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Public Service Staff Relations Act

Before the Public Service Staff Relations Board



BETWEEN

**ALAIN FRIOLET**

Grievor

and

**TREASURY BOARD**
**(Solicitor General of Canada – Correctional Service)**

Employer

***Before:*** Evelyne Henry, Deputy Chairperson

***For the Grievor:*** Dany Milliard, UCCO-SACC-CSN
(Francine Cabana, Public Service Alliance of Canada until March 15, 2001)

***For the Employer:*** Richard Turgeon,
(André Garneau until February 14, 2001)
and Marique Bouchard

Heard at Québec, Quebec
From September 19 to 22, December 13 to 15, December 18 to 21, 2000,
August 28 to 31, December 3 to 7, December 11 to 14, 2001,
February 25 to 28, April 24 to 26, 2002.

[1] Alain Friolet, a correctional officer (CO II) at Donnacona Institution, was suspended on September 14, 1999, and discharged on November 16, 1999.

[2] The grievance of the discharge was referred to adjudication on February 2, 2000, while the grievance of the suspension was referred on April 13. The hearing initially scheduled for May 31 and June 1, 2000, was postponed at the request of the employer and was heard in part in September and December 2000. At those hearings, the employer was represented by Mr. Garneau.

[3] The resumption of the hearings scheduled for March 12 to 16, 2001, had to be postponed following Mr. Garneau's departure so the employer's new counsel could familiarize himself with the file, the hearing of which was scheduled for April 30 to May 4, 2001.

[4] As a result of a change in the certified bargaining agent for the Correctional Services Group, Francine Cabana of the Public Service Alliance of Canada withdrew from the case. The new bargaining agent, UCCO-SACC-CSN, moved for a postponement so that the file could be transferred to Mr. Milliard, who had represented Mr. Friolet at the hearings in August and December 2001, and ending in February and April 2002.

[5] At the employer's request, the hearing scheduled for January 14 to 18, 2002, had to be cancelled and postponed to the hearing scheduled for February 25 to March 1, 2002.

[6] When the hearings resumed on August 28, 2001, Mr. Turgeon and Mr. Milliard reiterated the positions of their respective clients that the case should continue before me, that neither wanted to go back and start the evidence again even if that might create problems for counsel.

[7] In all, there were thirty-one days of hearings in the course of which thirty-three witnesses were heard and seventy-six exhibits filed.

[8] The employer discharged Alain Friolet for the following reasons, which are set out in Exhibit E-1:

> [TRANSLATION]
>
> *On September 9, 1999, when your own bag was searched at Donnacona Institution, you were found in possession of two*

> *(2) pairs of jeans and six (6) sweatshirts belonging to the employer. Moreover, you acknowledged that you took the six (6) sweatshirts in question without authorization.*
>
> *The CSC investigation reveals that the commission of your offence on September 9, 1999, was planned and organized. It also indicates that you repeatedly put pressure on an inmate in order to obtain items belonging to the institution for your personal benefit. In addition, this investigation turned up a number of other serious breaches on your part.*
>
> *The acts you committed are very serious and totally unacceptable. You behaved in a manner likely to bring the Service into disrepute. Your conduct is completely incompatible with your role as peace officer and the Mission of the Correctional Service of Canada. You have completely forfeited your employer's trust.*
>
> *Consequently, under section 11(2)(f) of the Public Administration Act and the powers delegated to me, you are terminated as of November 16, 1999, at 1:45 p.m.*

[9] I must determine whether the employer has proved the reasons for the dismissal and whether these reasons warrant the penalty of termination.

[10] Alain Friolet raised the issue of procedural fairness in relation to the employer's investigation and, since September 9, 1999, has repeatedly claimed that he was the subject of a frame-up.

[11] There were many objections concerning the admissibility of hearsay evidence beginning with the contents of the employer's investigation report and the testimony of inmate M's lawyer and Mr. Friolet's first representative.

[12] Halfway through the hearings, Mr. Friolet moved to amend his grievance with respect to the corrective action required and to add a claim for damages; I reserved my decision on the motion.

[13] There were motions to have the testimony of inmates M and B and the evidence concerning Annex C of the investigation report heard in camera to ensure the safety of the witnesses and of Mr. Friolet. The parties agreed that some information or allegations might prompt members of criminal gangs to carry out reprisals against those individuals. Since the parties agreed that there was a risk and that in camera proceedings were appropriate, I allowed these portions of the evidence to be heard in camera.

[14] Alain Friolet has been a correctional officer since April 1979. Beginning late in 1994, Mr. Friolet attracted the attention of Preventive Security who gathered information about him which the employer did not put in evidence before me (see Exhibit E-6, Annex C). At the time, Mr. Friolet was an officer in charge of sports. Beginning on October 19, 1995, Mr. Friolet was assigned to duties in T unit as an AC II correctional officer.

[15] In November 1997, inmate M, a cleaner in T unit, UV wing, told the psychologist, Ms. Prémont, in confidence that he was involved in thefts of institutional materials. The thefts involved correctional officers, including Mr. Friolet. Ms. Prémont noted the fact because the inmate cried a great deal but refused to report the matter to Preventive Security. The inmate forbade her to mention it. At the time, the psychologist, Ms. Prémont, did not believe the inmate.

[16] On May 13, 1998, inmate M was released and assigned to a residence. He took unauthorized leave and was reincarcerated in June 1998 after committing several robberies. Inmate M was then serving a sentence of 8 years and 8 months for crimes such as "robbery, uttering threats, theft under, use of forged documents, fraud under and failure to appear". When he was moved to postsuspension at Leclerc Institution, inmate M threatened the staff and the other inmates if he were not transferred to Donnacona (see Exhibit P-32).

[17] On June 10, 1998, inmate M was given a provisional "high" security classification and was returned to Donnacona Institution on June 18, 1998, where he was placed in voluntary protective segregation.

[18] Inmates in protective segregation were housed in unit T, UV wing. Inmates in segregation spend 23 hours out of the 24 in their cells; they come out once a day to go to the courtyard and the showers. Shortly after his return to UV, inmate M resumed his position as a cleaner.

[19] On November 13, 1998, inmate M became a cleaner in the Administration building; this was a promotion. He left UV wing and went to live in a cell at the hospital. In addition to being paid at a higher inmate salary level, the position meant greater freedom of movement and a larger cell equipped with a refrigerator.

[20] In February 1999, inmate M received a further sentence of 7 years and 6 months, consecutive, for committing robberies, which increased his term of imprisonment to 16 years and 2 months. His anticipated statutory date of release is October 6, 2004, and his sentence expires on December 8, 2007.

[21] In winter or spring 1999, on a date difficult to determine because the evidence varies depending on the witness and also because Preventive Security and those involved did not, according to their testimony, record anything in writing, inmate M accused Alain Friolet of theft. I shall return to this matter later.

[22] Early in 1999, inmate M told various people that he was involved in stealing institutional property for Alain Friolet. The inmate related this in confidence to Luc Nabelsi, a correctional officer (AC-I), Fernand Guimond, a correctional supervisor (AC-III), and Denis Bélanger, the unit manager. He later made similar statements to Francis Brisson, a Preventive Security officer, and Warden Claude Lemieux. None of these people noted the date when he was first told by inmate M of Mr. Friolet's thefts. None of them reported on this as required by the rules.

[23] Possibly in May or June 1999, inmate M wrote an undated report which he gave to the Preventive Security officer, who presented it to the Warden. Warden Claude Lemieux told me that he considered this document an inmate grievance.

[24] On June 22, 1999, the inmate's security classification was changed from "high" to "medium".

[25] On June 29, 1999, Sylvain Durand, who was in charge of laundry, complained to Fernand Guimond, Mr. Friolet's supervisor, about the disappearance of blue towels and matchboxes.

[26] At the beginning of September 1999, inmate M said he was pressured by Mr. Friolet to remove institutional property, i.e., jeans, audiocassettes and computer cabling.

[27] On September 7, 1999, according to the Preventive Security officer, inmate M told him that Mr. Friolet was putting pressure on him and that the transaction would take place on September 9, 1999.

[28] On September 9, 1999, Warden Claude Lemieux, under paragraph 64(1)(b) of the Act, authorized "a frisk search or strip search of a staff member," (see Exhibit E-3). This was after the Warden learned from the Preventive Security officer that the inmate had told him that Mr. Friolet was going off duty for four days, that Mr. Friolet had put pressure on him and that there was going to be a transaction that evening.

[29] On September 9, 1999, Mr. Friolet worked overtime on the day shift in the office of the Correctional Supervisors (the "keepers" office) before noon and in unit L in the afternoon.

[30] For the evening shift, Mr. Friolet was scheduled to work four hours at MCCP, the main control and communications post, and the other four hours in unit T.

[31] When he arrived in the Correctional Supervisors' office for his evening shift, Mr. Friolet learned from someone who he thought was Jean-Marc Charbonneau that Réjean Gauvreau had changed their assignments and that he would not go to MCCP but would be in charge of moving activities in unit T. He signed the roll-call on the Correctional Supervisor's desk, at which the latter was sitting.

[32] Mr. Friolet took up his post to supervise the moving activities at about 3:25 p.m. or 3:30 p.m. After the official count, between 4:00 p.m. and 4:30 p.m., he took the small trolley into the detention kitchenette so he could serve the meals in the hospital.

[33] In the hospital, Mr. Friolet served three or four meals, including one to inmate B and one to inmate M.

[34] Mr. Friolet said he took six new 2X T-shirts wrapped in a package from the hospital laundry across from inmate M's cell.

[35] Inmate M said he had given Mr. Friolet six T-shirts, 3 pairs of jeans, 5 audiocassettes and one computer cable, but that Mr. Friolet had taken only the T-shirts and 2 pairs of jeans, which he had put in a *Monde des Athlètes* bag and placed on the second tray of the trolley.

[36] Mr. Friolet returned to detention, where he took a brown bag on top of the lockers, put the T-shirts in it, rolled up the bag and wrote his name on the bag, which he dropped [TRANSLATION] "to the right of the washroom door". The lockers and

washroom are opposite the control centre. The bag could not be seen from the control centre.

[37] Mr. Friolet returned the small trolley to the detention kitchenette. With the other officer, he took the large trolley and went to serve meals in the detention range. This took about fifteen minutes. After the meal service, he took a meal tray and picked up the brown bag and proceeded towards T unit.

[38] In T unit, he put his tray on the guards' kitchenette table and turned around to open his red bag that was to the right of the door and put the brown bag in it. In the kitchenette, there were co-workers with whom Mr. Friolet ate his supper.

[39] Mr. Friolet said that after his supper he took out the Tupperware plate containing the meal he had brought for himself, emptied it in the pail and washed it before putting it back in his bag, which remained in the kitchenette the entire evening.

[40] Mr. Friolet said that the kitchenette could be accessed by the inmates from 119 and that he did not watch his bag while he worked. Mr. Friolet also said that he did not return to his red bag during the evening.

[41] Inmate M said he had met the Correctional Supervisor, Jean-Marc Charbonneau, while cleaning up after supper and had asked him to go to the office to call "Francis or Mr. Veilleux ". On the telephone, he allegedly said [TRANSLATION[ "I've just given him some more jeans, some little sweatshirts, tonight you have to do something."

[42] Correctional Supervisor Jean-Marc Charbonneau stated that the Preventive Security officer had met him before his shift began, at about 3:00 p.m. or 3:10 p.m., to give him the search warrant signed by the Warden. The warrant stated the grounds for the search: [TRANSLATION] "*From our analysis of information that we believe to be credible, we believe that the employee is involved in the theft of institutional property and that this property is being taken out of the institution.*" The grounds were written by Francis Brisson.

[43] When inmate M telephoned the Preventive Security officer, Mr. Charbonneau was present. Mr. Charbonneau knew that, in the search that would be conducted, he would find a *Monde des Athletes* bag with six T-shirts and two pairs of jeans. Mr. Charbonneau therefore called Luc Nabelsi to let him know and tell him that he should go ahead with searching Mr. Friolet.

[44] Mr. Charbonneau warned the correctional officer at the gate that no one was to leave.

[45] At about 11:01 p.m. or 11:02 p.m., Mr. Friolet reported to the office of the Correctional Supervisor with his red bag to deliver the unit T inmate count.

[46] Mr. Charbonneau had himself replaced and followed Mr. Friolet. On the way, he told a correctional officer, Alain Rainville, to accompany him because there was an "officer" to be searched.

[47] When they reached the back gate, Mr. Nabelsi joined Messrs. Charbonneau and Rainville. About ten or fifteen employees were waiting in the "bucket" to exit. Mr. Charbonneau asked Mr. Friolet to follow him to a little room next door.

[48] Mr. Friolet had placed his bag on the floor between the gates. Mr. Rainville retrieved it and gave it to Mr. Charbonneau.

[49] The first thing that Mr. Charbonneau saw on opening the bag was a newspaper and a large brown bag marked "Friolet". The bag was of the kind used for the inmates' personal effects and also for giving employees their uniforms.

[50] The brown bag was folded over several times and Friolet's name was clearly visible. Inside, there was another plastic bag, a *Monde des Athlètes* bag, which held a clear plastic bag with six white T-shirts and two pairs of Levi Strauss & Co. jeans. Mr. Charbonneau's report dated September 10, 1999, (Exhibit E-4) does not indicate the sizes of the sweatshirts or the jeans.

[51] When Mr. Charbonneau opened the *Monde des Athlètes* bag and found the sweatshirts and the jeans, Mr. Friolet said [TRANSLATION] "The undershirts are mine, but I don't know where the jeans came from. It's a frame-up."

[52] Mr. Charbonneau said to Mr. Friolet [TRANSLATION] "I am going to make a phone call and I will come back." Mr. Charbonneau left the room. Messrs. Rainville and Nabelsi stayed with Mr. Friolet.

[53] Mr. Charbonneau telephoned Mr. Brisson from his cell phone and then contacted his replacement in the operational office to see if the count was correct. He waited for Mr. Brisson.

[54] When Mr. Brisson arrived, the other officers, who were waiting to leave, were asked to leave and Mr. Brisson came into the room where Mr. Friolet was.

[55] Mr. Charbonneau handed Mr. Friolet's bag to the Preventive Security officers.

[56] Viviane Mathieu, president of the local, arrived shortly after that. She was between the gates when Mr. Friolet and the Preventive Security officers, Francis Brisson and Mario Goulet, emerged from the little room. She accompanied them to the Preventive Security office. Mr. Goulet carried the bag. As he was leaving, Mr. Friolet repeated [TRANSLATION] "It's a frame up." "A mix-up".

[57] Mr. Brisson searched Mr. Friolet's bag again in the presence of Ms. Mathieu and Mr. Goulet. In searching the brown bag marked "Friolet", he found a *Monde des Athlètes* bag, two pairs of jeans and some T-shirts rolled up in a clear plastic bag. Mr. Friolet said that the T-shirts were his, the jeans had no business there and he did not know what they were doing there.

[58] Mr. Brisson did not question Mr. Friolet; he called Robert Veilleux, the Correctional Co-ordinator in charge of Preventive Security. Mr. Veilleux had been instructed by the Warden to inform Mr. Friolet that he could not come into the institution during his off-duty days.

[59] Viviane Mathieu stated that, on September 9, 1999, Mr. Friolet asked her to stay with him, saying that he did not really know what the security officers wanted from him. Mr. Friolet told her that he was prevented from leaving. Mr. Friolet asked several times if he had been arrested; the Preventive Security officers did not answer.

[60] In the Preventive Security office, Mr. Friolet repeated in front of Ms. Mathieu: [TRANSLATION] "The T-shirts are mine but the jeans I don't know what that's doing there, I didn't take any jeans. They're not mine."

[61] Mr. Friolet and Ms. Mathieu stated that the Preventive Security officers did not read Mr. Friolet his rights.

[62] Mr. Veilleux told Mr. Friolet that the warden would meet with him on his first day back at the institution after his off-duty days.

[63] Mr. Brisson's report, dated September 10, 1999, does not indicate the size of the jeans or of the T-shirts.

[64] Mr. Brisson said that Mr. Veilleux put the brown bag and "the evidence" in a locked filing cabinet. Mr. Brisson also said that the chain of possession "of the evidence" was not ensured. There was no record of the seizure and the items introduced at the hearing bear no seizure identification sign or mark. Mr. Brisson said he had returned the jeans that were seized to Personal Effects after the investigation.

[65] Luc Nabelsi's report, dated September 10, 1999, indicated that the jeans were size 36.

[66] On September 14, 1999, Warden Lemieux met with Mr. Friolet who admitted to taking the sweatshirts but not the jeans. Mr. Lemieux suspended Mr. Friolet for purposes of the investigation. The Warden told me that, on September 14, 1999, he still had doubts. This explains why, the same day, Mr. Lemieux gave André Courtemanche, Deputy Warden at Archambault Institution, and Claude Grand'Maison, Deputy Warden at Drummond Institution, a mandate to investigate.

[67] Messrs. Courtemanche and Grand'Maison conducted their investigation from September 16 to 24, 1999. They went to Donnacona Institution on September 16, 17, 20, 23 and 24, 1999.

[68] On September 24, 1999, Messrs. Courtemanche and Grand'Maison met with Mr. Friolet and his lawyer. The interview was tape recorded (Exhibit P-39). This is the only interview that was recorded during the investigation. The investigators did not obtain signed statements from the people they interviewed. They did not note all the names of those they did meet with.

[69] When he met with the investigators, Mr. Friolet repeated that he had taken "five T-shirts", but not the jeans. He told where he had taken the sweatshirts, how he put them in a brown bag and his red bag, which he described to the investigators. Mr. Friolet seemed to recognize the brown bag, the sweatshirts, the jeans and the *Monde des Athlètes* bag that were shown to him as the ones found in his bag. He argued that the size of the jeans was not his size, nor his son's, and suggested it was a sting operation. He told the investigators that he had said to Francis Brisson that he had not touched the jeans and that they were not his size or that of any member of his

family. When the sweatshirts were counted and there were six, Mr. Friolet said that he may have taken six since he had taken a packet of T-shirts.

[70] To the investigators, Mr. Friolet denied any involvement with inmate M or that he had taken other institutional items.

[71] The investigators met twice with Warden Lemieux in the course of the investigation to brief him about the situation in general.

[72] On October 12, 1999, the report (Exhibit E-6) was finished and was submitted to Warden Lemieux at a final meeting.

[73] On November 16, 1999, Mr. Friolet was dismissed. At that meeting, he asked to see the investigation report; he was refused and told to request it through access to information.

[74] Mr. Friolet said he had received an incomplete copy of the investigation report with a letter that was dated December 23, 1999, but received in March or April 2000.

[75] On January 19, 2000, Viviane Mathieu, President of the Alliance local, met with inmate B who had asked to meet with her concerning the Friolet case. The inmate told her that Mr. Friolet's dismissal was a frame-up and agreed to see her again the next day.

[76] On January 20, 2000, inmate B met with Ms. Mathieu in the company of correctional officer, Pierre Labadie. Inmate B said he had been told in confidence by inmate M that the Friolet case was a frame-up by inmate M and Preventive Security Officer Brisson. Mr. Labadie took note of inmate B's statements and had him sign them (Exhibit F-18). Ms. Mathieu sent the statement to the national office of the Union of Solicitor General Employees.

[77] Inmate B asserted that he had seen inmate M and Preventive Security Officer Brisson together on many occasions before and after September 9, 1999. He asserted that he had seen Mr. Brisson give the jeans to inmate M. Inmate B asserted that inmate M had confided in him that he had access to the inmates' personal effects and also to the computer where inmates' personal effects are listed. Inmate M told inmate B in confidence that he could help himself to their belongings with no one the wiser and that he had done so.

[78] Inmate M confided in inmate B that Preventive Security was paying him for his services and that he was going to get private family visits and a transfer to a minimum security institution if Mr. Friolet was discharged.

[79] Inmate B lost his cleaning position in Administration towards the end of 1999. He attributed the loss of this job to inmate M.

[80] Inmate B left Donnacona Institution on February 1, 2000; he was released. He was reincarcerated on March 4, 2000, following a credit union theft.

[81] On February 14, 2000, the follow-up was completed for inmate M's correctional plan by Suzanne Gagnon, a case management officer at Donnacona Institution. His security classification was "medium".

[82] On March 9, 2000, the transfer of inmate M to Archambault Institution was agreed to. His security classification was rated at "medium".

[83] On September 5, 2000, the follow-up of inmate M's correctional plan was performed by Johanne Gagnon, a parole officer at Archambault Institution. His security classification was changed to "minimum".

[84] On September 21, 2000, inmate M testified for the employer at Mr. Friolet's adjudication hearing. Preventive Security Officer Brisson was present in court during this testimony.

[85] On October 2, 2000, the transfer of inmate M to the Federal Training Centre (FTC), a minimum security institution, was accepted (Exhibit P-36).

[86] On or about November 2, 2000, inmate M escaped from the FTC.

[87] When he was taken back, inmate M was incarcerated in Leclerc Institution. Subsequently, he was transferred to Drummond Institution where he spent a week before returning to Archambault Institution.

[88] On November 20, 2000, Marc-B. Bilodeau made a formal demand on behalf of inmate M in which it is mentioned that Messrs. Brisson and Veilleux were said to have asked inmate M to place two pairs of jeans belonging to the institution in Mr. Friolet's bag. It is indicated in the demand that, during a telephone call to inmate M, Francis

Brisson had said that a change in his testimony would cause him a lot of problems regardless of where he served his sentence.

[89] In the formal demand, Correctional Services were called on to [TRANSLATION] "take the necessary measures to put an end to all intimidation, harassment or discussion between your officers and/or clerks and our client concerning the officer or the case of Mr. Alain Friolet. In addition [...] to pay the sum of Forty Thousand dollars to the order of the undersigned in trust within ten days [...] ".

[90] On November 28, 2000, inmate M met with Mr. Friolet's representative to whom he confided that he had taken part in framing Mr. Friolet. Inmate M told Ms. Cabana that it was he who had put the jeans in Mr. Friolet's bag. Inmate M stated on that occasion that Mr. Friolet's discharge was a frame-up in which Preventive Security Officer Brisson, correctional officers Nabelsi and Dumont and Correctional Supervisor Charbonneau participated.

[91] Inmate M told Ms. Cabana that he had obtained the jeans from Mr. Brisson to be put in Mr. Friolet's bag, but did not say how he managed to do this.

[92] Inmate M confided to Ms. Cabana that he had participated in the frame-up to obtain cigarettes, visits with his sister and for his "minimum".

[93] Preventive Security Officer Brisson was passing through at Archambault Institution on November 28, 2000, the day of the meeting between Ms. Cabana and inmate M.

[94] The meeting with inmate M had been planned to be held at Drummond Institution but the day before the meeting Ms. Cabana had been told that the inmate had been transferred to Archambault Institution.

[95] On January 9, 2001, Mr. Bilodeau signed an affidavit in which he asserted that he had made false and misleading allegations with respect to inmate S.M. because he was having a hard time being separated from the latter. These allegations concerned the relationship between inmate M and Mr. Bilodeau and were supposedly made on November 2, 2000.

[96] On August 30, 2001, inmate M testified a second time, called by the complaining party. Mr. Courtemanche was present as Mr. Turgeon's technical adviser. Inmate M

admitted that he had met with Ms. Cabana and told her and Mr. Courtemanche that he had participated in a set-up to get Mr. Friolet discharged and that he had placed the jeans in Mr. Friolet's bag.

[97] Inmate M claimed he acted this way for "revenge" because he was "very frustrated" and wanted to get his "minimum faster". He admitted that he was a manipulative inmate and that he had told Mr. Courtemanche that Messrs. Veilleux and Brisson [TRANSLATION] "didn't give me what they promised me".

[98] Inmate M said that the discussions he had had with Messrs. Veilleux and Brisson to be transferred to minimum security began five months before the Friolet case.

[99] The inmate said that the statements he had made to Ms. Cabana were false. He blamed inmate S.M., who had been at Leclerc Institution at the same time with him after his escape, for the idea of the lawsuit against the Correctional Service. He said that the written statement he gave Mr. Bilodeau had been prepared under the influence of inmate S.M. and that that it was false. The statement he gave Mr. Brisson was the truth, he said.

[100] During his testimony, inmate M said he was waiting for a decision from Mr. Courtemanche who had sent him "to the hole" for extortion. When asked whether he had been involved in extortion or lending tobacco at interest, the inmate answered: [TRANSLATION] "I am not going to tell you 'yes' in front of Courtemanche [...] I told Courtemanche 'no'. " Inmate M said he was "in the hole" for a month. He was awaiting "an answer in a few days, it has to be right for me, we're going to have to talk face to face".

[101] During his testimony, inmate M spoke to Mr. Courtemanche who acted as a technical adviser and told him in a threatening tone: "I won't spend the afternoon here!"

[102] Inmate M admitted signing the statement and the lawsuit when he was at Archambault Institution but because [TRANSLATION] "I was so wasted." ["J'étais tellement pogné."] He said his lawyer "was high on coke", that he could not reach him to stop the lawsuit because he could not telephone him any more since his number had changed.

[103] In reply to the employer's question why inmate M had refused to authorize Mr. Bilodeau to give a copy of his statement, the inmate answered: [TRANSLATION] "If you give, I'll give to you, they didn't give anything." {"Si tu donnes, je vas te donner, y ont pas donné rien."]

[104] Inmate M stated that in his cell he had a "big pack" of "transfer bags", 50 to 75 of them. Inmate M said that the jeans were 36s or 38s, Levis, "more 38s" and that the sweatshirts were "2Xs or 3Xs" "smaller than that they didn't want".

[105] Inmate M denied talking to Inmate B about the Friolet case. He denied making the confidences that Inmate B said he had received from him. He denied receiving visits or any benefits whatsoever from his testimony. Inmate M said he always got cigarettes from all of the Preventive Security officers.

[106] On November 29, 2001, Mr. Friolet filed a motion to amend the corrective action requested in his grievance and add the following damages:

- *Moral damages (including lengthy rehabilitation - loss of self-esteem and stress ...)* *$50,000,*
- *Loss of reputation, loss of image, loss of job opportunities* *$50,000,*
- *Exemplary damages* *$50,000.*

[107] The following case law was cited in support of the claim:

- *Re Harry Woods Transport Ltd. v. Teamsters Union Local 141*, 15 L.A.C. (2d) p. 140
- *Aluminart Architectural Inc. et Vitriers - Travailleurs du Verre, Section Locale 1135*, [1999] R.J.D.T. 1230
- *Métallurgistes Unis d'Amérique, Local 7285 et Lab Chrysotile Inc., Société en commandite, Opérations Bell (T.A.)*, [2001] R.J.D.T. 939
- *Lawrence O'Leary v. Her Majesty the Queen in right of the Province of New Brunswick*, [1995] 2 S.C.R. 967
- *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929

[108] The employer opposed the motion. Taken by surprise, the employer requested time to respond to the motion.

[109] I reserved my decision and granted the employer an opportunity to make submissions on the merits at a later time. I nevertheless permitted Mr. Friolet to present the evidence on which he intended to rely for his claim for damages. Mr. Friolet accordingly filed medical certificates and called his psychologist, Lyne St-Pierre, to testify.

[110] At Mr. Courtemanche's disciplinary investigation, Robert Veilleux testified and furnished Annex C of Exhibit E-6. This Annex relates allegations hinting at a relationship between Mr. Friolet and the criminal element that was inconsistent with the work of a correctional officer. No evidence was submitted to establish the merits of these allegations or explain their source. Mr. Veilleux did not testify before me. Annex C is part of the investigation report and contributed to the recommendation for a severe penalty that could include termination.

[111] When Warden Lemieux testified, he told me he had taken the recommendations of Messrs. Courtemanche and Grand'Maison into account but played down the importance of Annex C and its allegations. The Warden told me that the investigation revealed that Mr. Friolet read his newspaper and watched television at work. The testimony, uncontradicted by Mr. Friolet, is that he read his newspaper on his breaks and listened to the radio on some assignments where it was allowed. The persons heard by Mr. Courtemanche did not all testify before me and his report did not identify them all.

[112] Mr. Courtemanche testified candidly about his investigation and the comments made to him by inmate M after his arrival at Archambault Institution. He did not ask for written statements from the people he met with and whose testimony he accepted, and he recorded only the meeting with Mr. Friolet. He concluded that Mr. Friolet no longer met Correctional Service values. Mr. Courtemanche did not confront Mr. Friolet directly about the statements received, especially Annexes C and G of his report.

[113] Section 56 of the Rules provides for staff searches. All witnesses who mentioned the search said that it was extremely rare for the staff to be searched at Donnacona Institution, so rare that some of them had never seen a search conducted.

[114] Francis Brisson testified in chief, based on his statement to the investigation committee. When he was questioned on facts not in his report, he was evasive and referred to his supervisor, Robert Veilleux, who he said was "in charge" of the investigation of Mr. Friolet.

[115] In his report (Annex B, Exhibit E-6), Mr. Brisson stated that he had met with Inmate M initially at the end of May about his allegations about Mr. Friolet and had received his statement early in June. When he was cross-examined, Mr. Brisson said more than once that he had met with Inmate M initially at the end of April and had received his statement early in May.

[116] Mr. Brisson was trained as an investigator, and as a Preventive Security officer he knows the importance of incriminating objects in a seizure and the procedure to follow to ensure the chain of possession. He did not follow the rules under paragraph 64 for searches nor the procedure that should be followed when an item is seized in the commission of a crime. It is he who obtained the search permit and completed the grounds for the search that appear in Exhibit E-3.

[117] Mr. Brisson testified that he had given some packs of cigarettes to inmate M for doing a good job with his cleaning and informing on the inmates. On cross-examination, when he had to read his entries in the cigarette log, there was no entry with respect to inmate M between 1997 and 1999. The first entry was dated April 27, 1999.

[118] The entries are spread out as follows:

| Date | Quantity | Given by |
|---|---|---|
| April 27, 1999 | 1 carton | F. Brisson |
| May 26, 1999 | 5 packs | F. Brisson |
| June 10, 1999 | 1 carton | Mario Goulet |
| August 6, 1999 | 1 carton | F. Brisson |
| September 1, 1999 | 2 cartons | F. Brisson |
| September 21, 1999 | 1 carton | F. Brisson |
| October 27, 1999 | 2 packs | Mario Goulet |

[119] To many of the questions put by Mr. Friolet's representative, Mr. Brisson answered that he did not know or did not remember.

[120] Renaud Delisle has been a correctional officer AC-I for 17 years. Mr. Delisle denied that he had known that Mr. Friolet was taking property out of the institution. He said that he had never told inmate M the things the latter had written on page 7 of his statement (Exhibit E-2).

[121] Mr. Delisle was not approached in connection with inmate M's statement (Exhibit E-2) prior to the disciplinary investigation of the Friolet case. He said no to the investigators who asked him whether he remembered that inmate M had admitted to him that he had been pressured by Mr. Friolet to give him "stock".

[122] Adrien Lamer, a correctional officer AC-II, has been at Donnacona Institution since it opened and in the Correctional Service since 1977. Mr. Lamer did not speak with inmate M about the thefts that he committed with Mr. Friolet and was not aware that Mr. Friolet was stealing. Mr. Lamer saw inmate M's statement (Exhibit E-2) for the first time at the hearing. Before September 9, 1999, no representative from management or Preventive Security had approached him about the statement (Exhibit E-2). Mr. Lamer said he had not wanted to take part in Mr. Courtemanche's investigation because he was not working with Mr. Friolet at that time; he was working in the visitor's department; he had nothing to say.

Arguments

[123] In view of the many hearing days and the large number of objections raised during the adjudication, objections that were taken under advisement, I asked the parties' counsel to send me their written arguments. I asked the parties to deal in their written arguments with the objections that they wanted me to address specifically in my decision. Each party was able to respond orally on the hearing days to the other party's arguments.

[124] The employer summarized its view of the facts presented at the adjudication, which I do not intend to reproduce (the document contains 74 typed single-space pages).

Arguments for the employer

[125] The employer submitted the following arguments in writing:

[TRANSLATION]

*PART II — STATEMENT OF THE ISSUES*

- *Did the employer discharge the onus on him in the case at bar and prove that, on September 9, 1999, Friolet stole institutional property, to wit: sweatshirts and jeans?*

- *Did the employer discharge the onus on him in the case at bar and prove that, on September 9, 1999, Friolet stole institutional property, to wit: sweatshirts and jeans, with the complicity [of an] of inmate M?*

- *Is the mere fact that a peace officer steals institutional property enough to break the relationship of faith required for the performance of his duties?*

*PART III — REPRESENTATIONS*

***Employer's theory of the case***

*746. The employer's theory of the case is that Friolet asked Inmate M to take property illegally that belonged to the CSC in order to turn it over to Friolet for his own purposes. This constitutes theft and an abuse of power.*

***Grievor's theory of the case***

*747. The Grievor's theory of the case is that he stole the six sweatshirts and that an unidentified person on the same day allegedly took advantage of this opportunity to add jeans to the sweatshirts.*

*PART IV — OBJECTIONS*

***Punitive damages***

*748. With regard to the objection to the motion to amend the grievance that was made by Mr. Milliard on the resumption of the hearings on December 3, 2001, which reiterates the terms of his correspondence of November 29, 1999, the employer's position is that this motion cannot be granted since its effect would be to change the nature of the grievance. See, in this regard,* Burchill v. Attorney General of Canada, *[1981] 1 F.C. 109;*

*749. The amendment sought by the grievor is accordingly inadmissible. The purpose of this amendment is, in fact, to alter the very nature of the grievance. A grievance consists of basic elements, namely: the person concerned, an object*

*and a remedy. A change in one of these elements would result*[1] *in changing the nature of the grievance;*

*750. The amendment you are asked to grant is a claim for punitive damages. The reasons argued in support of the motion to amend the grievance are based on the "allegedly" wrongful conduct of the employer at the time of Friolet's discharge;*

*751. Exemplary damages belong in the category of punitive damages. However, before punitive damages can be awarded, malice and bad faith must be very clearly demonstrated;*

*752. The evidence that has been adduced before you cannot justify such damages since not only has Friolet not demonstrated the premeditation and bad faith that would give rise to an award of exemplary damages, but he has been unable to support his allegations respecting his conspiracy theory with any evidence;*

*753. In respect of the claim for loss of reputation, loss of image, loss of job opportunities, this is included in the relief that may be granted by the adjudicator;*

*754. Furthermore, no evidence whatsoever was adduced before you concerning the awarding of such damages;*

*755. Moral damages are included and intrinsically attached to the dismissal. However, they must be evaluated having regard to the decision in respect of this dismissal;*

*756. Having regard to any cause of action not directly related to the dismissal, we submit that no relief can be granted under the powers conferred on you by the Public Service Staff Relations Act and granting such relief would be an excess of jurisdiction;*

*757. In the alternative, we submit that no evidence of any damage whatsoever has been adduced, and the onus was on the grievor to show the damage that he claims to have sustained;*

*758. We also wish to point out to you that this case does not give rise to these kinds of damages. A party who claims punitive damages must come with clean hands, which is manifestly not the case here, if only in view of Friolet's admissions respecting the theft of the six sweatshirts;*

*759. Although, we are convinced that you should not allow the proposed amendment, we remind you that the purpose of*

[1] Métallurgistes unis d'Amérique, Local 7285 et Lab Chrysotile Inc. [2001] R.J.D.T. 939 to 951, p. 947

*awarding punitive damages is to punish the bad faith or misconduct shown by the employer at the time of the dismissal. Therefore, the employer's conduct and actions at the time of the said dismissal must be analysed. In this regard, we refer you to* Vorvis *v.* Insurance Corporation of British Columbia[2]*, cited in Wallace, a decision in which the Supreme Court of Canada determined what might constitute bad faith by the employer. Thus, at page 14, the Honourable Judge McIntyre held as follows:*

> *"Moreover, punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of [page 1108] its harsh, vindictive, reprehensible and malicious nature. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterizing a punitive award, but in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment."*

*This is why we submit that the evidence adduced by Friolet at the hearing of this grievance is not of such a nature as would allow you to award punitive damages.*

***PART V — ARGUMENT***

*760. The issue you must decide with respect to the grievances filed by Friolet consists in analysing whether the latter was discharged for just and sufficient cause having regard to the legislation in force, the case law and academic opinion;*

*761. We submit that the issue must be analysed by taking the employer's onus into account. Since this is not a criminal proceeding but a labour relations grievance, the applicable standard of proof in the case at bar is a balance of probabilities;*

*762. The employer submits that Friolet's acts are inconsistent with the status of a peace officer;*

*763. The fact that one of Friolet's duties was to participate in the rehabilitation of the inmates only aggravates his act;*

*764. Having regard to the grievor's theory, how can it be explained that, the one time, according to his evidence, in his long career with the CSC that he stole institutional property, he was allegedly framed. Is this really likely?*

[2] Vorvis v. Insurance Corporation of British Columbia, [1989] 1 S.C.R. 1085, p.1108.

*765. We submit that no evidence of this alleged frame-up was adduced. As he had during the investigation, Friolet only alleged a frame-up but provided no evidence whatsoever that would support this conspiracy theory;*

*766. Friolet's version of the facts is improbable and cannot be accepted. It is the version of a person who is trying to save his skin by any means;*

*767. The mere fact that he stole from his employer is already a very serious crime that is unacceptable given Friolet's special status as a peace officer. Stealing, even a small amount or something without much value, is unacceptable and most definitely impairs the relationship of faith between employer and employee;*

*768. When, as in the case at bar, an inmate is used as an accomplice and induced to commit unlawful acts, this is an acceptable and immoral act;*

*769. The evidence that has been adduced leaves no doubt as to inmate M's participation in Friolet's thefts;*

*770. Without reviewing all of the evidence, what explanation is there for the simple fact that M had such specific knowledge of the "Monde des athlètes" bag and its contents?*

*771. What are the mathematical probabilities that on the very day Friolet decides to steal for the first time in his career: one, he is caught and, two, he is allegedly framed?*

*772. Considering the circumstances surrounding Friolet's dismissal and his attitude, it appears obvious that the relationship of faith has been irreparably ruptured and that there are no circumstances that could make up for this fact;*

*773. In view of the evidence adduced, we submit that Friolet's dismissal was warranted and we ask you to dismiss his grievances;*

*774. In the alternative, if you should find that Friolet was not dismissed for just and sufficient cause, we ask you not to order Friolet's reinstatement, but instead consider awarding compensation in lieu of notice;*

*775. It seems obvious that reinstating Friolet is not in the interests of any of the parties;*

*776. As such, we submit that the case law has narrowed the tests whereby compensation may be awarded. The*

*decision in* Wallace v. United Growers Ltd. (Public Press)[3] *lists the factors to be considered in determining a reasonable notice period;*

*777. The factors are the following: the characteristics of the job, the employee's length of service and his age and the availability of similar employment. The Court is at pains to note that consideration of these factors provides the basis for assessing the reasonableness of the notice period and depends on the specific circumstances of each case;*

*778. We submit that, in connection with this assessment, you should also take into account the fact that Friolet has admitted that he stole institutional sweatshirts;*

*779. In the circumstances and in view of Friolet's admissions, we consider that compensation equivalent to between three and nine months' salary in lieu of notice would be reasonable;*

***PART VI: RELIEF SOUGHT***

***FOR THESE REASONS, MAY IT PLEASE the Tribunal:***

***TO DISMISS** these grievances; and*

***IN THE ALTERNATIVE:***

***TO ORDER** the employer to pay the grievor compensation equivalent to between [six] three and nine months' salary in lieu of notice.*

Montreal, April 8, 2002

Arguments for Mr. Friolet

[126] Mr. Friolet had the employer's written submissions in his possession when he submitted his own 146-page argument. What follows is a summary of Mr. Friolet's written submissions and his oral reply to the employer's written and oral submissions. In his oral reply, Mr. Friolet repeated and elaborated on some of the points in his written submissions.

[127] The key points in Mr. Friolet's submissions are the following:

[3] ***Wallace* v. *United Growers Ltd. (Public Press)*, [1997] 3 S.C.R. 701.**

[128] The failure to observe the principle of procedural fairness renders the dismissal void.

[129] The nature and context of the dishonest conduct must be taken into consideration.

[130] The allegation that the theft was planned and pressure exerted on the inmate to commit thefts was not proven.

[131] Mr. Friolet's testimony is more credible than inmate M's.

[132] Other misconduct by Mr. Friolet as grounds for dismissal was not proven and was based on Annex C, which is hearsay.

[133] The evidence obtained from the search should be set aside because the employer clearly used a criminal remedy and the evidence obtained was gathered in breach of section 24(2) of the *Canadian Charter of Rights and Freedoms* and section 64 of the *Correctional Service and Conditional Release Act.*

[134] The frame-up theory is plausible and the employer should have provided evidence to rebut inmate B's testimony.

[135] The adjudicator has the jurisdiction to allow the relief that is sought in the grievance to be amended.

[136] The adjudicator has the jurisdiction to order damages in view of the employer's unconscionable conduct and the consequences for Mr. Friolet in terms of his physical and mental health.

[137] On the first point, Mr. Friolet referred to five Supreme Court decisions recognizing the duty to act fairly: *Nicholson v. Haldimand - Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Cardinal and Oswald v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Knight v. Board of Education of the Indian Head School Division no. 19 of Saskatchewan*, [1990] 1 S.C.R. 653; and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[138] Mr. Friolet submitted that the Supreme Court has clearly established that an administrative decision is subject to the principle of procedural fairness. In Exhibit

E-5, at page 2, the Warden instructed the investigating committee to follow the rules of procedural fairness. Mr. Friolet cites pages 328, 329 and 330 of *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police (supra).*

[139] Mr. Friolet also referred to the dissent of Justice Robertson in *Kampman v. Canada (Treasury Board),* [1976] A-543-94 (T-2120-93), the decision in *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701 and *Université Laval c. Syndicat des chargées et chargés de cours de l'Université Laval (S.C.C.U.L.-C.S.N.)* [1999] R.J.Q. 2509.

[140] Mr. Friolet argued that he was not fully informed of the case he had to answer, that the intention of the disciplinary investigating committee was not bring out all of the relevant facts in an impartial manner and give Mr. Friolet an opportunity to contradict them or object, but rather to find evidence against Mr. Friolet to reach a pre-determined result even before the process. Mr. Friolet illustrated this argument from the facts in evidence concerning the change in his shift and the elements found in the investigation report, elements that to a significant extent amounted to unconfirmed hearsay.

[141] Mr. Friolet argued that Messrs. Adrien Lamer and Renaud Delisle were not questioned for long by the investigating committee even though it was in their power to confirm the alleged hold over inmate M, according to the latter's statement (Exhibit E-2).

[142] The investigating committee intimated that Mr. Friolet appeared only for September 9, 1999. He was not told that he had been suspected of theft for four years and of exerting pressure on an inmate. He was not told about Annex C when what led to the punishment was not so much the theft but the whole issue of exerting pressure on inmate M. This information should have been provided in timely fashion; otherwise, the whole process should be set aside. The Warden relied on the report, which was not impartial. Warden Lemieux did not get back to Mr. Friolet to inform him of the contents of the report before dismissing him.

[143] Furthermore, Mr. Friolet received a letter of dismissal (Exhibit E-1) that, contrary to all expectations, referred to matters other than the jeans and sweatshirts. In a general way and with few details, the letter referred to planning and organization. It mentioned repeated pressure on an inmate to obtain items for the grievor's personal benefit and a number of other significant breaches that had been alleged against him.

[144] These elements were never brought to Mr. Friolet's attention and it was only several months later, as a result of his access to information requests, that he succeeded in obtaining the report (Exhibit E-6), but only in part, since some sections, including Annex C, had been removed. It was only at the beginning of the adjudication that he obtained the report (Exhibit E-6) in full and became aware of the charges that had been made against him a number of months earlier, when he did not have the opportunity to express himself. The employer's attitude represents a total denial of justice with regard to Mr. Friolet.

[145] Mr. Friolet, therefore, had the legitimate expectation that the procedure would be fair and would concern only the events for which he had been suspended. This was even more so because his disciplinary record showed nothing in the previous two years and, under clauses 17.01 to 17.06 of the collective agreement, he was entitled to expect that his disciplinary record would be considered clear.

[146] According to clause 17.01 of the collective agreement, he was entitled to be notified of the reasons for his suspension. These reasons, however, referred solely to the act of September 9. Subsequently, he was told that a disciplinary investigation would be held and was never given additional information about any other incident that would be considered.

[147] Moreover, clause 17.05 provides that the employer agrees not to introduce as evidence in a hearing relating to disciplinary action any document from the file of an employee, whose content the employee was not aware of at the time of filing or within a reasonable period thereafter.

[148] This requirement from the collective agreement was never complied with and Mr. Friolet had no knowledge of the evidence on file against him, except partially with regard to the events of September 9 concerning the "sweatshirts" and the jeans. Mr. Friolet was therefore entitled to expect that the employer could not raise other matters.

[149] However, the investigation committee went far beyond those matters and considered other evidence that was not part of what it could consider under the current terms of the collective agreement.

[150] Moreover, clause 17.06 of the collective agreement provides that any document or written statement related to disciplinary action shall be destroyed after two (2) years have elapsed. The investigation report considered earlier events, however, that the employee was entitled to consider were prescribed.

[151] In relation to the nature and context of the dishonest conduct, Mr. Friolet referred to the decisions in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, and *Board of Education for the City of Toronto v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487.

[152] Mr. Friolet submitted that the nature and context of the dishonest conduct must be taken into consideration and that the termination was warranted only if the dishonest conduct was so serious as to be incompatible with the employer-employee relationship.

[153] Mr. Friolet did not admit to stealing the jeans but, on the supposition that the jeans and the sweatshirts were stolen, he submitted that the jeans were not only the subject of conflicting evidence, but furthermore that, based on section 24(2) of the Charter, his possession of the jeans must be set aside because of the failure to respect his fundamental rights guaranteed by the Charter.

[154] Mr. Friolet explained that the act of taking the sweatshirts for unauthorized purposes should be placed in context. On the one hand, the evidence reveals that correctional officers are completely outfitted by the Correctional Service, as Exhibit E-30 shows. He referred to page 12 of the 46 pages of Exhibit E-30. Obviously, the T-shirts were not mentioned. However, according to the evidence heard, female correctional officers are given T-shirts.

[155] Recognizing, however, that the jeans lacked this mitigating element and are more difficult to obtain since they are kept in the Personal Effects department, the employer put a great deal of reliance on the fact that the inmate's participation was necessary to steal them. According to the evidence heard, Mr. Friolet asked, was it more probable or plausible that a correctional officer would commit this dishonest act by himself or would he use an informer, inmate M, to do it in his place; he submitted that using inmate M would be the least logical solution given his status and connections with Preventive Security.

[156] Even on the supposition that Mr. Friolet stole the jeans and the sweatshirts, that act is serious but insufficient for a dismissal; the employer described the kind of acts that are serious enough to warrant dismissal in Exhibit E-8, *Standards of Professional Conduct,* which provides that:

> [TRANSLATION]
>
> *Employees who commit criminal acts or other serious violations of the law - particularly in the case of a second or further offence where the offence is serious enough to lead to incarceration - do not exhibit the kind of conduct considered acceptable in the Service, either personally or professionally* (section 2, p. 10).

[157] Mr. Friolet submitted that there is no evidence, with the exception of inmate M's testimony, that he might have committed such an act in previous years.

[158] For many years, many institutional items have been taken by a number of employees and the employer has never intervened in the form of strengthening its control mechanisms.

[159] In analysing the context, the employer's obvious laxity in monitoring the inventory shows the lack of importance placed on the disappearance of institutional objects. Furthermore, the evidence showed two cases of dishonesty: that of Mr. Verret and that of Mr. Dumont (implicated with Mr. Blais). The latter case appears more serious than Mr. Friolet's; the two were involved in a concerted fraud to obtain bilingual positions leading to a salary increase over several years. The only punishment they received was six months without pay.

[160] Mr. Friolet added that the employer did not follow up on any of the accusations made by inmate M against a number of correctional officers. He noted that the conclusions of the report (Exhibit E-6) with respect to these events and individuals were that there was no reason for punishment and used this to support his claim that no importance was accorded to the disappearance of institutional property.

[161] Mr. Friolet referred to the conclusions of the investigation report (Exhibit E-6), which states at page 28:

> [TRANSLATION]

> *Considering all of the facts and versions we have gathered, we believe that the admitted theft of six institutional sweatshirts, in addition to the theft of the two pairs of jeans, which the employee does not acknowledge, constitutes a serious breach punishable under the Code of Conduct. Taken in isolation, this incident leaves us somewhat perplexed as to the severity of the measure that is to be taken with respect to this employee who, all in all, has a long career behind him in the course of which he has certainly rendered the organization good service. From this point of view, although the offence could lead to a dismissal, our tendency would be to show clemency.*

[162] Mr. Friolet submitted that, notwithstanding his status as a peace officer, the dishonourable consequences of being dismissed for dishonesty, which for all intents and purposes would deny him any hope of finding a comparable or compatible job, make the dismissal measure far more severe in relation to the breach committed by him, even on the assumption that the jeans and the T-shirts were stolen.

[163] The employer should have demonstrated, on a preponderance of the evidence, the pressures exerted on inmate M, the repeated thefts and the deviant conduct mentioned in the disciplinary report (Exhibit E-6) if it wanted to apply a punishment as harsh as dismissal without payment of compensation.

[164] However, all of this evidence flows from facts and circumstances that were never placed in evidence by the employer in the case at bar, except through the irreconcilable testimony of inmate M.

[165] The Standards of Professional Conduct, already communicated under Exhibit E-8, apply to all employees, including the two Preventive Security officers, Mr. Goulet and Mr. Brisson, and their superior, Robert Veilleux. However, those standards were not followed in a number of areas. In analysing the context and circumstances, the employer's course of conduct must be considered. In this regard, Mr. Friolet cited a number of passages from the Standards of Professional Conduct (Exhibit E-8):

> [TRANSLATION]
>
> *In such a case (where the employee's conduct flagrantly or repeatedly departs from acceptable standards), it is up to the Supervisor to take the action required to resolve the problem quickly while respecting the rights of the employee.*

> *The employees assist and actively encourage the offenders to become law-abiding citizens by establishing constructive relationships with them in order to facilitate their reintegration into the community. This relationship is marked by honesty, integrity and fairness.* p. 12, s. 4
>
> *An inappropriate relationship would consist, among other things, in concealing an offender's illegal activity, using the offender for personal reasons, establishing business relationships... It is up to the supervisor to react without delay when he notes the existence or the possibility of an inappropriate relationship between an offender and an employee.*

[166] It seems obvious that Preventive Security's behaviour in not intervening with respect to Mr. Friolet and the inmate and even the benefits given to inmate M in terms of the cigarettes and other benefits given him, both in respect of the Friolet case and in other cases, demonstrate the failure to follow the rules by those in a position of authority. It is thus difficult to require subordinates such as correctional officers to observe higher moral standards than their superiors.

[167] The conduct of the Preventive Security director and his superior, Mr. Veilleux, does not comply with Directive 581 (Exhibit P-31, Tab 8), particularly in relation to inmate M, who could validly be suspected of committing a criminal offence in which he participated with Mr. Friolet, if criminal offence there was. The Commissioner's Directive specifies the intervention framework. The investigation should be carried out by a law enforcement agency, which is obviously an external agency.

[168] According to section 3 of the Directive, "The names of all staff members having dealt directly with the inmate immediately following the commission of the offence shall be recorded and made available to investigators from the law enforcement agency."

[169] According to section 4, "Under no circumstances shall the inmate who is suspected of having committed an offence be subjected to promises, threats or pressure of any kind."

[170] Section 11 provides: "When the identity of the suspect(s) is not readily known, staff members shall refrain from questioning any potential individual suspects until the arrival of the police force of local jurisdiction and being advised by them of the procedures to follow."

[171] However, all these measures were contravened according to the statements of inmate M in May or June 1999, and during the September 9 procedure. At the very least, inmate M was suspected of having committed a criminal offence since, in accusing Mr. Friolet, he incriminated himself as well, at least until a serious investigation was performed. That investigation was never carried out and, on the face of it, inmate M was completely exonerated, without investigation, all contrary to the Directive.

[172] Commissioner's Directive 041, filed in evidence in Tab 10 of Exhibit P-31, also specifies the requirement to investigate an incident. More particularly, section 9 of this Directive specifies: "Investigations are conducted into incidents that affect the security and/or safety of an offender, the staff or the public, and/or the operations of the Service. "

[173] Mr. Friolet submitted that there are three major premises in the evidence that, according to him, make it unlikely, if not impossible, that he used inmate M to plan a theft or that he put pressure on the said M with a view to obtaining institutional property.

[174] Inmate M's personality is not one that inspires confidence. This is an inmate with a lengthy criminal record. A simple reading of Exhibit P-32 relative to the establishment of his security classification as maximum in the summer of 1998 is telling. This individual is given to violence, is unstable and has a borderline personality; he has committed many armed robberies and extortion; he has attempted to escape. He never keeps his word or any promises.

[175] Furthermore, his double and completely contradictory versions of this case and his natural manipulative tendencies make him someone who fundamentally is not only not credible but one who cannot be used by a person wanting to commit the kind of acts of which Mr. Friolet is accused.

[176] Second, inmate M has a considerable background as an informer. He is obviously an informer who has been informing for many years as the whole penitentiary, including of course Mr. Friolet, knows. He is also so well regarded by Preventive Security that he is given many privileges. He holds a position of trust that allows him total freedom of movement almost anywhere in the penitentiary. He receives the maximum salary, is given many packs of cigarettes and has an excessively

well furnished cell in terms of quality and quantity. Furthermore, he is in constant contact with Preventive Security and Mr. Bélanger, Mr. Friolet's superior. Inmate M customarily calls Mr. Brisson by his first name.

[177] Third, the amazing ease with which anyone who wants to take objects in the penitentiary can do so rules out for anyone who wants to commit a dishonest act the use of an inmate who is an informer. The Correctional Service's laxity and lack of control and the fact that the institutional property that Mr. Friolet is accused of taking can be found in industrial quantities almost everywhere definitely preclude the use of inmate M in any manner whatsoever.

[178] From December 1998 on, inmate M was a cleaner in Administration; his cell is located in the hospital and no longer in the UV wing. However, his contacts with Mr. Friolet were much more limited when he was in the new assignment since this department is different from Mr. Friolet's. Furthermore, such contacts generally occurred unexpectedly and in places where there were usually other people present; for example, the inmate could meet Mr. Friolet in the laundry, in the Administration offices or at the "carrefour". These places are generally fairly well frequented and it would have been difficult for Mr. Friolet to plan anything with inmate M. Evidence of planning and pressure on inmate M is based solely on inmate M's assertions.

[179] But not only was M's testimony not credible; he advanced two completely contradictory theories.

[180] Apart from Messrs. Lamer and Delisle, the employer had a third witness, Edmond Tremblay, which meant that an intervention in the process was possible in May and June 1999 so that M's version could be verified.

[181] Furthermore, given the institution's extensive surveillance and listening system, could not the alleged exchange between inmate M and Mr. Friolet have been taped, an exchange that according to inmate M had been planned to take place in his cell a number of days in advance?

[182] Mr. Friolet commented on the evidence to demonstrate the lack of credibility of the theory of inmate M and the employer. He analysed the testimony of the psychologist, Ms. Prémont, and the statements of inmate M. He brought out the

contradictions and inconsistencies that demonstrate, in his opinion, that the planning and pressure on inmate M were unproven.

[183] Mr. Friolet submitted that his version of the facts is incompatible with that of inmate M. The testimony of inmate B, who saw what appeared to him to be a white bag on the second tray on the trolley, corroborates his version.

[184] In his testimony, Mr. Friolet was not positive about whether he took the T-shirts before or after serving the meals to inmates B and M. After hearing inmate B's very systematic description of what he had seen, it would have been quite easy for Mr. Friolet to claim that he had taken these T-shirts before going to inmate M's cell so as to validate the information he had received from inmate B. The cassettes made during Mr. Courtemanche's questioning revealed that Mr. Friolet placed the taking of the T-shirts before he served the inmates; this could, therefore, shed some light on what the inmate saw. Mr. Friolet did not try to embellish his testimony, nearly two years after the incidents, by categorically affirming that he had taken the T-shirts before.

[185] Obviously, as inmate M's second version was completely inconsistent with his first account, it is hard, once again, to grant him any credence at all.

[186] It should be remembered that Mr. Friolet's version is the only acceptable version and that inmate M's version was dramatically contradicted by himself.

[187] It must be concluded, therefore, that the weight of the evidence is not sufficient to find that inmate M definitely handed over a *Monde des Athlètes* bag during the supper service.

[188] In conclusion, as regards the planning and pressure on inmate M, it should be agreed that these elements contributed to the employer's statement in the report (Exhibit E-6) and the letter of dismissal (Exhibit E-1) that Mr. Friolet's actions tarnished the image of the service and constituted a serious breach of duty by a peace officer.

[189] However, these points were clearly not proven on a preponderance of the evidence and are not even credible.

[190] The report (Exhibit E-6) states that inmate M was able to describe Mr. Friolet's red bag. Mr. Friolet explained that his bag was generally accessible and visible to anyone inside the institution.

[191] Inmate M's knowledge about Mr. Friolet's bag could also be explained by the fact that the inmate might have helped place the items inside the latter's bag, or, if he was not familiar with it, someone may have described the bag to him so that he could identify it.

[192] The report (Exhibit E-6, at page 23) also notes that [TRANSLATION] "the fact that, even before Mr. Friolet was searched, the inmate could also give a precise description not only of the number of sweatshirts and jeans and their sizes but also of the *Monde des Athlètes* bag in which the items were placed, lends credibility to these words."

[193] The fact that his description was correct no more supports the theory that the thing was given to Mr. Friolet than it does a conspiracy involving inmate M.

[194] The report (Exhibit E-6, end of page 23) seems to be critical of the fact [TRANSLATION] "that Mr. Friolet cannot explain how the jeans and the *Monde des Athlètes* bag were found with the sweatshirts that he had placed in a brown paper bag and marked with his name, that bag then being placed in his own red sports bag."

[195] What could be more normal, according to Mr. Friolet's theory of the case, than his inability to explain the source of the *Monde des Athlètes* bag and the jeans in the brown paper bag?

[196] Furthermore, why would Mr. Friolet have needed, if he had been given the *Monde des Athlètes* bag, to put that bag in a brown paper bag with his name on it and then put the whole thing in his red bag; it begs the question: if only one person was involved, why the second bag?

[197] Mr. Courtemanche also never asked himself how it was that inmate M could not explain the presence of the brown bag marked "Friolet". This item does not match inmate M's version just as the presence of the jeans and the *Monde des Athlètes* bag does not match Mr. Friolet's version.

[198] Immediately after the passage on page 23, the report (Exhibit E-6) states that inmate M could not have had access to Mr. Friolet's red bag. The evidence is far from persuasive on this point. The evidence tends to show that inmate M had access to just about any place he wanted.

[199] Furthermore, how can it be explained that inmate M could take items such as jeans from Personal Effects and pass through at least two controls, where he had to be searched, on the way to his cell, all in violation of the basic rules that applied inside the institution; if he could bring off this feat with no support from inside the institution, just how would it be impossible for him to have access to Mr. Friolet's bag. This question is even more to the point in that the officers' room shown on Plan E-10(b) is like the guards' room in Sector 119, and the report (Exhibit E-6, at page 13, second-to-last paragraph) states that [TRANSLATION] "during our investigation we personally noted at about 8:00 p.m. one evening that the two inmates on cleaning were left unsupervised in the staff room."

[200] It cannot, moreover, be thought that these rooms or areas would not be cleaned and maintained by inmates since the rest of the institution is cleaned by them.

[201] With regard to the other violations argued in justification of the dismissal, Mr. Friolet submitted that they are based on Annex C, which constitutes hearsay and cannot be considered since doing so would contravene the provisions of the collective agreement.

[202] The author of Annex C did not testify, nor did the individuals who related anecdotes or details to the investigators on which the investigation committee relied in concluding that Mr. Friolet's attitude and values were incompatible with his position as a peace officer.

[203] The employer did not see fit to hear any evidence except from inmate M. The report (in Exhibit E-6) refers to some details that could have been led in evidence, but the employer decided to call no evidence on them, yet they were the keystone of the dismissal and the basis for the finding of Mr. Friolet's deviant attitude and conduct. Furthermore, there is no criticism in his disciplinary record referring to any incident in the two years that could be considered under the collective agreement.

[204] Mr. Friolet commented on the decisions in *V. Babineau and Treasury Board (Solicitor General - Correctional Service (Canada))*, Board files 166-2-28509 and 28510; *J.H. Leadbetter and Treasury Board (Solicitor General of Canada - Correctional Service)*, Board file 166-2-28705; and *I. Jalal and Treasury Board (Solicitor General - Correctional Service (Canada))* Board file 166-2-27992, pages 33, 34 and 35.

[205] Mr. Friolet also cited *J.G. Herritt and Treasury Board (National Defence)*, Board file 166-2-27188; *S. Melcher and Treasury Board (Solicitor General - Correctional Service)*, Board file 166-2-27604, where laxity was an issue, and *R. Hampton and Treasury Board (Revenue Canada - Taxation)*, Board file 166-2-28445; a discharge for theft was reduced to a 4-month suspension.

[206] *B. Dhanispersad and Canadian Food Inspection Agency*, Board file 166-32-30072, concerns an inspector who stole from the client, denied doing so and changed his version, but the adjudicator looked at three grounds: evidence of dishonesty, the attempt to implicate a co-worker and the directly work-related context.

[207] In *C. Rowsell and Non-Public Fund Employees Employed at Canadian Forces Bases and Stations*, Board files 166-18-29187 to 29191, see pages 28, 29 and 30 where the basic working conditions are taken into account.

[208] In *Pinkerton du Québec Ltée et Union des agents de sécurité du Québec, métallurgistes unis d'Amérique, section locale 8922 (F.T.Q.)*, T.A. 92-00083, December 12, 1991, decision 92T-546, the discharge was reduced to 8 months' suspension. Mr. Friolet cited pages 14 and 15.

[209] In *Syndicat national des employés de l'aluminium d'Arvida Inc. et Société d'électrolyse et de chimie Alcan Ltée (usine Laterrière)*, T.A. 1017-9904, August 10, 2000 (D.T.E. 2000T-1019), AZ-00141264, Mr. Friolet cites pages 41 to 46. The discharge was set aside and an 18-month suspension substituted. In this case, a search, which is a criminal law procedure, was used in a civil case, as in the case at bar where the employer used a search to find material evidence for his civil case against Mr. Friolet.

[210] In *Union internationale des travailleuses et travailleurs unis de l'alimentation et du commerce, section locale 486 et Super C.*, T.A. 1018-0700, September 10, 2000 (D.T.E. 2000T-1114), J.E. 11-2001, the discharges were reduced to a 12-month and 7-month suspension.

[211] In *Syndicat des travailleurs de la mine Noranda et Métallurgie Noranda Inc.*, T.A. 1018-3399, June 27, 2000 (D.T.E. 2001T-84 ..BID03 : 2001DTE84), AZ-01141019; the adjudicator set aside the discharge, and the complainant was reinstated without financial compensation.

[212] In *Loblaw Québec Ltée et Union internationale des travailleuses et travailleurs unis de l'alimentation et du commerce, section locale 486*, T.A. 1018-8803, February 23, 2001 (D.T.E. 2001T-454 ..BID03 : 2001DTE454), AZ-01141120, the discharge was reduced to four months' suspension.

[213] In *La Sûreté du Québec c. Bernard Bastien et Association des policiers provinciaux du Québec*, C.S. Montréal, May 31, 2001 (D.T.E. 2001T604), the dismissal was reduced to two months' suspension. The employee had never admitted the violation.

[214] In *Fraternité des policiers de la Communauté urbaine de Montréal Inc. et Communauté urbaine de Montréal and M^e^ André Rousseau*, [1985] 2 S.C.R. 74 (C.A.), (pp. 74 to 84), Mr. Friolet cited pages 78 and 84. The discharge was reduced to 13 months without pay.

[215] Mr. Friolet cited *Lemmell et Mervellet Ltée c. Alain Breuil*, [1994] R.R.A. 330 to 333 (S.C.), for the proposition that it cannot be inferred that Mr. Friolet committed all of the thefts at the institution.

[216] In *D. Lynch and Treasury Board (National Defence)*, Board file 166-2-27803, the dismissal was upheld but the thefts had gone on for a long time and the employee had attempted to cover them up.

[217] In *Hilton International Québec et Syndicat des travailleuses et travailleurs de Hilton Québec (CSN)*, February 10, 1989, grievance NG-42, Mr. Friolet analysed the liberal and the narrower approaches and cited pages 8, 9 and 10.

[218] In *Provigo Distribution Inc. c. Deschênes, (soquij)*, January 12, 2000, S.C. Québec, decision 2000T-152, the discharge was reduced.

[219] In *Travailleurs et travailleuses unis de l'alimentation et du commerce, local 503 c. Claude-Henri Gendreau et Centre agricole Coop de la Matapédia (Coopérative fédérée de Québec)*, [1998] R.J.D.T. 38 to 42, the Court told the adjudicator to review the nature and context of the theft and the specific circumstances of each case.

[220] In *Association des policiers provinciaux du Québec et Sûreté du Québec*, T.A. 1018-9882, February 28, 2001 (D.T.E. 2001 T-479), AZ-01142062, the adjudicator accepted laxity as a mitigating circumstance and the discharge was reduced to one year's suspension.

[221] In *Québec (Ministère du Revenu) et Syndicat de la fonction publique du Québec (S.F.P.Q.)*, T.A. 1017-1798, December 6, 1999 (D.T.E. 2000T-224), J.E. 2000, nº 10, p. 136, the adjudicator found that [TRANSLATION] "even if 'zero tolerance' were justified, this does not imply an automatic discharge, without regard to all of the circumstances."

[222] The evidence showed that the strip search was authorized on the basis of inmate M's allegation that Mr. Friolet was going to remove institutional property from the institution on September 9; Mr. Friolet was intercepted, searched and held against his will; he was not read his rights on his arrest and did not have an opportunity to obtain a lawyer before the search, which deprived him of the fundamental rights guaranteed by the Charter.

[223] Like the search, the arrest and the charge against Mr. Friolet that he stole the jeans were clearly in the nature of a criminal procedure; the jeans were obtained as material evidence of the theft as the result of this procedure.

[224] However, once the employer obtained the material evidence of the jeans through the use of a criminal law procedure, he used it only in the context of a disciplinary record.

[225] Mr. Friolet submitted that the employer cannot act in violation of the Charter just because the material evidence was only used in a disciplinary hearing. The Charter overrides all other legislation and applies as soon as a violation occurs.

[226] The employer clearly used a procedure from the criminal law and the evidence, obtained in contravention of section 24(2) of the Charter must be excluded; section 64 of the *Corrections and Conditional Release Act* confirms, moreover, that the context for the employer's intervention is "relating to a criminal offence".

[227] Mr. Friolet referred me to a decision of the Court of Appeal: *Sa Majesté la Reine c. Sylvain Beaupré*, (C.A.) REJB 2000-21318. Mr. Friolet cited paragraphs 21 and 22, 24 to 27, 33 to 41, 43, 45, 49, 50, 53 and 55.

[228] Mr. Friolet submitted that inmate M's statement was not a credible source and that the information could have been verified and validated but was not.

[229] There is no doubt that, in Mr. Friolet's case, not only was the search unlawful, but in addition, contrary to the *Corrections and Conditional Release Act* section and the *Charter*, he was never informed of his right to counsel or read his rights.

[230] It is therefore clear that sections 8 and 10 of the Charter were violated; these sections read as follows:

> *8. Everyone has the right to be secure against unreasonable search or seizure.*
>
> *10. Everyone has the right on arrest or detention*
>
> *(a) to be informed promptly of the reasons therefor;*
>
> *(b) to retain and instruct counsel without delay and to be informed of that right;*

[231] These rights were clearly violated.

[232] Since the evidence of the jeans was obtained under conditions that violated the rights and freedoms guaranteed by the Charter, it only remains to ask whether the admission of the jeans as evidence against Mr. Friolet would bring the administration of justice into disrepute.

[233] Furthermore, the above-mentioned decision, which cites *R. v. Strachan*, clearly states: "A better approach, in my view, would be to consider all evidence gathered following a violation of a Charter right, including the right to counsel, as within the scope of s. 24(2).

[234] It is thus clear that the jeans, obtained as a result of an unlawfully authorized search, cannot be used against Mr. Friolet in any way.

[235] The second test, namely, whether the administration of justice would be brought into disrepute is also met for the following reasons. The first question is whether it is fair to use the jeans against Mr. Friolet in the context of this case.

[236] The way to answer the question is to ask whether the jeans, as material evidence, were obtained by a concerted effort or not. Here, however, it is clear that the

jeans were obtained as a result of a search, thus by mobilizing Mr. Friolet who had to collaborate before he had been given the right to counsel and before he was offered that right, which is fatal.

[237] This material evidence could never have been discovered without the unlawful and unreasonable search obtained in violation of Mr. Friolet's fundamental rights.

[238] The second factor is the seriousness of the violation. It is certainly not appropriate to talk about good faith or inadvertence in Mr. Friolet's case. The employer had inmate M's information for many months and never verified it. The employer should have investigated and obtained what was required to ensure that the information was reasonable before proceeding as it did. There was, accordingly, a deliberate, voluntary and flagrant violation of Mr. Friolet's rights, and there was no emergency that could justify such conduct.

[239] It must be concluded, as the Court of Appeal did and as the Supreme Court systematically does in many decisions, that the material evidence, namely, the jeans, may not, under section 24(2) of the Charter, be considered at all in this case.

[240] The weakness of the evidence against Mr. Friolet with respect to the jeans also confirms the lack of reasonable grounds for obtaining the search warrant in this case.

[241] The fact that the jeans were found in Mr. Friolet's possession cannot, in any case, validate *a posteriori* information that should be objective and reasonable before the employer authorizes a search.

[242] Since the search is illegal, the result of the search is also illegal; the failure to read the rights and offer counsel are also fatal.

[243] Therefore, the theft of the jeans cannot be imputed to Mr. Friolet because the employer did not respect Mr. Friolet's fundamental rights and because these acts bring the administration of justice into disrepute.

[244] Analysing these facts in terms of the preponderance of the evidence leads to the conclusion that all of the reasons in the report (Exhibit E-6) and in the employer's decision (Exhibit E-1) concerning the planning, the pressure placed on inmate M and the other misconduct alleged were definitely not proved on a preponderance of the evidence.

[245] On the conspiracy theory, Mr. Friolet suggested that the issue was not whether there was a conspiracy, but which theory was more likely:

a) Was inmate M able to provide a bag that Mr. Friolet would have accepted with the jeans and T-shirts in view of inmate M's role and his relationship with Preventive Security?

b) Is it probable that the jeans were not placed by Mr. Friolet in his bag?

[246] It is obvious that it is almost impossible, when arguing conspiracy, to obtain direct evidence. Mr. Friolet cannot be aware of the circumstances under which objects were placed in his bag.

[247] On the other hand, it is obviously difficult to obtain an admission from those who committed such acts. Therefore, one must rely on the circumstantial evidence established by the testimony and the conduct of the parties to determine which theory is more likely.

[248] To the extent that there are disturbing or inexplicable probative facts and the employer is unable to provide plausible explanations for them, the conclusion must be that the issue of the jeans has not been proved on a preponderance of the evidence and that the employer did not discharge its burden of proof.

[249] Moreover, having regard to the conflicting evidence, the fact of the jeans being in Mr. Friolet's bag is not sufficient in itself to find fraudulent intent, since the bag was left unsupervised throughout the evening and the employer did not provide enough lockers for its employees.

[250] Furthermore, even without analysing the conspiracy theory, the theft is obviously not a reason for discharge for the reasons already discussed. Obviously, therefore, there are grounds for reinstatement.

[251] Analysis of the evidence under this heading could, however, be important for assessing the severity of the punishment required in Mr. Friolet's case having regard to the T-shirts, the theft of which was admitted, and the jeans that he claimed not to have taken.

[252] Mr. Friolet related the story of his relationship with the three people in Preventive Security, which goes back to 1992 and 1993 when he was a union official and advocated the elimination of a position in Preventive Security. He told other anecdotes involving Messrs. Goulet and Veilleux that illustrated his poor relationship with the Preventive Security officers.

[253] Mr. Friolet pointed to some of the evidence tendered by inmate B that had not been contradicted. In his testimony and also in his written statement (Exhibit P-18), inmate B said: [TRANSLATION] "Goulet asked me to check whether Friolet was bringing inventory in when I was in 119. He asked me this 3 or 4 times."

[254] He then related the following words of Mr. Goulet: [TRANSLATION] "Friolet is an eager beaver and, since he works for the Rock Machine, he must be doing something crooked."

[255] These incidents came at the same time as the information alleged by inmate M who enjoyed a favourable relationship with Messrs. Brisson and Goulet.

[256] The atmosphere of doubt against Mr. Friolet, which caused him the loss of his position in sports around 1997, could only have arisen from the interventions of Preventive Security and Mr. Veilleux.

[257] Furthermore, Annex C, attached to the report (Exhibit E-6), is signed by Mr. Veilleux.

[258] Rightly or wrongly, it is obvious that Preventive Security and Mr. Veilleux had gathered a file against Mr. Friolet for a number of years and wanted to get him discharged. This emerges clearly from the evidence.

[259] Obviously, this is certainly not sufficient to conclude that the conspiracy theory is correct, but it shows a state of mind that, with other factors, could cast a dubious light on the employer's actions and explain some of them.

[260] Inmate B himself noted with respect to the conspiracy theory that he had seen Mr. Brisson meeting with inmate M and bringing him computer wiring in September 1999.

[261] He had heard a number of conversations before the events of September 9 that caused him to believe that there was a frame-up against Mr. Friolet. He related the words of Mr. Goulet who said [TRANSLATION] "Gotta try to get that dog, I don't like his looks."

[262] This statement to inmate B was not contradicted by the employer who had ample opportunity to call Serge Goulet, an important figure in this case. The employer decided to protect Serge Goulet who had a major conflict with Mr. Friolet.

[263] Inmate B also related the many comings and goings of Officer Nabelsi who had been chosen by Preventive Security to conduct the search.

[264] He heard parts of conversations before the events of September 9 in which Mr. Bélanger, one of Mr. Friolet's superiors, talked about the Friolet case. He also told us that Officer Nabelsi came to his cell on two or three occasions after September 9 to threaten him to keep quiet and not say anything about the Friolet case.

[265] Obviously, Officer Nabelsi was aware that inmate B had information from inmate M that would support the conspiracy theory.

[266] Furthermore, inmate B was quickly removed as inmate M's cell neighbour in the ensuing weeks.

[267] The employer did not even see fit to introduce rebuttal evidence on these issues.

[268] Inmate B also said that inmate M had told him that he would be given packs of cigarettes as a reward. The evidence showed that he received similar packs of cigarettes, a certain quantity of which was clearly not recorded in the log, contrary to directives.

[269] Inmate M was also given unworked overtime, which inmate B also received since he worked at the same time with inmate M. The certainty that he showed in arguing with the employer by telling him to produce inmate M's pay stubs to show that inmate M earned nearly $200 a week, an amount that he had never seen any inmate receive, should have prompted the employer to contradict this evidence.

[270] The employer did not see fit to do so, however, although if it had, it could have shown specifically that inmate B was not to be believed.

[271] Inmate B also related that inmate M received two or three visits a month, which was not customary. He himself noted these facts.

[272] The employer once again decided not to lead rebuttal evidence to show the frequency and number of these visits. He had, however, every opportunity to place documents in evidence contradicting inmate B.

[273] Inmate B mentioned as a major element that inmate M was supposed to be given a minimum security institution in return for his testimony. But how could he know, early in January 2000 when he gave his statement, that M was going to get a "minimum" when the said "minimum" classification was given several months later. He had no way to know this information or the evolution of inmate M's security classification.

[274] Inmate B also had no way of knowing early in January 2000 the amended version of facts that would be given by inmate M at the end of 2001, just as, incidentally, inmate M could not know of inmate B's statement on January 20, 2000.

[275] Although some of what M said to B is *prima facie* hearsay, since inmate M confirmed it himself in a statement in the fall, it was now part of the evidence that the employer was supposed to contradict, but could only contradict it with the help of inmate M.

[276] Inmate B said that the theft of the jeans was committed by inmate M and Mr. Brisson. According to inmate B, it was inmate M himself who put the jeans in Mr. Friolet's bag.

[277] These assertions were repeated by inmate M in his statement at Archambault Institution, a number of months after these events.

[278] Inmate B identified the same people as parties to the conspiracy as inmate M had.

[279] All these elements taken together raise serious doubts about what really happened on September 9, 1999.

[280] Inmate B gave details of two specific incidents involving Messrs. Goulet and Brisson. The employer did not see fit to lead rebuttal evidence. By failing to do so, the employer did not contradict important evidence that attacked the credibility of the individuals who were behind Mr. Friolet's discharge, whether or not there was a conspiracy. The employer should have re-established these facts.

[281] Mr. Friolet analysed and commented in detail on the documents in Exhibits P-32, P-33, P-35 et P-36 relating to inmate M's security classification in arguing that Preventive Security had contravened section 30 of the *Corrections and Conditional Release Act* and had facilitated his transfer to a minimum security institution.

[282] Mr. Friolet said that the evidence showed that, shortly after his arrival at the FTC, inmate M escaped from the minimum security facility because his risk of escape had been determined to be "low", contrary to the opinion of Ms. Moreau of the FTC.

[283] Preventive Security and more particularly Mr. Brisson, including Robert Veilleux and Serge Goulet, did not have a good relationship with Mr. Friolet and believed he was involved with the inmates although they had no evidence of this and never succeeded in obtaining any.

[284] Was there a conspiracy? It is difficult at the very least not to have serious doubts about Mr. Brisson's role in this case. It is more plausible that the jeans were in Mr. Friolet's bag without his knowledge than to believe that he would have accepted a bag from inmate M containing the jeans and T-shirts and then immediately cry conspiracy a few moments after the search but only in respect of the jeans; it is hard to believe that if that inmate M had given him the two separate items he would not have immediately denied everything and argued that it was all a conspiracy, knowing full well that he had been caught in the trap set by inmate M and Preventive Security; the speed of his reaction shows that he told the truth because, in the space of two seconds when he was caught in the act of theft, he could not devised such a complicated scenario in which that the jeans had to have come from an inmate but not the T-shirts.

[285] Particularly revealing, according to Mr. Friolet, was the fact that inmate M, when testifying for the second time, indicated that he had understood he would get some benefits.

[286] Was Mr. Friolet seen by inmate M when he took the T-shirts in the hospital? Was it decided to add the jeans afterwards to ensure Mr. Friolet's dismissal? When all of the aspects of this case are examined, a genuine malaise arises and Mr. Brisson's conduct is seen in a more than serious light.

[287] Mr. Friolet claims damages for non-economic losses and the loss of reputation he sustained. He explained that I have the power to amend his grievance in this light, according to learned opinion in the field: see Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration*, 2nd ed. Aurora, Ont.: Canada Law Book Ltd., 1984, p. 92.

[288] Mr. Friolet submitted that my jurisdiction, stemming as it does from the Act and the collective agreement providing for mandatory adjudication, encompasses all remedies, including in tort, arising from the application, administration or non-enforcement of the collective agreement, and that I also have full power to apply the Canadian Charter of Rights and Freedoms.

[289] This new trend was confirmed in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, which bars concurrent actions founded on liability in tort.

[290] Traditionally, adjudicators refuse to award damages other than for salary and thus have refused to award non-economic damages and damages for loss of reputation, *Brown and Beatty* (*supra*) p. 61. However, the authors recognize that the principle that applied when damages were awarded resulting in a reinstatement or other favourable decision were similar to the tests applicable in breach of contract cases (Donald J.M. Brown, *Current problems in the law of contracts - special lectures of the Law Society of Upper Canada*, Toronto, Richard de Boo Limited, p. 6, and Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration*, 2nd ed. Aurora, Ont.: Canada Law Book Ltd, 1984, p. 61.)

[291] However, damages in a breach of contract case may, in some circumstances, include non-economic damages and damages for loss of reputation.

[292] Mr. Friolet believes that his claim is supported by the employer's unconscionable conduct, that is, in not following the Directives and applicable legislation following the accusations made by inmate M in May and June 1999, the failure to intervene at that time, the lack of fairness in the way his case was handled, the employer's actions in the investigation process, which were clearly lacking in

fairness, the fact that Mr. Friolet was not allowed to learn the case against him so that he could make a full and fair defence, the comments against him in the report of Mr. Courtemanche and Mr. Veilleux, the Administration's behaviour towards the other correctional officers after the search that was clearly aimed at discrediting Mr. Friolet and tarnishing his reputation.

[293] According to Mr. Friolet, the consequences for his physical and mental health have been demonstrated. The magnitude of the employer's reaction to Mr. Friolet's acts exceeded all reasonable standards and thus permanently compromised his prospects for employment at a comparable salary with similar duties.

[294] We believe, moreover, that these violations were malicious and constitute an unlawful and intentional attack on Mr. Friolet's rights since, at the very least, Mr. Brisson, the employer's agent, acted with malice for the clear purpose of having Mr. Friolet dismissed. The attitude of Mr. Brisson and the employer require that exemplary damages be ordered.

[295] For all these reasons and on other grounds, he moved to have his grievance amended to include a claim for the following damages:

- Non-economic damages (including a lengthy rehabilitation - loss of self-esteem and stress ...): $50,000
- Loss of reputation, loss of image, loss of job opportunity: $50,000
- Exemplary damages: $50,000

[296] To the list of decisions already cited concerning the application of the Charter by an adjudicator, he added the decision in *Parent c. Centre hospitalier St-Joseph-de-la-Tuque inc.*

[297] Mr. Friolet relied on *Wallace* (*supra*) for the proposition that damages are not founded solely on loss of reputation but on how the employer is to conduct itself during a rupture of the employment relationship. The Warden used the investigation report without letting Mr. Friolet have it or ensuring that Mr. Courtemanche informed Mr. Friolet of all the points it covered.

[298] He also referred to *Wallace* (*supra*) (Supreme Court) which, in view of the circumstances, awarded twice the notice usually awarded by the courts. Mr. Friolet

submitted, in the alternative, that, should I find that the rupture of the employment relationship was to be upheld in this case, he would be entitled to twice the amount of compensation normally awarded.

[299] Mr. Friolet added that *R. Ling v. Treasury Board (Veterans Affairs Canada)*, (Board files 166-2-27472, 27975), in the light of the employer's conduct towards an employee, awarded forty-eight months' pay in lieu of reinstatement. The claim for damages was denied, however. Although this decision does not refer to *Wallace*, Mr. Friolet believes that, nonetheless, it has substantially the same basis. The adjudicator awarded twice the customary amount of compensation, i.e., four years instead of two years, which is usually the maximum. Mr. Friolet submitted that, in his case, such compensation would not be justified since the employer's conduct after the fact could not in any case influence the decision to reinstate him or not. In view of the few years he has left until his retirement, the obvious solution in his case is reinstatement. The employer will always have time to negotiate with Mr. Friolet to ensure his departure if desired. In view of the circumstances, Mr. Friolet does not have to go back with no real prospect of earning a decent livelihood.

[300] Mr. Friolet submitted that a number of factors militate in favour of reinstating him in his position with, at most, six months to a year without pay; the factors are listed as follows: Mr. Friolet's isolated act, which was unplanned, based on a preponderance of the evidence; his seniority; his good service record for over 20 years; his age; his lack of education, which would prevent him from finding similar employment at a comparable salary; his record, which, according to the provisions of the collective agreement, must be considered clean; the importance he places on his work; the paramount right to work recognized by the Supreme Court, inter alia, in *McKinley* and *Wallace*; the loss of reputation consequent on a dismissal for dishonesty; the time that has elapsed; the stress and personal problems he has experienced; the fact that it will be easy for the employer to prevent the kind of conduct engaged in by Mr. Friolet and other correctional officers by tightening controls at the exits by means of systematic searches; the fact that nothing in the act committed impairs his ability to fulfil his duties as a correctional officer in future; the negligible value of the property taken (about $20, or $120 counting the jeans); the absence of gross negligence of the kind provided for in the Rules of Professional Conduct; Mr. Friolet's attitude in immediately admitting his misconduct in respect of the T-shirts without ever trying to

lie or conceal what he had done; and the need to penalize the employer for its lack of fairness in the handling of Mr. Friolet's case.

[301] In summation, Mr. Friolet submitted that I must:

- first, decide the procedural fairness issue the result of which, as stated earlier, would be to set aside the dismissal, without further punishment;
- determine whether section 24(2) of the Charter should be applied in deciding whether, in view of the circumstances, the jeans may be used in evidence against Mr. Friolet;
- in the alternative, review the evidence to see if the principles of the Supreme Court of Canada in *McKinley* apply and ask myself whether the nature, surrounding circumstances and level of seriousness of the act should result in dismissal;
- if I decide that Mr. Friolet's act does not merit dismissal, reinstate him and decide on an appropriate punishment;
- In the alternative, if the employment relationship has been ruptured, I must award four years' salary and all of the other benefits provided for in the collective agreement.

[302] In his oral reply to the employer's arguments, Mr. Friolet, in support of his claim for reinstatement, stated that he would be prepared to work in any correctional institution in the Quebec region.

Employer's reply

[303] What follows summarizes the employer's oral reply to Mr. Friolet's written argument and its reply to his oral argument.

[304] The employer submitted that the rules of procedural fairness were followed in the case of Mr. Friolet who was informed when met with by the Warden and the investigation committee and able to give his version.

[305] The principles laid down in *Kane* (*supra*) and the case law cited by the employee are addressed to a court, not an administrative investigation committee. The investigation committee did not have quasi-judicial powers.

[306] In *Cardinal* (*supra*), the Warden had quasi-judicial powers when he made a decision that could be reviewed by the Federal Court.

[307] The employer filed the decision in *Tipple v. Treasury Board*, [F.C.A.] 1985 FCJ no. 818, for the proposition that, in the case at bar, the rules governing the investigation committee and the Warden's decision stem from the *Financial Administration Act* and the *Public Service Staff Relations Act.* An adjudicator is appointed by the Public Service Staff Relations Board for the purpose of reviewing the employer's decision.

[308] The employer cited *Batiot v. Treasury Board (Justice Canada)* [1999] C.P.S.S.R.B. No. 74, p. 16, which applied the principles in *Tipple* (*supra*). The employer submitted that *Knight* (*supra*) does not apply in this case and that *Baker* (*supra*) is concerned with an administrative decision reviewed by the Federal Court.

[309] The employer relied on the majority decision in *Kampman* (*supra*) and distinguished the result in *Université Laval c. Syndicat des chargées et chargés de cours* (*supra*), submitting that, if there was a breach at the level of the investigation committee, it could be corrected through the adjudication process.

[310] The employer denied that the investigation committee transgressed the rules of fairness and submitted that Mr. Friolet received a copy of its mandate (Exhibit P-5) at the beginning of his interview. Mr. Courtemanche demonstrated his impartiality and Mr. Friolet had an opportunity to give his version of the facts.

[311] The employer did not agree with Mr. Friolet's characterization of the facts and asserted that the employer was in good faith and sincere when it believed and continues to believe inmate M.

[312] The employer submitted that subsection 64(1) of the *Corrections and Conditional Release Act* deals with frisk searches and strip searches, and there was no frisk search or strip search. In this case, section 63 refers to the regulations and section 56 of the regulations provides that a staff member may conduct a routine non-intrusive search or a routine frisk search of another staff member, without

individualized suspicion, where that other staff member is entering or leaving the penitentiary. If searches without individualized suspicion may be made, they may also be made where there is suspicion. Furthermore, searches of staff members are a condition of employment for correctional officers and provided for in section 44 of Commissioner's Directive 571. Section 64(1) would not apply in a criminal matter because none of Mr. Friolet's rights were violated. Section 44 *et seq.* of the Commissioner's Directive apply in the general context.

[313] The employer did not agree with Mr. Friolet's position regarding the application of section 64 of the *Corrections and Conditional Release Act* to this case and submitted that the employer did not violate the rules of procedural fairness.

[314] Clause 17.06 was respected by the employer who is not referring to a disciplinary action but to Mr. Friolet's attitude, which accordingly is not unlawful to discuss.

[315] The employer commented on the two lines of authority regarding dismissals for dishonesty. The employer agreed with *McKinley*, cited paragraphs 49 to 51 and submitted that Mr. Friolet is a peace officer.

[316] The employer submitted that, in the case at bar, it was the employer who was stolen from; this act did not originate from outside the workplace. The violation was contrary to the Standards of Professional Conduct (Exhibit E-8); the employer referred to pages 9, 10 and 13 of that document.

[317] The employer submitted that, in the examples that were given of Messrs. Verret and Dumont, no inmate was involved, and the employer reacted in each of those cases on the facts specific to each.

[318] With regard to the statements of inmate B, the employer submitted that one should be cautious with statements from inmates, especially totally irrelevant statements that have no place in the discussion.

[319] The employer commented on the evidence and explained why it must be concluded that inmate M told the truth in his first version when he said that he had given the jeans and T-shirts to Mr. Friolet in response to the latter's pressure and that he had no access to room 119. The employer submitted that Mr. Friolet is not credible and his explanation is lame.

[320] With regard to the damages sustained, the employer submitted that Mr. Friolet failed to lead any evidence of his efforts to find employment. The loss of reputation could just as well be blamed on Mr. Friolet who provided statements to the media.

[321] The employer submitted that not to use Mr. Friolet's admissions regarding the theft of the T-shirts and the presence of the jeans in his bag on the basis of *Beaupré* (*supra*) as evidence, would bring the administration of justice into disrepute.

[322] Section 24(2) of the Charter does not apply to this kind of situation. In the case at bar, if there had not been a search, the evidence would have been lost forever. There is no breach of a correctional officer's privacy when he is searched on leaving a penitentiary; it is a condition of his employment.

[323] The employer maintained that the conspiracy theory does not hold water, that other people involved in the union had done similar things and had not been framed by Preventive Security. The employer did not call Mr. Veilleux because for all practical purposes he was not involved. The Preventive Security officers only did their job. If Mr. Friolet thought that Messrs. Goulet and Veilleux were parties to the conspiracy he had only to summon them; the burden of proving a conspiracy lies with him.

[324] The employer submitted that the evolution of inmate M's security classification followed procedure and the normal progression. In questioning the security classification program's evaluation, Mr. Friolet is questioning the system. This system applies to all inmates and nothing special was done for inmate M. The evidence is very clear on this point.

[325] With respect to *Wallace* (*supra*), the employer submitted that the maximum compensation awarded was 24 months and not 48 months as Mr. Friolet claimed.

[326] The employer submitted that there are major distinctions to be made between *Ling* (*supra*) and the case at bar.

[327] The employer referred to *Jacques Lévesque c. Sa Majesté la Reine* [2000] J.E. 2000-307 and cited paragraphs 14, 16 and 17, in which the reasons for the rejection of the section 24(2) Charter arguments are reviewed.

[328] The employer referred to *Goodfellow*, Board file 166-2-9312, next-to-last page, concerning the shift in onus where an employee is found in possession of stolen material.

[329] The employer referred to *Vorvis v. Insurance Corporation of British Columbia,* [1989] 1 S.C.R. 1085, at page 9, and to *Dhanipersad* (*supra*), paragraphs 125, 129, 139, 141 and 142. He submitted that the correctional officer position is one of trust. In Mr. Friolet's case, there are no mitigating factors and by continuing to lie he has only harmed his case.

[330] In *Cudmore v. Treasury Board (Solicitor General of Canada - Correctional Service)* [1996] C.P.S.S.R.B. No. 58, Board file 166-2-26517, page 25, the adjudicator took the absence of remorse into consideration.

[331] The employer cited *King v. Treasury Board (Citizenship and Immigration Canada)* (1995) C.P.S.S.R.B. No. 8, Board file 166-2-25956, pages 20 and 21, and *Girard v. Treasury Board (Revenue Canada - Customs and Excise),* [1982] C.P.S.S.R.B. No. 187, Board file 166-2-13482.

[332] The employer cited *McIsaac v. Treasury Board (Revenue Canada - Customs and Excise),* [1990] C.P.S.S.R.B. No. 220, Board file 166-2-20610, p. 9, and *Bisson v. Treasury Board (Canadian Transport Commission)* [1986] C.P.S.S.R.B. No. 153, Board files 166-2-15706 and 15707.

[333] The employer cited *Ville de Lévis et Syndicat des policiers et pompiers de Lévis,* no. 89T-344, page 22 *et seq.*

[334] The employer cited *Champagne v. Canada (Public Service Staff Relations Board)* (F.C.A.) [1987] F.C.J. no. 906, for the proposition that the adjudicator had the jurisdiction to order five months' compensation instead of reinstatement.

[335] The employer referred to *Flynn v. Treasury Board (Environment Canada)* [1993] C.P.S.S.R.B. No. 22, Board file 166-2-23369, and *McMorrow v. Treasury Board (Veterans Affairs Canada)* [1994] C.P.S.S.R.B. No. 130, Board file 166-2-23967, p. 21, where compensation equivalent to approximately 13 to 14 months was ordered when a dismissal was held to be too harsh.

[336] The employer objected to the testimony of Mr. Lavigne and Ms. Cabana on the basis of the best evidence rule. In evaluating the evidence, I must take into account the two instances of inmate M's testimony before me. The version inmate M gave Ms. Cabana and Mr. Lavigne is hearsay. The version that inmate M gave before me is the most probative.

[337] As between Mr. Friolet's version and inmate M's, which is the more probable? By what lucky chance was it that the first time Mr. Friolet stole something he was caught? That the day it was decided to issue a search warrant, there was property to be seized. The employer does not have to prove a dishonest intention, the mens rea, and it also did not have to prove that there was no conspiracy.

[338] The employer distinguished this case from the authorities submitted by Mr. Friolet.

[339] The employer submitted that the reinstatement of Mr. Friolet is no longer possible in view of the publicity surrounding the case. Mr. Friolet committed theft; his job is to guard people sentenced for theft. He is the cause of his own misfortune. The trust inherent in the employment relationship is shattered; his attitude and the atmosphere mean that the trust relationship cannot be re-established. If I find that the dismissal was too harsh, compensation is a more appropriate remedy, since reinstatement is impossible both for Mr. Friolet and for the employer.

Reasons for decision

[340] The long and detailed evidence submitted by the parties is based, for the employer, on the testimony of inmate M and, for Mr. Friolet, on his assertions.

[341] I grant no credence to inmate M. He is in prison, among other things, for robbery, use of forged documents and fraud. He testified before me that he is a manipulative inmate and that he "gives" if he is "given to". He launched a lawsuit against the Correctional Service, which he accused of implicating him in a conspiracy to dismiss Mr. Friolet. He told Mr. Courtemanche, and also Ms. Cabana, in the presence of two other witnesses, that he had put the jeans in Mr. Friolet's bag himself. He told me the opposite and said he had acted out of revenge when he made those statements. Inmate M said things to inmate B in confidence in 1999, which were recorded in a statement dated January 2000. The facts related are similar to those in the lawsuit filed by inmate M a number of months later. The inmate would like us to believe that

the idea for the lawsuit and the pleadings were the work of another inmate, S.M., a friend of Mr. Bilodeau. I do not believe a word of this.

[342] Inmate M, contrary to the opinion of the psychologist, Ms. Prémont, is perfectly capable of inventing elaborate lies when he sees an interest in doing so. It should be noted that Ms. Prémont did not believe inmate M in 1997; it was only when Mr. Friolet was caught with stolen property that she believed the inmate. What interest did inmate M have in bringing accusations against Mr. Friolet and acting so as to get him dismissed? There are a number of possibilities. First, he had the attention of the Preventive Security officers; second, he could receive benefits from them since they play an important role in assigning inmates to certain jobs and in evaluating their security classifications and transfer requests. The evidence also revealed that inmate M was given large quantities of cigarettes between April 27 and September 21, 1999.

[343] Inmate M did not authorize his lawyer to give Mr. Friolet's representative a copy of his statement prior to his lawsuit because [TRANSLATION] "he didn't give anything." When he testified, inmate M had no interest in helping Mr. Friolet; he had an interest in maintaining the version that [TRANSLATION] gave him a benefit "in his mind", because he was expecting a decision in the near future concerning the extortion charges against him. The person who must make the decision is Mr. Courtemanche who has acted as technical adviser to counsel for the employer and has watched him testify. Inmate M had already given one version to Mr. Courtemanche during the investigation, a version that Mr. Courtemanche believed and that contributed to the recommendation for Mr. Friolet's dismissal. If inmate M now confessed to putting the jeans in Mr. Friolet's bag, it would contradict his allegations of harassment and pressure probably exerted by the latter and would constitute a serious offence liable to punishment. Inmate M has an interest in not changing his version.

[344] With regard to the other witnesses, I note that three of them, Messrs. Bélanger and Brisson and Warden Lemieux, are in management positions. They learned of inmate M's allegations on a date that is difficult to pin down because of a lack of documentation for which they themselves are responsible, and also because they gave conflicting testimony about the date on which they heard the allegations for the first time. The date when the management of Donnacona Institution learned of inmate M's allegations is rather uncertain. Luc Nabelsi testified that, early in 1999, inmate M told him things in confidence. Inmate M told Mr. Nabelsi about Mr. Friolet's demands for

"stock". Mr. Nabelsi situated the time of these confidences in winter 1999 and spring and summer 1999. In his confidences, inmate M implicated correctional officers Edmond Tremblay and Alain Friolet. Mr. Nabelsi asked the inmate whether he had reported the matter to Preventive Security. Inmate M told him that he had seen Preventive Security so Mr. Nabelsi felt that he did not have to follow up on what he had been told. He did not make an observation report.

[345] Mr. Bélanger told us that, in 1999, about a month after his arrival in the administration sector, inmate M had contacts with him. The inmate gave him information on the inmates in the administrative segregation sector. Inmate M was assigned to unit T where administrative segregation was located. Inmate M revealed to him that an employee was asking him to get him some items. Mr. Bélanger asked him to arrange a meeting with Preventive Security and not to disclose this information to other employees. Inmate M later told him in confidence that Mr. Friolet was asking him for other items, that Mr. Friolet was asking him to increase his orders for institutional items. Inmate M talked to Mr. Bélanger in this vein on two or three occasions.

[346] In examination-in-chief, Francis Brisson said he had met with inmate M after learning from Denis Bélanger, a "senior official", that Mr. Friolet was involved in the theft of institutional material. He learned at the same time that inmate M was very fearful and wanted to meet with someone from Preventive Security. Mr. Brisson indicated that there was another person, Fernand Guimond, Mr. Friolet's supervisor, who came to see him four or five days later on this subject. Mr. Brisson told them to tell the inmate to come see him in his office. Inmate M said he had met with Mr. Brisson in May 1999 and had told him about all the events involving Mr. Friolet over a number of years. Mr. Brisson asked him to put that in writing.

[347] Mr. Brisson, in his testimony-in-chief, said he had met with the inmate at the end of May 1999 and received the statement early in June 1999. On cross-examination, he repeated more than once that he had spoken to Mr. Bélanger and met with inmate M at the end of April 1999 and had received the statement early in May 1999.

[348] The inmate's report was not dated and Mr. Brisson did not make note of the date it was received. Mr. Brisson did not note the date of the first meeting either.

[349] When inmate M's statement (Exhibit E-2) was obtained, Mr. Brisson showed it to the Warden who did not make note of the date or his instructions to Preventive Security about it and there were no minutes of the meeting. The Warden asked to meet with inmate M who confirmed that he had written the statement and reiterated the highlights. The Warden took no notes at this meeting, made no report on the subject and did not ask anyone for notes.

[350] I find it deplorable that an allegation by an inmate-informer, whom people seem to believe, about a staff member was not the subject of any report and that a statement viewed as an inmate grievance received no acknowledgement of receipt or even the most summary indication of the date it was received.

[351] The only checklist of dates related to inmate M provided to me was the cigarette issue log. The first gift of cigarettes recorded is April 27, 1999. I will therefore keep April 1999 as the probable date on which members of management learned that inmate M was accusing Mr. Friolet of stealing from his employer.

[352] Warden Lemieux asserted in his testimony-in-chief that he had received inmate M's statement (Exhibit E-2) at the end of June 1999. He also said that he had authorized the search on September 7, 1999. On cross-examination, he admitted to having no memory of specific dates and that he primarily testified from the investigation reports and the statements in it, including that of Preventive Security Officer Brisson. The Warden's testimony is in large part hearsay. What I take from his testimony is that he met inmate M in spring 1999 after he had seen his written statement accusing Mr. Friolet and other correctional officers of the theft of institutional property. The Warden told me that he knew that institutional property seemed to be disappearing but did not believe that Mr. Friolet was the only person responsible for the pilfering. The Warden took no action to put an end to the pilfering. He ordered Preventive Security to pursue its investigation and continue gathering information. The Warden testified that he considered inmate M's statement (Exhibit E-2) to be an inmate grievance. However, the procedure prescribed for inmate grievances was not followed.

[353] The Warden authorized the search of Mr. Friolet at the request of Preventive Security as a result of inmate M's statements that a transaction would take place.

[354] Having authorized the search under section 64(1)(b), the employer did not follow the rules that apply to this section, particularly section 64(2) of the Act and CD630 on preserving evidence. I was told that they did not want to humiliate Mr. Friolet or hurt him any more. The problem this created for Mr. Friolet is that he was deprived of the means that might have helped him prove what he said or, from another point of view, the employer was deprived of the means of proving that Mr. Friolet was a liar and a thief. By not calling the police, by not treating the items seized as evidence, the officers deprived Mr. Friolet of the possibility of proving or at least indicating that he had not touched the jeans or the *Monde des Athlètes* bag, which could have been tested for fingerprints. If his fingerprints had been found on them, Mr. Friolet would have found it difficult to claim that there was a frame-up.

[355] The Warden told me that, on September 14, 1999, there was still a doubt in his mind about Mr. Friolet's guilt and that is why he asked for an outside investigation. I find this assertion extraordinary. It indicates to me that the employer had doubts about inmate M. In that case, why did someone not document or record inmate M's allegations? The procedure for inmate grievances was not applied to inmate M's written statement (Exhibit E-2). I find that very little was done to investigate the possibility of a frame-up by the inmate. Appropriate documentation and a thorough investigation could have brought out the discrepancies in inmate M's allegations and determined their veracity.

[356] The refusal to give Mr. Friolet a copy of inmate M's written statement and the investigation report before he was dismissed is contrary to the disciplinary policy of the Correctional Service. This unfair refusal helped poison the atmosphere of trust between the employer and the employees. The unions that represented Mr. Friolet were in fact made up of employees who were Mr. Friolet's co-workers. These employees and the others who collaborated in the investigation were polarized into camps for or against Mr. Friolet and some even developed a degree of paranoia against Preventive Security. This climate was the direct result of the lack of transparency and procedural fairness in the disciplinary process followed in Mr. Friolet's case.

[357] Mr. Friolet has asked me to exclude the evidence of misconduct obtained from the "unconstitutional search" of his bag on September 9, 1999, as well as his admissions concerning the T-shirts. I am not prepared to do so. Mr. Friolet's admissions concerning the sweatshirts were repeated to the Warden on

September 14, 1999, during the investigation and before me. Employee searches are a condition of employment in the Correctional Service. Mr. Friolet was aware of this condition of employment even though it was rarely applied. While I deplore the fact that the employer confused its judicial powers and its management rights and did not apply all of its regulations, I cannot conclude that Mr. Friolet's rights were so trampled on that his proven misconduct before me can be totally ignored. I subscribe to the principles in *Tipple* (*supra*) that the adjudication procedure provides a remedy to procedural defects in the disciplinary process.

[358] I am aware of the difficulties that exist in conducting an investigation in a correctional setting where a code of silence prevails, where there is a culture of antagonism between inmates and guards and where informing is a tool of security management. However, these difficulties cannot excuse the failure to observe the rules of fairness. Mr. Friolet was entitled to be treated with justice. He was not the only one to be the subject of allegations by inmate M. He should not have been the only one to be the target of surveillance and search.

[359] The employer justified its actions to me by saying that the majority of the employees were honest and that the union would object to the systematic searching of staff. Surely there is a happy medium between systematic and illegal searches and what went on at Donnacona.

[360] The Warden made his decision to terminate based on the investigation report and its recommendations. Mr. Friolet admitted to the Warden that he had taken the sweatshirts but not the jeans. The Warden did not give the investigation report to Mr. Friolet to obtain his version in light of the report. What the Warden considers Mr. Friolet's most serious contravention was that he had involved an inmate in illegal acts when his duty was to set an example for the inmates. The evidence of this contravention rests entirely on inmate M, whom I do not believe.

[361] From November 1998 on, inmate M was a cleaner in the administration and resided at the hospital. He had almost no more contact with the inmates. His contacts were with another inmate cleaner and the staff. If he had informed against inmates who could have been given cigarettes, this would have been noted before 1999. There were no notes to that effect.

[362] Mr. Brisson has no notes of his many meetings with the inmate. He did not note the date on which he received inmate M's statement (Exhibit E--2). I find Mr. Brisson's testimony is selective and that this witness appeared to conceal facts.

[363] Generally speaking, Mr. Friolet's testimony before me and his deposition before Mr. Courtemanche two years earlier are in agreement. There is a contradiction between Mr. Courtemanche's submissions and those of Mr. Friolet and Ms. Mathieu concerning the size of the brown bag and the name marked on it: "Friolet" or "Frio".

[364] I do not believe that this detail is decisive for Mr. Friolet's credibility. The discrepancy illustrates that Mr. Friolet's overall attention to details is not the best. The employer did not ensure the chain of possession, and the testimony heard by Mr. Friolet may have contributed to his confusion. Mr. Friolet showed a lack of patience and tolerance throughout the hearing. He presented himself as a victim who took very little responsibility for what happened to him. Mr. Friolet admitted to taking the sweatshirts, an admission that he made from the outset. He denied taking the jeans and claimed there was a frame-up. He denied having taken sweatshirts or any other institutional property in the past. In his statement to Mr. Courtemanche, his initial response regarding the sweatshirts would give the impression that the T-shirts he wore under his uniform were institutional sweatshirts. It was when questioned in greater depth that he said it was the first time he had taken sweatshirts and he also stated that he had not said that the T-shirts that he was wearing came from the institution.

[365] I have grave doubts about Mr. Friolet's assertion that he had never previously taken T-shirts or other small articles of clothing or toiletry available in Donnacona Institution. I believe that Mr. Friolet's personality prevents him from admitting these facts. He testified, [TRANSLATION] "People shouldn't think that I took the T-shirts to work on my lawn, everybody wears T-shirts under their work shirt." Mr. Friolet also said later: [TRANSLATION] "In any case, it's not me [...], when I want something, I pay for my things; I don't need anybody."

[366] Mr. Friolet's psychologist, Lyne St-Pierre, described her client as a man of "traditional values".

[367] Pilfering is certainly not at the core of such values and to have risked his job and his pension for institutional items of such little value does not seem to be something that Mr. Friolet finds it easy to admit.

[368] I believe Mr. Friolet when he says he did not ask inmate M to steal items for him to which he had access. I also believe Mr. Friolet when he said he had stolen the pack of sweatshirts from the hospital laundry. I do not believe him when he says that it was the first time. What he did with the sweatshirts indicates a system. When he was called out at the exit, he did not seem nervous and when his bag was searched he immediately admitted to taking the sweatshirts as if this were routine. Someone taking sweatshirts for the first time would have not have had that assurance. Would a person unaccustomed to pilfering take five or six sweatshirts all at once, the first time? I do not think so.

[369] As for the jeans, Mr. Friolet has always denied taking them. The size of the stolen jeans does not match his size, or his son's or wife's size. Does Mr. Friolet deny taking the jeans because, in his eyes, that constitutes theft while in the case of the sweatshirts, it doesn't? It's possible.

[370] The problem with the jeans is that inmate M told a number of people that he had put them in Mr. Friolet's bag. There is also the statement and testimony of inmate B who saw Mr. Brisson and inmate M with the jeans the day before September 9, 1999. There was no rebuttal evidence on this aspect of inmate B's testimony.

[371] On the question of the jeans, Mr. Friolet has always claimed there was a frame-up. In September 1999, Mr. Friolet could not know what inmate M and inmate B would say the following year. He was not confronted with the statement of inmate M nor with the results of Mr. Courtemanche's investigation before his dismissal. His version regarding the jeans has never changed.

[372] According to the employer, Mr. Friolet had no access to the jeans and would have had to go through inmate M to get them. I do not accept this argument. Inmate M had less freedom of movement around the institution than did Mr. Friolet, even though inmate M's situation was quite extraordinary. Mr. Brisson and inmate M testified that inmate M went where he wanted in the institution. Mr. Courtemanche testified that he was surprised to see the inmate cleaners (inmates M and B) sitting in the officers' room. Despite the large measure of freedom enjoyed by inmate M, I

cannot believe he had an opportunity to go look for the jeans that a correctional officer would not have had, as well. I cannot believe that the presence of a correctional officer in the Personal Effects section would be more suspicious than an inmate's. That would be nonsensical. I cannot believe that inmate M would be the only one who knew about the shortcomings in the system for the protection of personal effects and jeans.

[373] The employer did not dismiss Mr. Friolet just because of the theft of the sweatshirts and the jeans, but for planning and organizing the theft by exerting pressure on an inmate. The employer also based itself on other misconduct in respect of which it did not adduce evidence.

[374] The evidence of pressure on inmate M is based solely on what inmate M said. I grant no credence to inmate M. This inmate is perfectly capable of setting up the affair for the benefit that he derived from it. Security Officer Brisson's lack of candour and the absence of testimony from Robert Veilleux, his supervisor, did not assist the employer to discharge the onus on it.

[375] The employer proved the theft of the sweatshirts and the possession of institutional property, the jeans, but did not prove all of the reasons for dismissal, the most serious of which, according to the Warden and the investigators' analysis, was the involvement of inmate M and the pressure exerted on him.

[376] I must decide whether the theft of institutional property by a peace officer merits a dismissal. In other circumstances, I might be tempted to say it does but, in the case at bar, I cannot do so because the Warden definitely told me that this fact alone would not necessarily have led to the dismissal of an employee with over twenty years' service. Also, Mr. Courtemanche wrote in the conclusions to his report:

> [TRANSLATION]
>
> *... we believe that the admitted theft of six institutional sweatshirts in addition to two pairs of jeans that the employee does not acknowledge constitutes grave misconduct under the Code of Conduct. Taken in isolation, this incident in itself leaves us somewhat perplexed as to the severity of the action that is to be taken with respect to this employee who, all in all, has a long career behind him and one in which he has certainly rendered good service to the organization. In this perspective, although the offence*

> *committed could lead to dismissal, our tendency would be to show some clemency.*

[377] There is another circumstance that tends to mitigate the seriousness of the offence of which Mr. Friolet is guilty; namely, the employer's laissez-faire attitude concerning the pilfering. This laissez-faire is clear with relation to the complaints raised by the person in charge of the laundry and the lack of urgency in reacting the inmate M's written statement, which the Warden told me he considered to be an inmate grievance. For all practical purposes, the employer did nothing, from May to September 1999, to eliminate the pilfering that prevailed in Donnacona Institution except provide cigarette cartons to inmate M. In the end, what the employer chose to do was to search only Mr. Friolet. The excuses put forward to justify the delay and the selective search , i.e., to preserve a correctional officer's reputation, do not hold water given the context and how the search was conducted. A warning to all employees about pilfering is always a good idea, especially in a setting where almost all the clothes and work-related items are supplied that are not provided elsewhere and where the employees see a certain amount of waste on the part of the inmates or towards them. The employees may fail to make the distinction between what is permissible to take and what is not. The boundary between theft and something else is uncertain and can vary from one person to the next. It is clear in the case at bar that jeans crossed over that boundary in the eyes of everyone concerned. But the T-shirts, taken individually, could easily fall into the grey area, along with the batteries, tooth brushes and other items reported by inmate M. Therefore, a warning to all employees to respect the property of others, especially institutional property, was necessary before dismissal was considered.

[378] Mr. Friolet's counsel raised the failure to observe the rules of fairness in the investigation and the way Mr. Friolet was treated in his motion not only to have the grievance allowed but that damages be imposed on the employer. There is no doubt that the way in which the employer proceeded was not the fairest, but Mr. Friolet was responsible in part for his own misfortune. If he had not stolen sweatshirts under inmate M's nose, if he had never pilfered anything and if he had checked his bag before leaving, the "frame-up", if there was one, could not have occurred.

[379] The evidence for a conspiracy is based on the subsequently contradicted allegations of inmate M. I grant no credence to inmate M. I do not believe him when he says that Mr. Friolet put pressure on him to steal. I also do not believe him when he

says that Messrs. Brisson and Veilleux asked him to put the jeans in Mr. Friolet's bag. Inmate M is a clever observer and an inveterate informer. What did he see? What did he do? What did he hear? It is hard to know because he talks about everything he sees or thinks he sees, he says anything and takes centre stage in all his stories.

[380] It is certain that inmate M received cigarettes in significant quantities for making the allegations against Mr. Friolet. This does not constitute evidence of a conspiracy. This proves that the inmate had an interest in continuing to make this kind of allegation. With respect to the evolution of inmate M's security classification, I am not satisfied that it was inconsistent with the normal operations of the correctional system. It does not prove the conspiracy itself even if in inmate M's mind it may have seemed like one of the benefits arising from making accusations against Mr. Friolet or acting to get him dismissed.

[381] I do not think that this situation is one of those that show the employer's bad faith and malicious intentions to the extent that an award of damages is justified. Therefore, I do not have to rule on the issue of whether I have the jurisdiction to order damages.

[382] What disciplinary action would be appropriate for a correctional officer who steals sweatshirts and is found in the possession of the employer's jeans is very hard to determine; certainly a lengthy suspension is required. Mr. Friolet is guilty of a serious offence; stealing from one's employer is very serious. The rationalization used by Mr. Friolet to minimize his act does not assist him. Reinstatement in a position at the same level in an institution in the Quebec region would be a last chance for Mr. Friolet having regard to his long service record and all of the mitigating circumstances in his case. I therefore order Mr. Friolet's reinstatement in the Correctional Service. The employer may choose to reinstate Mr. Friolet in his position at Donnacona or in a position at the same level as the one he held in one of the institutions in the Quebec region where there are AC-II positions.

[383] The employer will have to pay relocation expenses if it does not reinstate Mr. Friolet at Donnacona. Mr. Friolet shall not be entitled to a reimbursement for salary and benefits between the date of his dismissal and March 10, 2002, which is the date preceding by twenty-six weeks the date of issue of this decision. I take into account in the choice of this date the twenty-six weeks of delay during the adjudication procedure, which are directly due to the employer.

[384] Mr. Friolet's grievance with respect to his suspension is dismissed. The grievance with respect to his discharge is upheld providing that Mr. Friolet is reinstated in an AC-II position beginning on March 10, 2002. He must report to Donnacona Institution within five working days following receipt of this decision to find out his assignment. I remain seized of this matter for a period of sixty days in case the parties encounter any difficulties in implementing my decision.

**Evelyne Henry**
**Deputy Chairperson**

OTTAWA, September 10, 2002.

P.S.S.R.B. Translation