provincial Court proceedings; and Exhibit E-10, which was a copy of *The Wildlife Act*.

A request for the exclusion of witnesses was made and granted.

Evidence

The grievor began his employment with Parks Canada as a seasonal General Labour and Trades Group employee (GL-ELE-03), in 1984. He worked in Prince Albert National Park maintaining back country trails, canoe routes, campsites, as well as hauling firewood and fighting fires. The season normally ran from May to October, and some work was required in February and March as well. The grievor had a discipline-free work record up to the date of his suspension.

Mr. McLeod testified he was part of a four-person work crew, and most of the time he would work with one, two or three of the crew members. He could, on the odd occasion, work by himself. This evidence was supported by Mr. Jim Lambe, who authored the letter of termination (Exhibit E-12).

The grievor's supervisor, Mr. Kurt Smith, on the other hand, testified that there was a significant amount of independent work required by the grievor in the course of his duties as not all of the grievor's work was done under supervision.

The issue of whether the grievor worked alone, or in a group, was important for reasons which I will detail later.

The grievor said he would arrive at work driving his own vehicle and park in a compound with all other employee vehicles. They would then drive a government vehicle to their work location.

All witnesses agreed that Mr. McLeod was a good employee and there was nothing, prior to his being charged, which would indicate he did not respect the environmental aspects of Prince Albert National Park.

The events which precipitated the discharge began in July 1995, when an undercover conservation officer commenced what was called "Operation Grey Owl". The undercover officer, Mel Koehler, testified he was assigned to go into the Prince Albert area to investigate certain complaints of violations of both the Saskatchewan *Wildlife Act* and the *National Parks Act*. Mr. Koehler testified the grievor was not the subject of the investigation at the outset, but events that took place during the investigation, as described below, led to the grievor being charged. The investigation of the grievor lasted from approximately August 1995 to March 1996. Charges were laid after the investigation was finished.

Mr. Koehler testified both from memory and using notes made contemporaneously with the events which they record. Mr. Landry agreed that the witness could refer to his notes, although they were not entered as an exhibit.

The first contact Mr. Koehler had with Mr. McLeod, albeit indirectly, took place on August 26, 1995 when the undercover officer was at the home of Robert Goertzen, a friend of Mr. McLeod's. Mr. Koehler had let it be known that he was out to purchase antlers. In addition, he told Mr. Goertzen (and later Mr. McLeod) that he bought antlers for $5 per pound and could sell them in Winnipeg for $7 per pound. The witness testified he portrayed himself as both a legal and an illegal dealer in antlers. On August 26, Mr. Goertzen indicated he knew where a set of elk horns was that Mr. Koehler might be interested in buying. Both men proceeded to Mr. McLeod's home; however, the grievor was away at the time. Nevertheless, Mr. Goertzen showed Mr. Koehler a set of elk horns that the grievor had in a shed and, according to Mr. Koehler's testimony, the two men agreed on $300 as a purchase price. Both men proceeded back to Mr. Goertzen's house and, again according to Mr. Koehler's testimony, Mr. Goertzen said he would contact Mr. McLeod to see if the price was agreeable. The telephone call was made and the $300 purchase price was agreed upon.

Mr. Goertzen testified that there never was a sale of the elk horns, and he never received $300 from Mr. Koehler. Mr. McLeod testified he never received any money whatsoever from Mr. Goertzen in relation to this sale.

In any event, the first time Mr. Koehler actually met the grievor was on October 18, 1995 when Mr. Koehler stopped in to see Mr. Goertzen. Mr. Koehler had been told by Mr. Goertzen that the grievor had other horns he wanted Mr. Koehler to see, and Mr. McLeod came over to Mr. Goertzen's place that evening to meet Mr. Koehler.

Mr. Koehler's testimony was that, shortly after Mr. McLeod arrived at Mr. Goertzen's place, he (Mr. McLeod) spoke of the elk horns that Mr. Koehler had recently bought for $300 and said they came from the Park. Although he did not specify which park, the Provincial Court of Saskatchewan stated, in Exhibit E-2, paragraph 2:

> *... It is clear from the evidence that he was referring to the Prince Albert National Park....*

It is illegal to remove antlers from within the Park, as they are part of the natural regenerative process.

The grievor testified that he could well have said to Mr. Koehler at that meeting that the antlers came from the Park. However, the grievor testified the statement was not true as he never did remove antlers from the Park.

At that same October 18 encounter between Messrs. Koehler and McLeod, Mr. Koehler testified the grievor stated he had found another set of elk horns in the Park that he sold to someone for $80. He told Mr. Koehler that he had a terrific job as he could use government equipment, get paid, and make $80 on the side. He also told Mr. Koehler that every spring he went for a three-day walk and collected antlers and he could never be fired unless he was caught stealing.

The grievor actually testified twice. The first time, Mr. Fader, the employer's representative, called him as a witness. The second time, his own representative, Mr. Landry, called him.

During his initial testimony, the grievor stated he had collected antlers over a period of some 15 years and did not want to reveal to Mr. Koehler the specific location where he found his antlers. Instead, he testified he made up the story about removing them from the Park, but the story was "bullshit". His later testimony indicated he had collected the antlers from various hunting sites he visited, none of which were in the Park.

He testified he did this because Mr. Koehler was telling them some hunting stories, which the grievor regarded as "bullshit". In fact, the grievor testified he and Mr. Goertzen played a game involving a bet to see who could tell a tall tale to Mr. Koehler without having Mr. Koehler say "bullshit", and removing antlers from the Park was simply one of many tall tales he told. The grievor testified he told Mr. Koehler other tall tales as well, such as shooting deer out of season, and splitting a deer's skull with a single shot.

When Mr. Goertzen testified, he confirmed that both he and Mr. McLeod had a bet to see who could tell the tallest tale to Mr. Koehler without having Mr. Koehler say "bullshit". However, according to Mr. Goertzen's testimony, this bet would have been made after the first meeting between Messrs. Koehler and McLeod. Mr. Goertzen testified he would not have made the bet in the presence of Mr. Koehler, but rather they would have made the bet after listening to a few stories.

During the second testimony by the grievor, he said he began to tell tall tales as soon as he met Mr. Koehler, although the actual bet was not made until some time within one week after meeting Mr. Koehler.

In any event, at the October 18 meeting, Mr. Koehler told the grievor that he bought and sold antlers and Mr. McLeod thought Mr. Koehler was a legal dealer in antlers. In fact, Mr. McLeod testified that as Mr. Koehler stated he had a permit to deal in antlers, Mr. McLeod did not think selling antlers to Mr. Koehler would be illegal. The grievor said, in cross-examination, that even though he was an experienced hunter, he did not know it was illegal to traffic in wildlife without a permit. He admitted he never had a permit to sell the antlers to Mr. Koehler.

The next meeting between Mr. Koehler and the grievor took place on November 16, again at Mr. Goertzen's house. They were planning a hunting trip for the following day and Mr. McLeod spoke of a bear he had shot on his property being cleaned up by ravens. Mr. Koehler verified this story on November 18, when he photographed the bear carcass.

Messrs. Koehler and McLeod went hunting on November 17 with Mr. and Mrs. Goertzen. The Goertzen's went in their vehicle and Mr. McLeod went in Mr. Koehler's truck. During the drive, the grievor told Mr. Koehler about shooting one deer and possibly wounding another, which he never found. As they passed the location where the grievor said this took place, they observed some ravens around body parts of a deer. The grievor said that was possibly the deer he never found.

The grievor also spoke of selling a set of deer antlers for $60 to an American hunter. Mr. Koehler testified this American hunter was subsequently charged and pleaded guilty to buying antlers.

Mr. Koehler testified Mr. McLeod spoke of an elk he had "poached" close to a building near his property, but outside the Park's boundaries, known as the DNR office. The importance of these statements will become evident later on.

The pair hunted for the day, without success until they were on their way home. Mr. Koehler testified he saw a deer, stopped the truck, and Mr. McLeod shot it. They waited a short period of time for the Goertzen's to arrive; then the four proceeded to the field to retrieve the deer. Once they got back to the truck, as Mr. McLeod realized he did not have a deer tag in his possession he asked Mrs. Goertzen for her tag and he placed this on the deer. They then returned to Mr. McLeod's place.

Once there, Mr. Koehler asked to see the antlers Mr. McLeod had. In one building were two sets of elk horns, and in another were a number of shed antlers (that is antlers naturally shed by the animal) as well as a set of elk antlers that Mr. McLeod said came from the elk he had "poached" close to the DNR office.

Mr. Koehler asked if the antlers Mr. McLeod had came from the Park and the grievor replied that they had, as he had picked them up sometime during the previous two years. Mr. Koehler testified he expressed concern to the grievor that the antlers may have been marked somehow by Park officials in order to later identify them, but the grievor assured Mr. Koehler that they were not marked as he was well back in the bush when he picked them up.

For the November 17 incidents, ultimately Mr. McLeod was charged and convicted of the fact that he did "unlawfully hunt wildlife without a license, contrary to Section 28(1)(b) of The Wildlife Act" (see Certificate of Conviction, Exhibit E-4). The Saskatchewan Court of Queen's Bench confirmed this conviction on appeal (Exhibit E-3, page 6).

Mr. McLeod was also charged with, and convicted of the fact that he did "unlawfully use or carry another persons (sic) license or seal while hunting, contrary to Section 15(b) of The Wildlife Act" (Exhibit E-5). Mr. McLeod pleaded guilty to this charge.

Mr. McLeod was also charged with, and convicted of the fact that he did "possess wildlife taken in contravention of The Wildlife Act, contrary to Section 31 of The Wildlife Act, Ch. W13.1, to wit: elk antlers" (Exhibit E-6). On appeal, this conviction was upheld (see Exhibit E-3, page 7).

The next occasion that Mr. Koehler and the grievor met that resulted in charges being laid took place on December 16, 1995. Mr. Koehler went to Mr. McLeod's residence and purchased two sets of whitetail deer antlers for $60. Mr. McLeod told Mr. Koehler they came from the Park. Mr. McLeod did not have the requisite permit to allow this sale to be made.

The grievor was charged with the fact that he did "traffic in wildlife contrary to Section 41 of The Wildlife Act, Ch. w.13.1 to wit: whitetail deer antlers" (Exhibit E-7). On appeal, the conviction was confirmed (see Exhibit E-3, page 8).

On March 31, 1996, Mr. Koehler again visited Mr. McLeod's residence and Mr. McLeod showed Mr. Koehler three sets of whitetail antlers. Mr. McLeod stated he picked the antlers up that spring from the Park by first putting them in a government

truck under a tarp, and later transferring them to his own vehicle. The grievor sold the antlers to Mr. Koehler for $20.

The grievor was convicted of the same offense he committed in December 1995, namely trafficking in wildlife (see Exhibit E-8). On appeal, the conviction was also confirmed (see Exhibit E-3, page 8).

Mr. Koehler testified that Mr. McLeod spoke about stealing a warden's jacket from the Park store by putting a sweater over it and wearing it home, whereupon he removed the flashings.

The grievor denied telling Mr. Koehler that he had stolen a warden's jacket. Instead, he said that he told Mr. Koehler he had a jacket at home left by some drunken warden after a party. He did testify he said this in a joking manner, but said he acquired it after someone left it behind at a party and never claimed it.

In March 1996, two members of the Special Investigations Unit advised the Manager of Warden Services, Mr. John Fau, of the recent undercover work of Mr. Koehler. Mr. Fau testified he was told that Mr. McLeod was in violation of *The Wildlife Act* and that he had been removing antlers from the Park for resale and using government equipment to do so. Eventually a search warrant was executed on Mr. McLeod's residence on April 4, 1996, and two National Park officers were in attendance. Among the items seized were elk antlers and a Park warden's jacket. Mr. McLeod testified he was charged the day the search warrant was executed.

Mr. Fau said no Park warden had ever stated he had lost a jacket, but no proceedings took place against Mr. McLeod for the jacket. Mr. Fau reported the matter of the charges against the grievor to Mr. Lambe, the Saskatchewan Asset Manager in Prince Albert National Park.

That was the last contact Mr. Koehler had with the grievor. When asked if he believed the grievor's stories, Mr. Koehler stated he did because, for the most part, they could all be verified. A search warrant executed on the grievor's house revealed a warden's jacket without flashes; the hunting stories were verified in one fashion or another; and the American was found guilty with respect to his purchase of antlers which Mr. McLeod said he had sold to him. Therefore, in Mr. Koehler's opinion,

Mr. McLeod was not telling tall tales, but rather was speaking the truth when he said he took the antlers from the Park.

During cross-examination, Mr. Koehler said he too told hunting stories while in the company of Messrs. McLeod and Goertzen, stories relating to incidents which did not necessarily happen to him personally but he told his audience they had happened to him.

Also in cross-examination, the witness admitted that he had never gone into Prince Albert National Park with Mr. McLeod to hunt and, furthermore, Mr. McLeod seemed to respect the "No Trespassing" areas as well.

During the grievor's testimony, both at the beginning and at the end of this hearing, he never denied telling Mr. Koehler that the antlers he was selling came from the Park. He consistently denied the veracity of the statement, however. He testified he has, in fact, never taken antlers from the Park. He testified he told the story because, as he worked in the Park, he thought it was believable and he did not want to reveal the true location of his source of antlers. He added to the story by saying he used a government vehicle to remove the antlers from the Park. The grievor admitted he knew it was illegal to take antlers from the Park.

Mr. Kurt Smith, the grievor's supervisor, said he had no personal knowledge of the grievor removing antlers from the Park, nor had he heard any rumours from other staff that this had taken place.

Mr. Fau testified he had no personal knowledge that Mr. McLeod removed antlers from the Park. The only evidence available was the word of Mr. Koehler. In fact, the Department interviewed about six other employees to see if anyone had any information about Mr. McLeod, and nothing relevant was revealed. Mr. Fau said that no employee of Prince Albert National Park had ever told him that he had heard Mr. McLeod was removing antlers from the Park.

The grievor's season was scheduled to begin on May 2, 1996, and he reported for duty that day. He was told to report to Mr. Lambe, and was then told to go home.

On May 6, a meeting was held with the grievor, his bargaining agent representative and management, and the grievor was asked if he had anything to say in relation to the charges. The grievor told those present that he had been instructed by his counsel not to say anything.

On May 13, 1996, the grievor received a letter suspending him indefinitely pending the investigation of the illegal trade in wildlife parts (see Exhibit E-11). The grievor filed a grievance and was told, in the level one grievance reply of June 10, that the suspension was imposed in order to complete an internal investigation. This was nearing completion and he was to be advised "in the near future" (see Exhibit G-2).

Mr. McLeod testified he has never seen the results of an internal investigation.

Mr. Lambe testified that he decided to suspend the grievor initially and hoped that Mr. McLeod would provide more information about the charges. Such information never came. In addition, Mr. Lambe said the Department wanted to do an internal investigation and await the outcome of the Court case.

Mr. McLeod's court case proceeded on April 14, 1997 and initially the grievor was charged with 12 offenses (see Exhibit E-3, page 1). At the conclusion of the trial, the grievor was convicted of seven counts and pleaded guilty to one other count.

On April 22, 1997, the grievor was issued the termination letter (Exhibit E-12), and he grieved this too.

Mr. Lambe said the recommendation for termination was made only after considering all mitigating factors, such as a 13-year discipline-free record and a good work record. However, he felt the seriousness of the offense overshadowed this and he said discharge was appropriate, even with the charges that remained after the appeal which upheld four of the charges.

Arguments

For the Employer

Mr. Fader commenced by reviewing the Court decisions, which related to the illegal trade in wildlife. The Court accepted the testimony of Mr. Koehler that the

statements were, in fact, made by the grievor and the Court put some weight on those statements. In Exhibit E-1, paragraph 2, Mr. Fader said the Court found there was evidence the antlers did come from the Park. In Exhibit E-2, page 2, the Court accepted the fact that certain statements were made by Mr. McLeod and that they were true; therefore Mr. Fader suggested a conclusion should be drawn that all statements made by Mr. McLeod were true.

The grievor was a 13-year employee but, Mr. Fader argued, the nature of the case and the facts support the penalties imposed. In the main, Mr. Fader argued, this is because of three principles in this case, namely the commercial aspect involved; there has been no remorse shown; and there has been damage caused to the image of the Public Service.

Mr. Fader contended this is a case about credibility. The grievor has been convicted of offenses under *The Wildlife Act*, but the grievor claims he did not remove antlers from the Park. Mr. Fader argued that the grievor's testimony is not credible, and the admissions against interest made to an undercover officer show those statements to be true. Those same statements were made over a five- and one-half-month period while the undercover officer was involved in the matter.

Mr. Fader pointed out that the initial testimony of the grievor led us to believe that the grievor and Mr. Goertzen were playing a game because of a bet they had. Testimony indicated this took place within five or ten minutes of the grievor first meeting Mr. Koehler. Now the grievor has altered his story to say there was no game during his first meeting with Mr. Koehler, but he lied anyway. Mr. Fader contended it was not credible to think a Park employee would make such risky statements to someone he just met unless they were, in fact, true.

The other stories the grievor told the undercover officer were true. He said he took a jacket from the store and a jacket was found in his home. He said he sold antlers to an American, and this proved to be true. The same applies to his hunting stories. I was asked to believe that his admission against interest with respect to the removal of antlers from the Park was true as well.

When the grievor was suspended, why did he not simply go to the employer and say he did not remove the antlers from the Park? He knew it was illegal to remove antlers from the Park, so why not make a comment to the employer if he had never removed antlers from the Park?

The indefinite suspension was justified because charges had been filed and items had been seized under a search warrant. The alleged offenses were in conflict with the employment relationship and therefore it was reasonable for the Department to consider that maintaining the employee on staff was not possible.

The grievor has been convicted of serious offenses. He works unsupervised and it is not possible to bring him back. His offenses are in contradiction to the *National Parks Act*, section 4, and the National Parks Policy, at page 1, paragraph 2.

In summary, Mr. Fader pointed to seven reasons why the discipline should be upheld. These reasons include the length of time the grievor collected antlers; the commercial aspect involved, including the fact a sale was made even prior to the sale to the undercover officer; there has been no remorse; the grievor knew taking antlers from the Park was illegal; he did it during working hours; he used government equipment to do so; and he bragged about not getting caught.

Mr. Fader cited the following cases: *Rose* (Board files 166-2-27307 and 27308); *Lynch* (Board file 166-2-27803); *Re Canadian Airlines International and Transportation Communications Union* (1989), 2 L.A.C. (4th) 362; *MacKenzie* (Board files 166-2-26614 and 26615); *Thomson* (Board file 166-2-27846); and *Scott* (Board files 166-2-26268 and 26269).

For the Grievor

Mr. Landry stated that the reason the grievor never explained himself to management was that after May 6, 1996, he was never interviewed. At the May 6 meeting, he was not asked if he took anything from the Park, and he had been instructed by his counsel not to comment on any issue.

Mr. Landry contended that the Court documents do not find as a fact that the grievor took the antlers from the Park. Exhibit E-1, paragraph 2, does not contain a finding of fact, but rather it is a statement that there is evidence. The evidence did

not lead to proof that the grievor removed antlers from the Park. There was no attempt to test the evidence in Court because this was not needed in light of the motion for non-suit, of which they were successful. Mr. Landry pointed to paragraph 3 of Exhibit E-2 where Justice Goliath of the Provincial Court writes:

> *… I make no finding with respect to the legality of the possession of the naturally shed antlers.*

Mr. Landry stated that the grievor has been consistent from the outset of his testimony in that he admitted making the statements against interest, but denied the truthfulness of the one concerning taking antlers from the Park.

With respect to the finding of the warden's jacket at the grievor's residence, while it may not have been advisable for the grievor to say the jacket came from a drunken warden, it does not form part of the employer's reasons for discharge and nothing should be made of it.

Mr. Landry stated that there was no conflict with the employment relationship. The grievor was working on trails, the majority of time with a crew of others, and there was no evidence he could not continue. The grievor had a discipline-free record and was a good employee. There was also no evidence from other crew members that they would not work with the grievor, had he continued on the job.

There were no convictions for any activity conducted within the Park. All five convictions related to activity outside the Park.

In this case, Mr. Landry pointed out the employer has the burden of proof, and it has not been met. There has been no evidence produced to prove the grievor took the antlers from the Park. Neither the grievor nor Mr. Koehler ever hunted inside the Park and no one has ever seen the grievor take anything from the Park. No one has ever seen him in a vehicle in the wrong place in the Park and there had been no suspicion attached to the grievor prior to Mr. Koehler coming into the picture.

The grievor was suspended indefinitely in May 1996 pending the outcome of what he was told was an internal investigation. The grievor has never been told of the results of any internal investigation.

The entire situation arose because of some stories Mr. Koehler was telling that the grievor did not believe; therefore the grievor replied with stories of his own. However, there was no truth to some of the stories the grievor told.

The case comes down to the testimony of Mr. Koehler. While Mr. Koehler thought the grievor was telling the truth, an internal investigation turned up nothing relevant. Also, no employee of Prince Albert National Park could say he ever saw Mr. McLeod remove antlers from the Park. That fact, coupled with the fact the grievor was never convicted of removing antlers from the Park, is important, says Mr. Landry. Is it reasonable to think this type of activity could occur with three or four other crew members working with the grievor? To do this, the grievor would have had to discover the antlers, cover them up for the rest of the day, place them in a government vehicle and finally move them to his truck which was parked alongside all other employee vehicles. All of this activity to enable him to store the antlers in his shed? It is not plausible, according to Mr. Landry.

Mr. Landry cited the following cases: *Lawrence* (Board file 166-2-21341); *Bastie* (Board file 166-2-23228); *Caterer* (Board file 166-2-23750); *Thomas* (Board file 166-2-18952); and *Bocchicchio* (Board file 166-2-9237).

Reply

Mr. Fader stated that the employer was relying on admissions against interest. It was the employer's position that these statements, when made, were credible and the new defense is not credible.

With respect to the interim investigation, the grievor knew the case against him and could have gone to management at any time to explain his actions. There has been no unfairness.

The grievor stated he did do some work independently. It would take very little time to pick up antlers from within the Park and remove them.

Reasons for Decision

This is a discharge case and in this situation the employer has the burden of proof. Similar to the findings in the *Rose* (supra) case, this is not a matter of proving beyond all reasonable doubt that the alleged events took place, but rather against the balance of probabilities test establishing that the antlers were removed from the Park and in so doing the grievor used a government vehicle.

I must determine if the employer has met this test and, if so, is discharge warranted.

Briefly put, the employer's position is that statements the grievor made to an undercover officer over a period of some five and one-half months are statements against his interest and should be believed. Specifically, the grievor consistently told the undercover officer that antlers, which he had in his possession, came from the Park (which the courts have deemed to be the Prince Albert National Park). In addition, the grievor claimed to have acquired these antlers using government vehicles.

The employer is also relying on the Court decisions to show that the courts have found these statements to be true. As such, the issue has been disposed of and can not now be relitigated.

The grievor's representative does not deny that the grievor made certain admissions against his interest to the undercover officer, but the grievor has testified that these statements were simply not true. Additionally, no court has found proof that the grievor removed antlers from the Park.

In *The Law of Evidence in Civil Cases*, Messrs. Sopinka and Lederman discuss hearsay and admissions against interest. At page 140 they write:

> *… it is always open to that party to take the witness box and testify that he either never made that admission or qualify it in some other way….*

That is what we have here. Mr. McLeod testified that he indeed did make various admissions against his interest to the undercover officer, but that said admissions were not true.

The grievor has admitted that he knew removing antlers from the Park was illegal and as a Park employee, I believe he would have a higher onus to protect the Park's natural integrity than, for example, a member of the public would. In fact, the grievor's representative acknowledged to me that, in this case, were it decided that the grievor had indeed removed antlers from the Park, discharge would be an appropriate response.

Mr. Koehler, in his capacity as an undercover officer, testified that he continually had to judge whether people he was in contact with were telling the truth. He said he did not believe some people, but he did believe others. The grievor fell into this latter category, largely because the other stories told by the grievor were verified in one fashion or another. Mr. Koehler said that because the other stories proved to be true, the claim that the antlers came from the Park was, in his view, truthful. As Mr. Koehler has never seen the grievor actually removing antlers from the Park, it is the admission against the grievor's interest that is being relied upon.

The grievor states that he was not being truthful when he made these claims to Mr. Koehler, and the employer was not able to provide any witnesses to say they had seen the grievor actually remove the antlers from the Park. Ultimately, only the grievor knows, with absolute certainty, whether or not he removed antlers from the Park, but is there, nevertheless, sufficient justification to warrant discharge?

If the courts had found these admissions against Mr. McLeod's interest to be true, then the matter would be somewhat simplified. However, even then it would always be open to the grievor to offer an explanation for a finding of guilt as a mitigating factor (see, for example, *Re Canada Safeway Ltd. and United Foods and Commercial Workers International Union, Locals 206 and 486* (1982), 8 L.A.C. (3d) 378).

In my view, the courts have made no such finding.

In Exhibit E-1, the Provincial Court of Saskatchewan writes, at paragraph 2:

> *There is evidence that the accused was in possession of elk antlers on or about the dates stated, and that the antlers came from Prince Albert National Park.*

Mr. Landry stated that this was simply a statement made by the Court to the effect that there was evidence, but the evidence was never tested as the charges this related to were dismissed. I agree.

In this case, the Court made a statement that there was evidence that Mr. McLeod had antlers that came from the Park, but the charges that accompanied this statement were dismissed. The evidence was therefore never put to the test, as it were, because these charges were dismissed on a technicality.

However, other charges remained and were dealt with again by the Provincial Court of Saskatchewan (Exhibit E-2). Mr. Fader directed me to paragraph 2 of this exhibit, wherein it states:

> *…The accused admitted to the undercover officer that he had picked up the shed antlers in the park. It is clear from the evidence that he was referring to the Prince Albert National Park….*

Is this a finding of fact that Mr. McLeod picked up antlers from inside Prince Albert National Park? I do not believe it is. I believe the decision finds, as a fact, that when Mr. McLeod mentioned the word "park", he was referring to Prince Albert National Park. However, the first sentence of the above quote is, I believe, simply a statement that Mr. McLeod told the undercover officer the antlers came from the Park. It is not proof, per se, that the statement is true, nor was it accepted as such.

Support for this proposition is found at page 3 of the Court's decision, paragraph 3, where Justice Goliath again writes (see Exhibit E-2):

> *…I make no finding with respect to the legality of the possession of the naturally shed antlers.*

So there were findings of guilt with respect to a number of wildlife related charges (see page 7 of Exhibit E-2), but there was no finding with respect to removing antlers from the Park.

These findings of guilt were appealed to the Saskatchewan Court of Queen's Bench and nowhere in the decision of Justice Matheson can I see a finding that the antlers came from Prince Albert National Park. There is one statement Justice

Matheson makes that I find particularly appropriate in this case. He writes, at paragraph 13 (Exhibit E-3):

> *If every person who asserts that he has engaged in illegal activity could be convicted solely on the basis of that assertion, a goodly number of braggarts would greatly rue their propensity to exaggerate.*

This would be particularly true of the grievor. The certificates of conviction, Exhibits E-4 to E-8 inclusive, are not findings of guilt with respect to the allegation that Mr. McLeod removed the antlers from the Park. Exhibits E-4 to E-6 inclusive, relate to the incidents of November 17 of attaching another person's seal to the deer he had shot, as well as possessing elk antlers. Exhibits E-7 and E-8 relate to his sale of the antlers to Mr. Koehler without having the requisite permit.

I do not find any court has determined that the grievor had antlers which came from Prince Albert National Park.

Therefore, we are left with the grievor's admission against interest as the sole basis for the discharge.

When the employer was made aware that charges were being laid against Mr. McLeod, the grievor was told there was an ongoing investigation into the allegations and that he would "be placed on suspension without pay pending the outcome of this investigation" (Exhibit E-11). I believe it is reasonable to conclude that such an investigation would result in one of two findings, namely that there was additional proof that the statements Mr. McLeod made were true, or else there was no other proof concerning the veracity of said statements.

In this case, no other proof was presented to me independent of Mr. Koehler's testimony. Not one employee had ever seen the grievor remove antlers from the Park over the course of his 13-year work history. Not one employee had heard a rumour that the grievor had removed antlers from the Park. As Mr. McLeod was not even an initial target for the undercover operation, there was no initial "tip" made to indicate some wrongdoing by the grievor. The grievor admitted he sold antlers to an American hunter, and I was informed this hunter was later found guilty of an offense. If there had been admissions against interest made by the grievor to this American hunter, it may have buttressed the employer's case, but no such evidence was presented to me.

I also do not believe that the employer has sufficiently proven the veracity of the grievor's statements that he removed the antlers, using a government vehicle, from the Park. Surely if he had done so someone somewhere would either have seen him do this during the course of his working day (and the employer's contention is that the action took place during the grievor's working day) or would even have heard rumours to that effect.

There is no doubt that the findings of guilt with respect to the charges laid are serious issues for the grievor. He has been convicted of unlawfully hunting wildlife; his job entails protecting wildlife.

The grievor trafficked in antlers, without a permit, which was illegal. His December 16 transaction netted him $60 and his March 31 transaction netted him $20.

Again, for someone whose employment is with Parks Canada, these charges are more serious, I believe, than were they levied against a member of the public.

However, are they so serious as to warrant discharge? I do not believe the employment relationship is so irrevocably broken by a guilty verdict in these specific charges as to warrant termination.

This is a difficult situation to resolve and, as I said earlier, only the grievor himself knows with absolute certainty whether he removed antlers from the Park. If he actually did, he most certainly jeopardized his employment for the sake of a few dollars. His statements were, at the very least, reckless and ill advised and, at the most, injurious to continued employment.

However, in the end I do not feel that there has been a sufficient case made by the employer to warrant the ultimate penalty of discharge. Certainly some discipline is warranted for the grievor's actions, and the grievor's representative in his closing recognized this. The letter of discharge (Exhibit E-12) cites the fact that the grievor was found guilty of a number of wildlife related charges. Given his position, I believe these actions do warrant some discipline, and I am comforted in this belief by the fact the grievor's representative acknowledged some discipline was, indeed, warranted.

I am also very aware of the fact the employer met the grievor shortly after the charges were laid and asked for an explanation from the grievor with respect to the charges. No explanation was forthcoming. At any point in the proceedings the grievor could have stated to the employer that he made admissions against interest to Mr. Koehler, but these admissions were simply not true. He chose not to do so, even after the Court had issued its findings on appeal. In fact, the evidence presented to me indicated the grievor made the assertion that the admission against interest was false for the first time at adjudication. He has been less that candid with the employer in this case.

In *Chong* (Board file 166-2-16249), Deputy Chairman W.L. Nisbet was faced with a situation where the grievor had also been less than candid in explaining his actions. He wrote, at page 79:

> *I have concluded that the failure of the grievor to provide a candid and complete explanation of his use of private accommodation in Toronto when he had the opportunity to do so is a breach of his obligation to the employer to provide such an explanation and that breach disqualifies him from being reinstated with full backpay. I have decided that the backpay to which he would otherwise have been entitled should be reduced by one-half.*

In this case, I have concluded that Mr. McLeod should be reinstated, but at the commencement of his 1999 season. However, there is to be no retroactive compensation or other benefits from the date of his indefinite suspension to the date of his reinstatement.

This decision should not be taken to mean that I believe Mr. McLeod was telling a tall tale when he said he removed the antlers from the Park. I simply do not know at this point. Rather, when an employer is presented with an admission by an employee against interest such as this, and the admission is later refuted by the individual who made it, some other corroborating evidence may be necessary. If such evidence had been presented here, my decision may well have been very different.

Accordingly, the grievance against Mr. McLeod's indefinite suspension is denied and the grievance against the termination of his employment is allowed to the extent indicated.

Joseph W. Potter,
Deputy Chairperson

OTTAWA, March 4, 1999.