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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

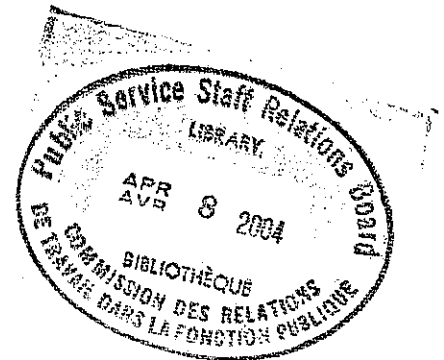
JOHN ALFRED SPAWN

Grievor

and

PARKS CANADA AGENCY

Employer

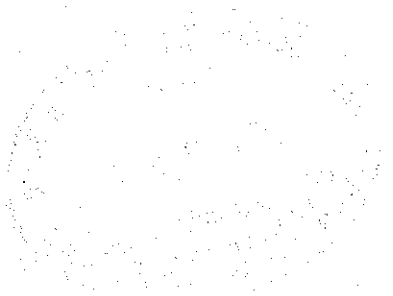


Before: Evelyne Henry, Board Member

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

For the Employer: Richard E. Fader, Counsel for Parks Canada Agency

Heard at Sydney, Nova Scotia,
December 9 to 12, 2003.



DECISION

[1] Mr. Spawn grieves Parks Canada Agency's decision to demote him from his full-time Firefighter/Security Person position (GS-PRC-06) to a seasonal position of Groundskeeper (GL-ELE-03).

[2] The decision to demote Mr. Spawn for disciplinary reasons is contained in the letter dated September 19, 2001, from Acting Field Unit Superintendent, Tim Reynolds (Exhibit E-5):

An investigation was conducted by Maritect Investigations and Security Ltd. into the theft of gasoline at the Fortress of Louisbourg National Historic Site of Canada. Based on the evidence gathered and from your own admission, you have been found guilty of stealing gasoline from the Parks Canada Agency. I have carefully reviewed your misconduct and have concluded that such behaviour is incompatible with the high level of trust, honesty and integrity required of your position as Watchstaff.

Your lack of professional conduct and unethical behaviour has damaged the bond of trust and management's confidence in your ability to continue to perform the duties of your current position.

Therefore by virtue of the authority delegated to me under section 12 of the Parks Canada Agency Act, you are hereby demoted to the seasonal position of Groundskeeper, GL-ELE-3, effective 1600 hours, Wednesday, September 19, 2001.

Your continued employment is based on the fact that you are and will continue to receive Employee Assistance services and on the mitigating factors presented at your disciplinary hearing. Please provide Management with confirmation that you are continuing to consult the Employee Assistance Program in an effort to deal with your personal problems. Management is supportive of this initiative and encourages you to continue with your counselling until your personal issues are resolved.

Further discussions will occur to arrange for the restitution of the value of the gasoline taken.

You will be on probation for a period of two years and any further incidents of theft in the workplace will result in your termination of employment with the Agency. A copy of this letter will be placed on your personal file. You have the right to grieve this action taken by management directly to the final level of the grievance procedure.

[3] The employer called three witnesses to present its evidence: an expert witness, Dr. Edwin Michael Rosenberg, M.D., F.R.C.P(C); Superintendent Timothy (Tim) Jacob Reynolds; and, Field Unit Superintendent, Ms. Carol Mary Whitfield.

[4] Dr. Rosenberg introduced his curriculum vitae (Exhibit E-1) and testified to his professional qualifications and education. Dr. Rosenberg specializes in psychiatry. He has considerable experience with and qualifies as an expert on post-traumatic stress disorder.

[5] Dr. Rosenberg met with the grievor, Mr. Spawn, on September 17, 2002, at the request of the employer for an independent assessment. The meeting lasted one hour and a half. Dr. Rosenberg prepared a nine-page report to Ms. Whitfield (Exhibit E-2) dated October 10, 2002.

[6] Dr. Rosenberg had received a copy of the grievance presentation from the employer, as well as copies of reports from Mr. Spawn's treating family physician, Dr. Buhariwalla (Exhibit E-3(a)) and from his treating psychologist, Mr. Wayne Yorke, M.A., C.A.M.S. (Exhibit E-3(d)).

[7] It was Dr. Rosenberg's opinion that Mr. Spawn did not suffer from post-traumatic stress disorder but was suffering from major depressive illness. In his report, he writes the following:

...

Mr. Spawn is euthymic (of normal mood) at this time, and is able to return to the workplace.

Depressive illness is characterized by low mood, changes in appetite or weight, sleep disturbance, loss of interest in pleasures, and impairments in ability to think and/or concentrate and/or make decisions. As well, it is not uncommon for individuals suffering with depression to demonstrate defective judgement (the mental act of comparing choices between a given set of values in order to select a course of action). (For example, shoplifting is a not infrequent accompaniment to major depressive illness).

Given the history as related by Mr. Spawn on this occasion, and having reviewed the grievance document with its medical and psychological attachments, it is my opinion that Mr. Spawn was/is not suffering with post-traumatic stress disorder, and that he did not manifest any of the symptomatology necessary for that diagnosis.

Post-traumatic stress disorder is a condition which develops in response to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury; or witnessing an event that involves death or injury to another person; or learning of a serious threat or injury to a family member or other close associate. The response to the stressor involves intense fear, helplessness, or horror. Symptom clusters include those relating to re-experiencing of the stressful event, avoidance of circumstances which recall the event, and states of hyperarousal.

Rather, it is my opinion that Mr. Spawn was suffering with major depressive illness, which may have been preceded by exposure to a number of stressors, including the deaths of various individuals, and, more particularly, the ongoing stress of dealing with a child whose behaviour became "difficult."

As noted previously, it is not uncommon for individuals with depressive illness to manifest poor judgement. This poor judgement will all too often become apparent when the individual does not appear for medical/psychiatric help at the initial onset of the symptomatology. Consequently, if medical and/or psychological help is obtained, it will occur when behaviour has become so disruptive that others may have forced the issue of diagnosis and treatment.

Major depression is generally viewed as a chronic and recurrent condition, the initial episodes of which may be preceded by specific psychosocial stressors. It is my opinion that this has happened in the case of Mr. Spawn.

As well, in an individual who is suffering with depression, the exposure to ongoing stressors will augment and sustain depressive symptomatology.

It should be noted that Mr. Spawn was also seen in consultation by a local psychiatrist (Dr. A. Munshi) who prescribed antidepressant medication (Trazodone) for a period of time from September 2001 until January 2002. Mr. Spawn is not currently being seen in psychiatric follow-up, but is being seen in regular follow-up by his treating clinical psychologist.

Although depressive illness tends to recur, its symptomatology, when recognized in its early stages, will respond to various management strategies. Individuals previously ill with depression should be aware of the nature of recurrent depressive symptomatology, and seek professional help early in the illness before there is an impairment of functional ability due to mood symptomatology.

...

[8] According to Dr. Rosenberg, Mr. Spawn's action of stealing gas was not an example of irresistible impulse or being unable to stop an action undertaken. It was a good example of bad judgement typical of depression. Therapists advise their patients suffering from depression not to make important decisions affecting their life such as relationship, sale of business, change of job, etc. Their judgements are faulty and clouded by depressed thinking.

[9] In commenting on the opinions of Mr. Spawn's medical experts, Dr. Rosenberg disagreed with Dr. Buhariwalla's diagnosis as contained in his letter of October 12, 2001 (Exhibit E-3(a)), and with the opinion of Dr. Paul Sheard, F.R.C.P.(C) (Exhibit E-3(b)), contained in a letter dated February 12, 2003. Dr. Rosenberg did not know how Dr. Sheard arrived at his judgement as the latter does not describe the treatment Mr. Spawn received nor what symptomatology had improved. According to Dr. Rosenberg, a properly drafted report should contain a description of the symptomatology and how it directly led to making the choice of theft. The report does not contain this information. In Dr. Rosenberg's experience, it is not common for post-traumatic stress disorder to lead to theft.

[10] Dr. Rosenberg agrees with psychologist Yorke's primary diagnosis of "Major mood disorder depressed with features of anxiety". Dr. Rosenberg disagrees with his provisional diagnosis: "Post-Traumatic Stress Disorder, resulting from the Critical Incident Stress event". According to Dr. Rosenberg, in Mr. Yorke's letter of October 12, 2001, he states that the treatment was successful, but failed to say which symptomatology had improved. In Mr. Yorke's letter of September 12, 2001, there is no description of symptomatology nor any diagnosis offered.

[11] In commenting on Dr. Munshi's report (Exhibit E-3(g)), Dr. Rosenberg disagrees with Dr. Munshi's conclusion. What Dr. Munshi describes as post-traumatic stress disorder symptomatology in Mr. Spawn is more typical of major depression.

[12] Dr. Rosenberg stated that demonstration of poor judgement is not unusual for individuals suffering from depression. When Mr. Spawn stole gas, he considered choices, he knew taking the gas was wrong, he chose the expedient course of taking the gas, he demonstrated poor judgement. Not everyone who suffers from depression steals.

[13] Asked what were the chances of relapse into depression, Dr. Rosenberg stated that epidemiology studies show that 60% of individuals suffering from depression will have a recurrence of depression.

[14] In cross-examination Dr. Rosenberg reiterated or clarified his testimony. Dr. Rosenberg did not provide a copy of his report to Mr. Spawn. He did not recall whether Mr. Spawn had specifically requested a copy of the report.

[15] Dr. Rosenberg stated that it is common for individuals suffering from post-traumatic stress disorder to suffer from major depression at the same time. Dr. Rosenberg is in agreement with Mr. Yorke's statement in Exhibit E-3(d), page 2:

...

It is possible that the chain of events that occurred prior to his act of theft, came together and overwhelmed Mr. Spawn to such an extent that his sense of judgement became distorted and confused, his actions becoming those of an individual with diminished capacity...

[16] Dr. Rosenberg stated that, in his experience, there is a minimal link between post-traumatic stress disorder and criminality. When shown a document from the National Center for Post-Traumatic Stress Disorder, Department of Veterans Affairs (Exhibit G-1), entitled PTSD and Criminal Behavior, Dr. Rosenberg commented that the document related to studies done among incarcerated populations, not populations at large.

[17] Mr. Tim Reynolds has been with Parks Canada since 1976. He is currently the superintendent of the Cape Breton Highland National Park and has been since the early nineties. He reports to Carol Whitfield, the Field Unit Superintendent for Cape Breton.

[18] Mr. Reynolds was involved in a disciplinary investigation conducted on September 13, 2001. Present at the investigation hearing with Mr. Spawn was his representative Edward Kennedy, and for management with Mr. Reynolds were Acting Superintendent for the Historic Park, Anne O'Neill, the manager of Resource Conservation, Sandy McLain, and the Human Resources manager for Cape Breton, Paulette Budge.

[19] Mr. Reynolds opened the meeting in the usual manner and stated that it was a very serious matter. Ms. Budge made notes of the meeting and produced a report (Exhibit E-4). Mr. Reynolds states that the report is an accurate account of the meeting.

[20] Mr. Spawn was very emotional, crying a lot. He explained that a number of personal events had occurred since April 1, 2000, with the death, in an accident, of a young girl from the neighbourhood whom he failed to resuscitate. Mr. Spawn was very upset about the incident and feared for his children. In July 2000, Mr. Spawn was called in to a motor accident where another young fellow whom he knew was killed. A close friend and supervisor in whom he use to confide also died in July 2000. In February 2001, his teenage daughter left home.

[21] Mr. Spawn admitted to taking gas from around the time that his daughter left home as he was on the road a lot, trying to talk to his daughter. He admitted that it continued throughout the summer after she had returned home on the condition of being able to use the family car.

[22] According to Mr. Reynolds, Mr. Spawn admitted to taking gas 20 to 25 times, not knowing exactly how many times. It started after his daughter left in February, towards the end of winter. Mr. Spawn stated he could have taken gas as few as 10 times or as many as 30. He remembered being violently sick after it.

[23] Mr. Spawn apologized for his actions.

[24] Mr. Reynolds testified that it was his decision to demote Mr. Spawn. He was the chairman of the disciplinary committee. On the committee were the managers present at the disciplinary hearing, as well as Ms. Whitfield, who participated via teleconferencing from Halifax, and a staff relations advisor from Ottawa.

[25] The committee looked at Mr. Spawn's position. The situation was very serious, a very significant breach of trust. His job was to protect Parks Canada's assets. His position as watch staff was to protect the park from the very activity he was carrying out. He really compromised his ability to perform his job.

[26] The committee considered various options from immediate termination of employment to demotion, including the option of a lengthy suspension. The committee was sympathetic to Mr. Spawn's case and felt discharge was inappropriate and decided to remove him from his watch-staff position but to create a position of

"laborer" for the summer period. Mr. Reynolds wrote the letter to Mr. Spawn (Exhibit E-5) which described the action taken. There were conditions set that Mr. Spawn receive Employee Assistance services and that he reimburse the value of the gas. The employer has not received the restitution of the value of the gas. There was a two-year probation period; Mr. Spawn was on leave without pay the first year and took the Groundskeeper position the second year.

[27] Mr. Reynolds introduced as Exhibit E-6 the report of the investigation by Maritect Investigations and Security Ltd. as it relates to Mr. Spawn.

[28] In cross-examination, Mr. Reynolds indicated that he was not present at the meeting between Mr. Spawn and Maritect but that he had read the report prior to the September 13, 2001, disciplinary meeting.

[29] It was Mr. Reynolds who asked Mr. Spawn about the community organizations Mr. Spawn was involved in; he wanted to know more about the man.

[30] Mr. Reynolds was aware Mr. Spawn had no previous disciplinary record and took into consideration that he was a good employee. Mr. Reynolds does not recall reading Mr. Spawn's performance appraisal but had his job description on hand and the manager responsible for the watch-staff services was part of the decision process.

[31] Mr. Reynolds was aware that part of Mr. Spawn's duties was to fill up vehicles with gas. Mr. Reynolds was not aware that the person on duty patrolling outside would park in the compound.

[32] Mr. Spawn had given Mr. Reynolds permission to talk to his counsellor. Mr. Reynolds did not speak directly to Mr. Yorke; the Human Resources manager did. The only medical document Mr. Reynolds had at the time of the decision was Mr. Yorke's handwritten note (Exhibit E-3(f)).

[33] Mr. Reynolds indicated that the committee was not unanimous in its decision; it "met a majority consensus" to demote Mr. Spawn. The committee was composed of the four people who met Mr. Spawn on September 13, 2001 (Mr. Reynolds, Ms. Anne O'Neill, Sandy McLain and Ms. Paulette Budge) as well as two staff relations officers: Mr. Guy Lauze from Ottawa and Brenda Henn from Halifax, and Ms. Carol Whitfield, also in Halifax at the time.

[34] Mr. McLain was the manager who was unhappy with the decision. He knew Mr. Spawn and felt that the disciplinary action was too harsh. He recommended a suspension. Mr. Reynolds does not recall the length of suspension recommended nor the specific input from Mr. McLain.

[35] Mr. Reynolds did not enquire into the condition of restitution of the value of the gas. This was the responsibility of Ms. Whitfield and the management of Louisbourg Fortress. He did not reach an estimate of the value the employer wanted restituted.

[36] Mr. Reynolds indicated that he and the committee took into consideration the considerable stress Mr. Spawn had been under. He did not take into consideration that Mr. Spawn's judgement was impaired by illness as he had no knowledge of an illness at the time, only of very stressful situations.

[37] Ms. Whitfield has been employed by Parks Canada since 1968 and has been Field Unit Superintendent for Cape Breton since May 1998. Her primary duty is the overall responsibility for Parks in Cape Breton, managing five national historic sites. She also has overall supervision of the Cape Breton Highlands National Parks through Mr. Reynolds. Ms. Whitfield is responsible for all Parks Canada activities in Cape Breton Island and northern mainland Nova Scotia. Her office is located at the Fortress of Louisbourg National Historic Site of Canada.

[38] Ms. Whitfield described the Louisbourg site and its organization. She indicated that in the compound there are the administrative buildings, a variety of trade shops, a library, stores conservation laboratories and a huge archaeological collection of artefacts. On the business plan the physical resources, largely buildings, are valued at 156 million dollars. There are five million priceless artefacts excavated by archaeologists and fifteen thousand antiques and reproductions. The replacement value of the antiques purchased in the 1960s and early 1970s in France is an estimated 8 to 10 million dollars.

[39] Mr. Spawn was employed in the fire/watch staff group which provides security 24 hours a day, seven days a week, year round. There is a minimum of two fire/watchpersons on duty at all time. The positions were established initially as security against theft and intrusion but following a fire in the 1970s, two fire trucks were acquired and security staff was trained in structural fire, as well. The fire/watch staff is the initial response team for a fire; one of them sits and monitors a panel while

the other performs other duties. In the summer, they provide first aid to the public and do a variety of other jobs, including checking fire extinguishing equipment and training staff in first aid. They are a dispatch service for wardens in Cape Breton Highland National Parks and they do bank deposits of gate receipts in the summer.

[40] The fire/watch staff reports to one of the wardens; there are two at Louisbourg. The warden normally works days, five days a week. There can be a considerable time lapse between the occasions when the warden and a watchperson can be working at the same time because watchpersons are on rotation.

[41] Management was unaware of Mr. Spawn's problems, as he told no one. On at least two occasions, the manager responsible for Mr. Spawn asked him how he was doing and Mr. Spawn's answer at the time was that he was fine.

[42] Ms. Whitfield was aware from a letter of reference Warden Lee Anne Reeves wrote that Mr. Spawn had told her he had had a crisis intervention session following the death of Devon Fudge, the young man involved in the car accident.

[43] Ms. Whitfield introduced Mr. Spawn's Firefighter/Security Person, GS-PRC-06 job description (Exhibit E-7). This job requires attentiveness and quick response in emergency situations, as well as doing patrols alone at night. This position entails elements of stress. It also gives the individual access to every single building and all assets. The watchperson operates alone, with no supervision. There is a high level of trust required.

[44] Ms. Whitfield introduced the groundskeeper position description (Exhibit E-8). That position reports to a foreman who works the same hours as the incumbent. The incumbent does not normally have access to all buildings and when he does, they are usually occupied. There is a level of trust required but not comparable to that of watchperson.

[45] The ultimate decision to demote Mr. Spawn was Mr. Reynolds' but Ms. Whitfield participated actively through teleconferencing with the team involved in the disciplinary hearing.

[46] Prior to the teleconference call, Ms. Whitfield had contacted Tom Meagher, the asset manager at Louisbourg, to ask him if he had any vacancies for which Mr. Spawn qualified. He stated he did not have nor anticipate any. The second question was

whether there would be work for him and what length of season if Ms. Whitfield were to propose a disciplinary demotion to groundskeeper level. Mr. Meagher said he had work but had no budget for it.

[47] There are several seasonal positions for groundskeeper but only one GL-ELE-3 position year round that also provides snow clearing in the winter. There are carpenters, painters and other trades, some working year round, others seasonally.

[48] The factors Ms. Whitfield considered in the disciplinary demotion were the level of trust required and the positions available. Ms. Whitfield was very cognizant that there was not just one but a series of incidents of theft over a long period, some of them observed on videotapes. Ms. Whitfield was cognizant of the fact that Mr. Spawn had a good reputation prior to this.

[49] A year prior to this incident, Mr. McLain had asked Ms. Whitfield to revise the length of season for Mr. Spawn's position. Although in an indeterminate/seasonal firefighter/security position, Mr. Spawn had been extended to full-year service because of others on leave, etc. Mr. Spawn had over 10 years of service. In the summer of 2000, he was made indeterminate full-time year round. Mr. McLain thought highly of Mr. Spawn.

[50] Ms. Whitfield listened carefully to those who attended the disciplinary hearing and she read the report of the hearing (Exhibit E-4). Clearly, management was dealing with an individual under significant pressure and stress; that is why she began to consider proposing a solution other than dismissal. It was during that call that she proposed creating an additional ELE-3 labourer position of a twenty-week period, for Mr. Spawn.

[51] Ms. Whitfield indicated that Mr. Spawn had not yet made restitution for the value of the gas taken.

[52] In cross-examination, Ms. Whitfield indicated that it was Mr. McLain who tried twice to find out how Mr. Spawn was doing pursuant to the accidental deaths of Christine Kennedy and Devon Fudge. Mr. Spawn did not reveal to either Ms. Reeves or Mr. McLain that he was in need of support.

[53] In Ms. Whitfield's recollection, her conversation with Mr. McLain occurred in August 2001 when she discussed Mr. Spawn and the thefts with him. She does not

recall the exact date. Ms. Whitfield was in Halifax at the time. Ms. Whitfield was on French training in Halifax from August 1st to September 21st, 2001. Most of the conversation dealt with what kind of punishment was likely to occur. Mr. McLain's position was that it should be an extended suspension and a return to his firefighter/security position. Ms. Whitfield had had conversations with labour relations officers about the breach of trust issue as it related to watchpersons and had informed Mr. McLain that the preliminary assessment pointed to an immediate dismissal. The subject matter of their discussions was related to whether the discipline to be imposed should be dismissal or suspension.

[54] Ms. Whitfield found Mr. McLain's position strange because in relation to a different incident of theft, she was assured by Ms. Reeves that no watchperson would ever steal because they all knew it would mean the end of their jobs and possibly of all watchpersons' jobs, which might go to contract. This was after an incident of stolen supplies following a volunteer staff party.

[55] Ms. Whitfield was first made aware of the theft of gas late in June when asset manager, Tom Meagher, told her that at least 400 litres of gas had been stolen. He had no idea who had taken it or how.

[56] In order to access gas, one needs a key to turn the pump on. The key is coded. Each key ring has a vehicle and a gas pump key attached. The pump makes a note of the code of the key used. Periodically, Mr. Meagher gets a report that carpenters have drawn this much gas, wardens this much, etc. This is a cost distribution system; sometimes there is a unique key, sometimes the same key is on several key rings.

[57] According to Ms. Whitfield, the information does not necessarily indicate what vehicle is used. For example, there are two warden vehicles with the same gas key; however, the theft was discovered because the key used to obtain the gas was unique to one vehicle, which was no longer in use. The former truck of the maintenance supervisor was parked on March 31, 2001, awaiting crown asset disposal. That vehicle was not driven after April 1, 2001, yet that vehicle, according to the gas pump, had drawn over 400 litres of gas. The investigation revealed that the person using that key was Mr. T.T.; more than one person was stealing gas.

[58] Following the June conversation with Mr. Meagher, Ms. Whitfield asked the utility foreman Danny Baldwin to put a video camera in place to monitor the gas pump

within the locked compound. It was installed early in July. On July 23, 2001, Ms. Whitfield sat with Mr. Baldwin and Mr. Meagher to view the video tapes. The tapes show clear incidents of theft on July 14 and 23. After viewing frame-by-frame four specific clips, they were sure they were dealing with as many as three or four thieves. At least one thief was in a watchperson uniform; Ms. Whitfield was not certain it was Mr. Spawn. Mr. Eugene Taylor, the warden who supervised the watchpersons, brought the schedule for the watch staff.

[59] In his role as supervisor as opposed to his peace officer role as warden, Mr. Taylor was asked to view the tapes. They were able to figure out that there were three non-government vehicles involved. Looking at the hubcaps and design of vehicles and the schedules, it appeared one vehicle could be that of John Spawn and he was on duty within the 10:00 p.m. to midnight timeframe when the pictures were taken. When Mr. Spawn came in to work that afternoon, they went to look at his vehicle and were in agreement that Mr. Spawn's vehicle matched one of the vehicles.

[60] Ms. Whitfield wanted better evidence about Mr. Spawn and wanted to identify who the other thieves were so she asked Mr. Baldwin to get a better camera. In the process of obtaining a better camera, management decided to have Maritect Investigations pursue the investigation. They changed the camera and used concurrent personnel surveillance. They learned that it was Mr. T.T.'s pattern to steal gas on Sunday night. On the Labour Day weekend, Maritect proceeded with personnel surveillance; they did not catch anyone. They continued the following Sunday and caught Mr. C.B., a substantive ELE-3 labourer acting in a probationary PRC-4 watchperson position. That position is a training opportunity for firefighter/security person positions.

[61] As a result, Mr. C.B. was put back in his substantive position with a suspension. Ms. Whitfield believes it was a two-week suspension. Mr. C.B.'s ELE-3 position is a twelve-month indeterminate position.

[62] Mr. T.T. was not caught red-handed but the tapes revealed that Mr. T.T. had been surprised when Mr. Spawn was coming in to steal gas. Mr. T.T. had quickly gotten into his car and driven with low beams to the back of the compound. When Mr. Spawn left after stealing gas, Mr. T.T. returned and finished filling his tank and jerry can and left. Ms. Whitfield believed Mr. T.T. got such a fright, he decided not to do it again. Mr. T.T. was a firefighter/security person on disability leave. Mr. T.T. was also

demoted to a second ELE-3 position. While in receipt of disability insurance (D.I.) benefits, Mr. T.T. signed papers for a medical retirement. Because he was on D.I., Mr. T.T.'s pay could not be influenced by the disciplinary action taken against him. If he had returned to work, his salary would have been reduced to that of an ELE-3.

[63] Ms. Whitfield found it complicated to deal with these three cases of theft: one was on D.I., and one was acting. All three were suspended by Anne O'Neill on September 10, 2001. Mr. Spawn's letter of suspension by Ms. O'Neill was introduced as Exhibit G-3.

[64] Ms. Whitfield did not talk to the grievor herself about the incident until the spring of 2003.

[65] Ms. Whitfield's assessment of the breach of trust and discussions with labour relations specialists indicated that dismissal was the norm in situations of this gravity. After listening to Mr. McLain and reading what was written in the disciplinary reports from Ms. Budge, she considered an option other than total dismissal. In Mr. Spawn's case, she took into consideration the fact that he was under considerable stress, in Mr. T.T.'s that he was in pain pursuant to his disability. Both had thefts taking place over an extended period of time. In Mr. C.B.'s case, there was a single incident. He had arrived at work with not enough gas to get home to Sydney. Ms. Whitfield is not certain on what shift Mr. C.B. was working nor whether the gas station in Louisbourg was closed by the time Mr. C.B. left. There are three gas stations between Louisbourg and Sydney.

[66] Ms. Whitfield participated in two teleconference calls, one on September 13, 2001, after the disciplinary hearings and one in the afternoon of September 14, 2001. She had heard what had occurred during all three disciplinary hearings. When Ms. Whitfield is absent, Mr. Reynolds acts as field unit superintendent and that time Ms. O'Neill acted as superintendent for Louisbourg Historic Sites. Two people replace Ms. Whitfield when she is absent. On September 13, 2001, Ms. Whitfield heard of the stress Mr. Spawn was under and it influenced her thinking. She considered his good record and his twelve odd years of service.

[67] Ms. Whitfield did not have Dr. Rosenberg's report dated October 2002 (Exhibit E-2) which indicates Mr. Spawn's illness caused defective judgement when she made her decision in September 2001. Ms. Whitfield knew Mr. Spawn was under

extreme pressure; she did not diagnose it as an illness and did not consider whether it could be corrected or not as such. She was looking at an individual who, when faced with stressful situations in his life, used bad judgement and stole. Ms. Whitfield felt that, given the assets that must be protected and the trust she puts in the firefighter/security person positions, she could not place Mr. Spawn in a position where, faced with stressful situations, he would use poor judgement. Ms. Whitfield's position was discussed by the group and it became the decision of the group. Mr. Reynolds was comfortable with that decision.

[68] Asked whether Mr. Spawn's illness being correctible was a factor considered, Ms. Whitfield indicated that managers are not medical people and did not look at the situation from that perspective when they took their decision to demote.

[69] Ms. Whitfield signed the letter to Mr. Spawn requesting that he go see Dr. Rosenberg. This came about as a result of the second level hearing of Mr. Spawn's grievance where the bargaining agent put forward post-traumatic stress disorder as a cause. Ms. Whitfield was not at that hearing; it was following the hearing that the need arose to confirm the diagnosis. She was to contact Dr. Rosenberg, whose name was given to her. Ms. Sheedy, Director General Eastern Canada, would wait for Dr. Rosenberg's report before replying to the grievance.

[70] Ms. Whitfield does recall that Mr. McLain had told her that he would trust Mr. Spawn when the subject of trust arose in her conversations with him. Mr. McLain was the Manager of Natural Heritage Protection. At that time, the watchpersons reported to him; subsequently, they reported to Anne O'Neill who is Manager of Heritage Presentation and Visitor Services. The change occurred in the fall of 2002.

[71] In re-examination, Ms. Whitfield indicated that both Mr. Spawn and Mr. T.T. were demoted to seasonal ELE-3 positions. Both had been stealing for an extended period, not only filling their gas tank, but also jerry cans. Mr. T.T. was not dismissed because of mitigating circumstances; he suffered extreme pain as well as financial problems.

[72] Mr. C.B., unlike the other two, only stole once; he had a gambling problem which led to financial problems and he also had an alcohol problem. She does not recall his length of service. All three employees had been there before she arrived in 1998 and Ms. Whitfield's sense was that they all started in the early nineties.

[73] Ms. Whitfield has no estimate of what Mr. Spawn owed. The estimate of what was owed by Mr. T.T. was worked out recently because he wanted to retire. It was somewhere between \$800. and \$1,000.

[74] Ms. Whitfield introduced the Cape Breton Field Unit Organizational Chart as Exhibit E-9 and explained it.

[75] Mr. Spawn called six witnesses: psychologist Mr. Wayne M. Yorke, psychiatrist Dr. Paul Sheard, Ms. Lee Anne Reeves, Mr. Eugene Taylor, Mr. Alexander (Sandy) McLain and himself.

[76] Mr. Wayne M. Yorke, M.A., C.A.G.S. has been a registered psychologist since around 1980-1981. He has been in practice in Nova Scotia since 1973. He has been a Fellow of Psychology since 1999. The parties accept that Mr. Yorke is an expert in psychology.

[77] Mr. Yorke first met Mr. Spawn around September 12, 2001, and has been treating him since that date. Mr. Yorke identified his letters of September 12, 2000, Exhibit E-3(f), of October 12, 2001, Exhibit E-3(d), and of April 8, 2003, Exhibit E-3(e).

[78] When Mr. Spawn came to see him, he had symptoms of depression and of moderate to high anxiety. He was emotionally overwrought, demonstrated through tearing and confusion of thoughts. As a normal procedure, Mr. Yorke recommended that Mr. Spawn see his physician to rule out physical ailments or illnesses.

[79] Following that, Dr. Buhariwalla referred Mr. Spawn to Mr. Yorke for post-traumatic stress disorder on September 20, 2001. Mr. Yorke's early diagnosis was (A) major mood disorder depressed with features of anxiety, (B) provisional diagnosis of Post-Traumatic Stress Disorder, resulting from the Critical Incident Stress event. The provisional diagnosis would require further investigation. After investigation, the diagnosis proved to be true with a caveat that it was acute and non-chronic. Non-chronic meant a duration of three to six months from the date of treatment.

[80] According to Mr. Yorke, the prognosis for Mr. Spawn is very favourable. Mr. Spawn has gone beyond his treatment and is successful in a maintenance programme. This treatment is ongoing to offset potential triggering of events so that there will be no relapse.

[81] It is Mr. Yorke's opinion that there is a connection between post-traumatic stress disorder and Mr. Spawn stealing gas because post-traumatic stress disorder contributes to inappropriate behaviour. In every case, it differs as to how an individual will respond to symptoms. Because of a mental state of confusion, it would affect judgement. A numbness of emotional affect, uncertainty and a state of confusion would diminish the judgement capacity.

[82] Mr. Yorke stated that, during the course of treatment, through their conversations, there was no indication that Mr. Spawn had the mental state of a criminal. Given Mr. Spawn's work record and his involvement in the community where he was an upstanding citizen with no criminal mindset, it is clinically highly inappropriate for Mr. Spawn to ever offend again in that manner. Based on the amount of disclosure presented by Mr. Spawn during the counselling sessions and on Mr. Yorke's assessment of his value system, Mr. Yorke is of the opinion that Mr. Spawn is not likely to re-offend.

[83] In cross-examination, Mr. Yorke indicated that he had seen Mr. Spawn only once when he wrote his letter of September 12, 2001, following an initial visit on September 5 or 6, 2001. Mr. Yorke is unsure of the date of initial contact. At the end of the interview on September 12, 2001, Mr. Spawn requested a note to Ms. O'Neill to indicate he had gone to see Mr. Yorke and attempted to deal with his issues.

[84] Mr. Yorke did not previously know Mr. Spawn, and the first interview ran close to an hour. Mr. Yorke based his note of September 12, 2001 (Exhibit E-3(f)), on information provided to him by Mr. Spawn.

[85] According to Mr. Yorke, it is highly possible that the series of thefts from February 2001 until September 2001 flowed from Mr. Spawn's mental state. Mr. Spawn understood the difference between right and wrong. Mr. Yorke stated: "I would say he would think it all right while at all time acknowledging he knew the difference between right and wrong, it was not an impulsive act." This flowed from the confused state of mind which goes with post-traumatic stress disorder.

[86] Dr. Paul Mackenzie Sheard, F.R.C.P. (C), has been a practicing psychiatrist since 1984. The parties agree that Dr. Sheard is an expert in his field.

[87] Dr. Sheard first met Mr. Spawn on January 21, 2003, on referral by Dr. Buhariwalla. Mr. Spawn was referred to Dr. Sheard for ongoing treatment; he needed further supportive talks and a review of medication. Dr. Buhariwalla had Mr. Spawn on anti-depressant medication with a flashback blocker, a standard drug used for post-traumatic stress disorder. The medication was entirely appropriate so Dr. Sheard slightly increased the dosage from 100 mg to 150 mg and scheduled six further discussion meetings. Over the last three or four months, the medication has been reduced to 50 mg.

[88] Dr. Sheard's diagnosis of Mr. Spawn, found in Exhibit E-3(b), is that he suffered post-traumatic stress disorder. Dr. Sheard described the symptomatology and reasons for his diagnosis. Dr. Sheard stated that any other symptoms of depression or anxiety suffered by Mr. Spawn fall under that general umbrella.

[89] Dr. Sheard stated that Mr. Spawn's condition has dramatically improved and that he is confident that it will continue to improve. Dr. Sheard indicated that Mr. Spawn has faced certain situations which could be found to be threatening and is continuing with his volunteer firefighter work. According to Dr. Sheard, the prognosis is excellent that Mr. Spawn will be getting off medication and be able to resume the kind of life he had before the trauma.

[90] Dr. Sheard is of the opinion that the risk that Mr. Spawn will re-offend is zero. He based his opinion on Mr. Spawn's history and the fact the period of emotional instability associated with the thefts had already been resolved. Dr. Sheard added that once the thefts were out in the open and Mr. Spawn confessed to all the thefts, a major block to ongoing recovery was lifted. Dr. Sheard mentioned that an indication that Mr. Spawn does not have a criminal mind is that he confessed to all the thefts: criminals only confess to the minimum; they know the more they confess, the more punishments there are going to be.

[91] In cross-examination, Dr. Sheard stated that the number of thefts and period were not noted, but he believed there were 40 or 50 occurrences over a three-month period.

[92] Dr. Sheard wrote the letter of February 12, 2003, to help Mr. Spawn's lawyer in relation with this case. When Mr. Spawn first went to see him, he was not fully on his

feet but he was able to return to his original position when he wrote the letter of February 12, 2003.

[93] Ms. Lee Anne Reeves has been a Senior Park Warden at the Fortress of Louisbourg since 1992. Ms. Reeves was watch staff supervisor in the absence of Doug Perrault from 1996 to 2000 and primary supervisor from March 2000 until November 2000, then fell back to her role as secondary supervisor.

[94] Ms. Reeves supervised Mr. Spawn and found him to be a very good worker, effective in his role and eager to take on new challenges.

[95] Ms. Reeves wrote a letter on October 16, 2001 (Exhibit G-4), to which she attached a letter of reference written on July 15, 2000 (Exhibit G-5). Ms. Reeves took CPR first aid training from Mr. Spawn.

[96] Ms. Reeves was aware Mr. Spawn suffered some trauma when a young girl died in an accident that occurred on land that belonged to Parks Canada in the housing area where Mr. Spawn lived. Mr. Spawn's demeanor appeared unchanged but he expressed concern over the young girl and over his counterpart who had attended the scene from the Volunteer Fire Department. When asked how he felt, Mr. Spawn would shift the conversation to his fellow volunteer firefighter. Ms. Reeves believes that Mr. Spawn had crisis intervention from the fire department in relation to the Christine Kennedy incident.

[97] Ms. Reeves would trust Mr. Spawn, pending successful outcome with his treatment program.

[98] In cross-examination, Ms. Reeves specified that she discussed the Kennedy accident with Mr. Spawn within days of its occurrence. It was common for watch staff to come in and out of the warden's office. It was on such an occasion that they discussed the accident.

[99] If Mr. Spawn had concerns, he could have raised them with Ms. Reeves. From May to mid-October 2001, Ms. Reeves was assigned to another park. From February to May 2001, she was secondary supervisor. Wardens work five days a week, normally from 8 to 4. It varies seasonally; there are periods when wardens will work evenings and periods when there is no warden present. There are only two wardens at the Fortress of Louisbourg. Eugene Taylor was primary supervisor.

[100] Ms. Reeves indicated that an Employee Assistance Program (EAP) is available at work and that it is well known.

[101] Mr. Eugene Taylor is Senior Warden at Parks Canada and has been stationed at the Fortress of Louisbourg since the fall of 2000. Mr. Taylor was working at the Cape Breton Highland Park from June or July 1998.

[102] Mr. Taylor supervised Mr. Spawn and the watch staff from the fall 2000. Mr. Taylor still supervises the watch staff. Mr. Taylor stated that Mr. Spawn was a good employee, conscientious, he did his work well and took initiatives in carrying out his goals and assigned tasks. Mr. Taylor considered that Mr. Spawn, out of a group of 13 or 14, stood out among the two or three on whom he could lean more to ensure that the equipment was in order and maintained for its day-to-day function.

[103] Mr. Taylor did not notice anything abnormal in Mr. Spawn's behaviour prior to the Maritect investigation on September 10, 2001.

[104] Mr. Sandy McLain had been absent on sick leave most of the summer 2001. Mr. Spawn had been asking about Mr. McLain more frequently than others. Mr. Taylor identified a note he wrote to that effect on July 31, 2002 (Exhibit G-6).

[105] Mr. Spawn did not impress Mr. Taylor as being dishonest. Mr. Taylor feels that something like this was out of character and if Mr. Spawn were treated, he would have no hesitation in trusting him again.

[106] In cross-examination, Mr. Taylor indicated that he did not have daily contact with the watch staff. He saw Mr. Spawn two or three times a week to discuss goals, training and so forth. Mr. Taylor confirmed that the firefighter/security persons carry out their work without a lot of supervision.

[107] Between February and September 2001, Mr. Taylor did not notice anything that would have brought Mr. Spawn's judgement into question at the time. He was very surprised when the incidents came to light.

[108] Mr. Alexander (Sandy) Gilford McLain worked at Parks Canada from June 1968 until he retired on November 28, 2003. Mr. McLain became Chief Park Warden at the Fortress of Louisbourg in June 1990. His role changed to include Cape Breton Highland National Park and he became Manager of Heritage Protection for the Cape

Breton Field Unit in May 1997; then he was assigned to the Service Centre in Halifax in May 2002 until his retirement day.

[109] Mr. McLain became Mr. Spawn's manager when he joined the Fortress of Louisbourg in the early 1990s and continued until Mr. Spawn was removed. Mr. McLain did not supervise Mr. Spawn directly. Mr. McLain identified Mr. Spawn's performance appraisal for 1999/2000 (Exhibit G-2) on which he was the reviewing officer. Mr. Spawn was a fully satisfactory employee. Mr. McLain would have personally rated Mr. Spawn as superior. Mr. Spawn played a leadership role, he volunteered for extra duties and had a pleasant personality when dealing with site visitors and other employees.

[110] Mr. McLain was off duty from June 15 to October 18, 2001. Although living in Ingonish, Mr. McLain spent most of that time on his farm in Lawrencetown in the Annapolis Valley, 582 kilometres from Sydney.

[111] Mr. McLain first became aware of gas theft from Eugene Taylor near the end of July 2001. He recalls a telephone call from Ms. Whitfield the following week. Part of Mr. Taylor's message was to tell him that Ms. Whitfield wanted to talk to him. Mr. McLain waited about a week and called Ms. Whitfield's office. She called Mr. McLain around the 6th to the 9th of August 2001.

[112] Ms. Whitfield wished to discuss the situation and requested that when disciplinary action was taken, Mr. McLain be involved rather than the person acting in his job because it was rather sensitive.

[113] Ms. Whitfield explained the circumstances she had knowledge of at the time, how the theft of gas was reported. Danny Baldwin had detected that 400 litres of fuel had been charged to a vehicle that had not been operated. Based on that, she decided to have surveillance equipment installed and that to date three or four different persons were filmed in the act of stealing gas. She identified one of them as John Spawn. Mr. McLain does not recall anyone else being identified at that time. Ms. Whitfield mentioned viewing the video with Mr. Taylor on July 23rd but at that point did not find it satisfactory, so new surveillance equipment would be installed.

[114] Mr. McLain suggested the possibility of involving the local police force. Ms. Whitfield advised him she wished to deal with it on a "personnel" basis rather than

“criminal”. It was her intention to collect video evidence and when she came to a conclusion of who was stealing gas, at that time, the individual or individuals would be confronted with the evidence and given the option to resign or be fired. Mr. McLain pointed out that if the police were involved, they may want to use tracer elements to identify the fuel. That was discounted as an option.

[115] When Mr. Spawn was mentioned as a candidate, Mr. McLain made Ms. Whitfield aware that he had spoken to Mr. Spawn concerning his health pursuant to several incidents he was involved in. Mr. McLain had noticed behavioural changes with Mr. Spawn. Mr. McLain mentioned that if action was taken, Mr. Spawn may use this as a defence because Mr. McLain had sought him out shortly after the Christine Kennedy accident.

[116] Mr. McLain was well aware of post-traumatic stress disorder, as he had received two on-the-job briefings on the subject. He had read a number of employer notice bulletins and discussed his role with the occupational nurse; as manager of staff, he would be a first responder.

[117] The first time Mr. McLain sought contact with Mr. Spawn on this issue was to inquire if he had received crisis intervention counselling. The next time he asked how he was doing was in the fall 2000 on the first day of a CPR course. The following time was at a Christmas gathering of the unit. On the first occasion, Mr. Spawn was very forceful on the point that he was all right but had concerns about his partner at the incident. The second time Mr. McLain asked was following the first-aid course. Mr. McLain observed that for two days Mr. Spawn seemed almost too energetic “as if on caffeine overload” whereas around Christmas 2000, he seemed quite down while most people were cheery.

[118] Mr. McLain and Ms. Whitfield discussed the matter again early in September 2001, when she called him about an unrelated matter. Basically, he received an update on the investigation.

[119] Mr. McLain was in the office on September 10, 2001, when Mr. Spawn met with Maritect. During his leave of absence, Mr. McLain returned to Sydney frequently to meet his surgeon. On the morning of September 10, he was asked by Mr. Taylor to come to the office in Louisbourg. Mr. Taylor was aware that Mr. McLain was coming to Sydney. Mr. McLain did not participate in the interview by Maritect. He asked

Mr. Spawn to go into the office where two gentlemen wanted to talk to him and left. Mr. McLain went into Ms. O'Neill's office and was advised that Mr. Spawn wanted to talk to him.

[120] Mr. Spawn was waiting with Mr. Baker of Maritect, who left when Mr. McLain arrived. Mr. Spawn was in a very fragile state, he apologized profusely, he expressed endless remorse for his actions, he talked about Miss Kennedy, Devon Fudge and his previous Captain, Joey Trimms and about some of his personal life at home. Mr. Spawn was comfortable relating to Mr. McLain certain very private issues because they had lived in the same neighbourhood from September 1991 to September 1997. Mr. McLain knew him, his family and the people he talked about. Mr. McLain had known the girl in the ATV accident as a young child and knew her father.

[121] Mr. McLain told Mr. Spawn of his disappointment and advised him to get counselling and gave him the number for EAP. Mr. Spawn had great difficulty in leaving Mr. McLain's office and was told repeatedly to go home. Mr. McLain visited him the following day and told Mr. Spawn that if he did not see a counsellor in the very near future, he should visit his priest.

[122] Mr. McLain was present at the disciplinary hearing on September 13, 2001. He agrees with the notes in Exhibit E-4. Mr. McLain asked the question of how many times Mr. Spawn had stolen gas. The reason he did not ask further questions was that they had conclusive evidence to deal with gas theft, as Mr. Spawn volunteered all the information required.

[123] In dealing with a criminal act, Mr. McLain wanted to know the time and date. In case of a repeat offence, he wanted to know the parameters. Mr. McLain was unaware of what Maritect had asked Mr. Spawn. All he knew was that when the investigator from Maritect, Mr. Jamieson, came to get Mr. McLain, he said Mr. Spawn had confessed. Mr. McLain was aware of the information from the videotaping.

[124] After the meetings with all three individuals: Mr. Spawn, Mr. T.T. and Mr. C.B., Mr. McLain asked Tom Meagher to come in to give estimates of the gas taken and the only figure he could come up with was 400 litres. There was some talk about the value of the fuel. They were speculating on the value as the government was paying 50¢ or less at the time. Mr. McLain wanted to know the value of the stolen gas because he wanted to deal with it similarly to criminal offences which entail a summary conviction

for theft under \$5,000. or indictable over \$5,000. Given the information, this appeared to be minor theft which would result in a fine for a first offence.

[125] After the disciplinary hearings, Mr. Reynolds, Ms. Budge, Ms. O'Neill and Mr. McLain discussed what they had. Mr. Reynolds invited proposals for disciplinary action. Mr. McLain recommended reimbursement of the value of the gas, suspension for two to four weeks with continued counselling as recommended in a letter from Dr. Yorke (Exhibit E-3(f)). No other recommendation was tabled and Mr. McLain's was not rejected. The group had direction to join Ms. Whitfield for a conference call. Basically, the conversation was between Mr. Reynolds and Ms. Whitfield. Ms. Whitfield restated her initial position of resignation or dismissal. The discussion became somewhat heated and Ms. Whitfield was reminded that she had tasked the Committee with the responsibility of the disciplinary action and if she wished to dictate to the Committee she should return to the field unit. The call ended and another was scheduled for September 14, 2001.

[126] On September 14, 2001, there were eight participants to the conference call: Ms. Whitfield and Ms. Brenda Henn from Halifax, Mr. Reynolds, Ms. O'Neill and Ms. Budge from the Field Unit, Mr. Guy Lauze and another person named Keith from Ottawa and Mr. McLain from his residence in Lawrencetown. The call took place at two o'clock on September 14, 2001, and lasted 141 minutes for Mr. McLain. He was the last one to join the call.

[127] Several options were considered, from suspension to dismissal. Some reference was made to departmental policies. Ms. Whitfield was "very expressive on not wanting the incidents treated as criminal offences" and she wanted all options considered before a final decision was made.

[128] Mr. McLain was asked whether he would still trust the three individuals caught stealing and he stated that he would. He explained that he felt that if these gentlemen were dealt with fairly and equitably, they would be the most honest people the employer had ever employed because they would be aware they would never get a second chance. Mr. McLain recommended suspensions in the range of two to four weeks, counselling and the reimbursement of monies for the gas.

[129] Discussions continued on various options. It was Mr. McLain's opinion that if the disciplinary actions were not defensible, the employer would be in a worse

position with the working population. Mr. McLain felt his comments were not welcomed by the expression of dissatisfaction with his comments. He indicated that if asked, he would state he still trusted the individuals and after explaining his position, excused himself from the call. He heard nothing further until he returned to work in mid-October 2001.

[130] Mr. McLain explained Mr. Spawn's job description (Exhibit E-7), which he had helped to prepare. Mr. McLain explained that Mr. C.B. was in a fire/watch position on a developmental basis. Mr. C.B. had been on lay-off from his substantive position. In 1999 or 2000, Mr. McLain arranged for Mr. C.B. to return to the workforce in the developmental position where he might feel less stress. After training three months in the position at the GS-PRC-4 level, he occupied the position at the GS-PRC-6 level and had done so for a year or more. Mr. T.T. had a long work history in material management and was due for lay-off in 1996 or 1997. He was successful in competing for a fire/watch position.

[131] Mr. McLain stated that as a Warden, he had been involved in a considerable number of criminal proceedings, some 50 to 75 cases. He also advised other staff on handling cases. In his experience, criminals make no admission of their crimes, even when caught red-handed. They still insist that proof be given.

[132] Throughout his entire career, Mr. McLain was under the impression that all gas was purchased and dispensed against particular vehicles and equipment for costing per kilometres or per hour and presented for budget purposes. In Louisbourg there is a key system and a key charged to each vehicle and when used, the key is recorded for the vehicle. For miscellaneous gas used for small engines, groundskeeper or fire equipment, a ledger is used to write what it is used for and the information is then reported on a monthly basis to the fleet management office. Someone from the garage would reconcile the readings of gas amounts with recorded odometer readings from vehicles and establish a cost per kilometre or per hour of vehicles and equipment. Mr. McLain was under the impression that gas was the only thing monitored closely.

[133] Mr. McLain explained that there is another key system: the access key which uses a key pad for security access. These were installed in the early 1990s when the Commissionaires were removed. Key pads were installed for the compound, the main gate and certain other buildings. A code is shared by watch-staff, one by wardens

because of the limits of the technology. According to Mr. McLain, gas keys are tied to equipment and access keys are tied to people.

[134] In cross-examination, Mr. McLain indicated that he was Mr. Spawn's neighbour for some time when he lived in Louisbourg. They played hockey some eight or ten times over a three-year period. He attended four or five house parties at the homes of friends they had in common and one at Mr. Spawn's home. Louisbourg is a small town of perhaps 1400 to 1500 people. In 2001, Mr. McLain lived in Ingonish where he was based.

[135] During the period of February to May 2001, Mr. McLain had no concern about Mr. Spawn's performance or his judgement. He noticed behavioural changes on three occasions when he had contacts with Mr. Spawn: the first was in the week that followed Ms. Kennedy's death, the second following the fall attendance at the first aid course and the third at the Christmas 2000 gathering.

[136] Mr. McLain indicated that EAP is very prominent in the Cape Breton Field Unit on the Internal Information Highway available at the Fortress of Louisbourg and at Highland Park. Bulletins are also attached periodically to payroll stubs.

[137] Mr. McLain gave consideration to the possibility that there may have been collusion by the watchpersons since no one was caught by watch-staff. He rejected it because one was caught red-handed and two were suspected and confessed. Mr. C.B. admitted three incidents to Mr. McLain. He had a volume for each: the first was ten litres, the second 10 litres and the third (at which point he was caught), 17 litres. He drove a Chrysler Neon. Mr. McLain had talked to all three between September 10th and 13th, 2001. Mr. Spawn had said he started in March or April 2001. Mr. T.T. had started in January 2001. Mr. T.T. had been off on DI since after an accident on Christmas Eve of 1999.

[138] Mr. McLain stated the decision to demote was made by Mr. Reynolds pursuant to a recommendation by Ms. Whitfield, as the ultimate decision was hers.

[139] Mr. Spawn began work with Parks Canada in 1988 at the Fortress of Louisbourg in a term electrician position. He became a fire/watch person in April 1991 in a seasonal position but he worked the full year. In 2000, his position became full-time indeterminate.

[140] Mr. Spawn first heard of the discovery of gas theft when interviewed by Maritect on September 10, 2001. He was working the 3 to 11 shift and received a phone call at lunch time to report to the Warden's office before going to work. He had no representative, nor did he call a lawyer when the opportunity to do so was offered.

[141] Mr. Spawn does not recall how many times he took gas. He agrees he had said 20 to 25 times, but it could be less or it could be more; he is not sure. Mr. Spawn did not record the times he took gas.

[142] Mr. Spawn described how he stole gas by pumping it in his vehicle and sometime by filling gas cans which he subsequently poured into his car. Mr. Spawn said he did not think, he just did it. Mr. Spawn does not have a criminal record and has not been disciplined by Parks Canada before. Mr. Spawn was not charged criminally for stealing gas at work. Mr. Spawn recalls that he started taking gas in late winter or early spring; he remembers that there was very little snow on the ground.

[143] Mr. Spawn was not in financial difficulties when he started taking gas but believed he was. He was living pay cheque to pay cheque but his bills were never behind. There were never lots of extras but he lived comfortably. There were no financial differences between 2001 and the previous years.

[144] Mr. Spawn was unaware that another person was taking gas as well. He first heard that Mr. T.T. was taking gas when he heard the testimonies in the present hearing. Mr. Spawn was not shown the video tapes of the gas theft.

[145] Commenting on Exhibit E-6, the report of the Maritect investigation, Mr. Spawn stated that, at the time, everything was amplified, that small incidents were magnified, that "expenses" were only one of the things he thought were a big problem. Mr. Spawn stated that what he described was what he normally did as part of his work. He answered all questions. He was not contacted subsequently to clarify or asked if his answers were inaccurate or insufficient. At the end of the interview, he asked to see Mr. McLain and he apologized. He stated he had made a mess; he was a wreck leading up to that summer. He had tried to get hold of Mr. McLain to apologize, to say how sorry he was as well as how embarrassed that he was not well. Mr. Spawn told Mr. McLain there was something wrong with himself, that he did not know why he did these things. He got the opportunity to chat and the rest is just a blur.

[146] About the disciplinary hearing on September 13, 2001, Mr. Spawn agreed that Exhibit E-4 records pretty well how it went.

[147] Mr. Spawn went home on September 10, 2001, and tried calling the number for EAP from a fridge magnet. He got a call from a Warren Zierssonan who was gearing down his practice and recommended Mr. Yorke. Mr. Spawn spoke to Mr. Yorke that day and saw him the next day and saw him again on September 12, 2001, when he got a note from him (Exhibit E-3(f)). Mr. Spawn brought Mr. Yorke's note to the disciplinary hearing of September 13, 2001. At that hearing, Mr. Spawn was not speaking from prepared notes. No one told him to stop talking. No one asked him about Mr. Yorke. Mr. Spawn was very upset on September 13, 2001; he was crying, he was confused, his "whole body was numb like this wasn't real".

[148] Mr. Spawn was not told anything about the number of times gas was taken, nor the rough amount of litres nor the rough value of the gas. Mr. Spawn does not know how he made it home; he vaguely remembers talking to Eddy Kennedy.

[149] On September 19, 2001, Mr. Spawn met with Paulette Budge, Tim Reynolds, Anne O'Neill and Eddy Kennedy and was given the letter of demotion (Exhibit E-5).

[150] After a consultation with the bargaining agent at the final level of the grievance procedure which occurred sometime in July 2002 in Ottawa, Mr. Spawn saw Dr. Rosenberg at the request of Parks Canada. The bargaining agent recommended a number of doctors in Sydney, but Parks Canada rejected the doctors recommended so he went to Halifax.

[151] Dr. Rosenberg told Mr. Spawn he had documents sent to him by the employer but never showed them to Mr. Spawn. Mr. Spawn had all his documents with him but Dr. Rosenberg did not want to see them.

[152] Mr. Spawn first saw Dr. Rosenberg's report in August of 2003. He asked for a copy at the end of his meeting with Dr. Rosenberg. Dr. Rosenberg said it would take roughly a month to prepare his report. Roughly a month later, Mr. Spawn called Dr. Rosenberg and spoke to him personally and was told all information had been sent to his employer.

[153] Mr. Spawn denies he told Dr. Rosenberg he "had an idea to steal gas to keep my daughter on the road". They talked of his problems with his daughter and of his being

on the road all the time trying to find her. His daughter had left home. According to Mr. Spawn, Dr. Rosenberg asked him what caused most stress to him, the death of Christine Kennedy or the problems with his daughter. He answered the death of Christine Kennedy and was asked why he had not stated his daughter, as she was closer to him. He said his daughter is important but with Christine, he couldn't fix it; with his daughter, he could.

[154] After September 19, 2001, Mr. Spawn was not working, and he drew unemployment insurance. He went to work with the Halifax Shipyard as an electrician in January 2002. He made more money than in his previous job but his expenses doubled. The expenses of maintaining his home and his room and board in Halifax meant he had less. He was laid off in September 2002. He was unemployed from September 2002 to May 2003 when he went to work at Parks Canada as a GL-ELE-3. He worked from May to October 31, 2003. He got an extension from mid-September to the end of October 2003. Mr. Spawn is currently on unemployment benefits. He has applied for jobs to various companies across Canada, some 20 to 25 applications.

[155] Mr. Spawn has two children at home. He has a mortgage on his home. His spouse works part-time.

[156] Mr. Spawn stated there is no chance he would be mixed up in gas theft again. When it happened, he was suffering from an illness he did not know he had. Now he knows the signs and Mr. Spawn would use the help he knows is available. In September 2002, when he was laid off and went home unemployed and couldn't find employment, Mr. Spawn saw his family doctor who set him on medication and arranged for him to see Dr. Sheard.

[157] In cross-examination, Mr. Spawn said he was a certified electrician with an inter-provincial ticket for electricians and could work anywhere in Canada.

[158] As a fire-watch person, Mr. Spawn used patrol vehicles, sometimes a truck, sometimes a car, whatever vehicle was assigned to watch that night. Mr. Spawn generally stole gas in the evening. On various occasions, he put gas in either of his vehicles. Mr. Spawn said he made no effort to conceal his putting gas in his vehicles. He stated that the cleaning staff works evenings in the compound and he never knew where they would be.

[159] Mr. Spawn stated he did not know what information the investigators had. He did not know of the camera nor did he see the camera.

[160] Mr. Spawn does not recall the details of the investigation; he goes by what's printed on the report (Exhibit E-6). He was very confused at the time. Mr. Spawn did not make a confession to Mr. McLain before he was confronted by the Maritect investigators. Mr. Spawn did not call Mr. McLain on his cell phone, the protocol being to go through his supervisor, Mr. Taylor, to talk to the manager.

[161] The documents Mr. Spawn wanted to show Dr. Rosenberg were the medical reports he had up to that date from Dr. Buhariwalla, from Mr. Yorke and anything he had pertaining to the case as well as letters of reference.

[162] On September 10, 2001, when Mr. Spawn met the investigators, it was his intention to tell the truth. At that time in his life, starting in April 2000, life was very confusing. Looking at it now and reading it, he has to interpret it. He was not a well man.

[163] Mr. Spawn has no idea if the last time he took gas was a week prior to the investigation interview. In his opinion, he did it for the first time in late winter or early spring, because there was snow on the ground, and it was muddy. His daughter first left in February 2001, it was winter. Mr. Spawn intended to tell the truth to the best of his ability on September 13, 2001. He does not recall what he said. He does not question the accuracy of Exhibit E-4. In saying that he had been violently sick, Mr. Spawn meant that he had thrown up.

[164] Mr. Spawn stated the crisis intervention session at the fire department consisted of a meeting with fellow firefighters and talking about the incident. It was an unguided discussion organized by Fire Chief Joey Trimms. One of the firefighters present had received training in crisis intervention.

[165] Mr. Spawn stated he has not been approached or asked for restitution. If anyone could tell him, he would gladly pay what he owes. Mr. Spawn asked about restitution first through Sandy McLain and also asked at a meeting with Tom Meagher. Mr. Meagher could not answer. Mr. Spawn has no idea what amount he owes and if someone stated "in those four months period an amount, I'd have to say yes".

Arguments for the Employer

[166] The employer submitted a book of reference containing case law and statutes.

[167] The employer submits that this is a simple case where the material facts are well established. There are five points that justify demotion:

1. The grievor was employed in a firefighter/security position;
2. He stole gas from his employer for personal use;
3. He stole over the course of an eight-month period;
4. He stole 20 to 25 times;
5. The grievor did not self-report; he was caught in an investigation.

[168] This is a case about mitigation and whether post-traumatic stress disorder can be used as a defence to mitigate the decision to demote. The burden is located with the grievor to establish his medical defence theory.

[169] What standard of proof should apply? The employer submits that we should not get carried away with expert and medical evidence. At the end of the day, the defence either fits a preponderance of probabilities or does not. The employer relies on *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at pages 357-358:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. ...

In the present case before this Court it would require far more evidence than exists in the record to convince me that Shostak did not know the common word for "confinement" in

the Ukrainian language. Confinement of women due to pregnancy is one of the well-known facts of life in any race or language. To my mind, to ask this Court to believe that Shostak did not know the common word for confinement in the Ukrainian language is equivalent to asking it to place its stamp of approval upon a proposition that places too great a strain upon one's sense of the realities of life. ...

[170] The issue is whether the grievor's state of mind was such that he should not be held responsible in the employment relation for his theft.

[171] The first case the employer draws attention to in this regard is Innis Christie's decision in *Canada Post Corp. and C.P.A.A. (MacMillan) (Re)* (2002), 102 L.A.C. (4th) 97, a discharge case for theft. The grievor stole approximately \$24,000. over a lengthy period of time in an unsupervised position. There were mitigating factors of a good record, the grievor was a functioning alcoholic and compulsive gambler. It was found that disability did not excuse the misconduct.

[172] In that decision, the employer indicated that the arbitrator cited an appropriate test for cases of this sort. In the first paragraph, under the heading "Decision", the arbitrator stated:

On the medical evidence I find that the Union has not proved that the Grievor suffered from bipolar mood disorder at any relevant time. In the absence of evidence of significant depression, I am satisfied that he did not meet the accepted definition of that condition. The issue for me, however, is not whether he met the medical definition of that condition, but whether his state of mind was such that he should not be held responsible in the employment relationship for his thefts. I have, therefore, tried to understand Dr. Sheard's diagnosis of the Grievor's hypomania and its effects quite apart from the "labelling" issue of the definition of bipolar mood disorder. ...

...

On the balance of probabilities I am not even satisfied that the Grievor suffered from a mental condition that could be described as "hypomaniac", which was such that he should not be held responsible in the employment relationship for his thefts. I accept Dr. Gosse's assessment that there was too high a level of functioning, rationality and judgment on the Grievor's part in the two years before his discharge to allow the conclusion that he was hypomaniac to the point where he can be said not to have been responsible for his actions.

[173] Then the employer turned to page 114-115 of the *Canada Post* decision where the arbitrator quoted a four-prong test taken from a decision by arbitrator Ish in *Re Canada Safeway Ltd. And R.W.D.S.U. (MacNeil)* (1999), 82 L.A.C. (4th) 1:

- (1) *It must be established that there was an illness, or condition, or situation being experienced by the grievor. Sometimes this is a true illness while other times it might be circumstances in a person's life that cause considerable psychological strain and can be as debilitating as a fully recognizable illness ...*
- (2) *Once an illness or condition has been established, then a linkage or nexus must be drawn between the illness or condition and the aberrant conduct. The mere existence of psychological stress does not automatically lead to improper behaviour such as theft. Again, most commonly this is established by expert evidence. This is not a scientific test and often an arbitration board must, as the finder of fact, draw certain inferences which lead it in one direction or another.*
- (3) *If a linkage between aberrant conduct and the illness or condition is established, an arbitration board must still be persuaded that there was a sufficient displacement of responsibility from the grievor to render the grievor's conduct less culpable ... even if a gambling or alcohol addiction [page115] is established, and it is established that but for the condition the aberrant conduct, such as theft, would not have occurred, it still may be concluded that the grievor possesses sufficient responsibility for his or her actions so that a substitution of penalty is not appropriate. This was precisely what occurred in the SaskTel case [Ish, unpublished, July 14, 1998] where it was accepted that the grievor had a pathological or compulsive gambling addiction and that it contributed to his acts of theft but it was concluded that he was still responsible because he had been fully aware of his problem and he was fully aware of the avenues open to him to have his problem dealt with. In other words, the mere existence of an addiction does not in itself explain or justify serious aberrant conduct. There are many people with alcohol, narcotic and gambling addictions but a very small number of those people steal money.*
- (4) *Assuming the three elements set out above have been established, the arbitration board must be satisfied that the grievor has been rehabilitated. This involves an acceptance by the arbitration board that the*

grievor's fundamental problems are under control. Of course there can never be absolute certainty on this count nor should absolute certainty be required. However there must be a sufficient degree of confidence that the employee can return to the workplace as a fruitful employee and that the underlying problems that led to the improper behaviour in the first place have been resolved so that the risk of that behaviour, or similar behaviour, occurring in the future is minimized. Again, in addition to the evidence of the grievor, it is usual that expert evidence would be submitted to establish that rehabilitation has occurred.

[174] This test was followed in *Re Canada Safeway Ltd. And Bakery, Confectionery & Tobacco Workers' International Union, Local 252*, (2003), 113 L.A.C. (4th) 385, where insufficient nexus between the traumatic emotional history and theft was also found.

[175] The employer drew attention to pages 406 and 407 of the decision, which contained two of the themes upon which he relied: first, that a heavy burden rests with the grievor and second that there is a distinction between the medical evidence of a patient advocate and that of an independent assessor. On this, he cited from paragraph 3 on page 16:

In particular, while there was objective evidence that the Grievor was and had experienced stress and emotional upset, the bulk of [page407] Ms. Yassenik's assessment as to the Grievor's mental state and response was based on the Grievor's self-reporting, and the usual approach to testing such self-reporting may have been lacking. ... Further, while the report was prepared prior to her assuming a therapeutic relationship with the Grievor, her evidence was given after she entered such relationship and the inherent bias which then exists is a matter of concern. As has been noted by arbitrators in other cases, the role of a therapist is significantly different than the role of an independent assessor. While I have no reservations about Ms. Yassenik's good faith, candour and sincerity, it is extremely difficult to continue to apply the objective eye of the independent expert when your role has switched to counselor, and advocate.

[176] He also cited from page 408-409:

... Arbitrator Picher (Canada Post, supra, 29 L.A.C. (4th) 143) reinstated a postal employee who stole and used a credit card from the mail on the basis of psychiatric evidence, which the arbitrator accepted and did not have the deficiencies contained in Ms. Yassenik's report...

... But in the result, in order to reinstate this Grievor, conditionally or otherwise, the Union must [page409] demonstrate on the balance of probabilities that all elements of Arbitrator Christie's test have been met. ... I might add however, that had I been of the view that the Union's evidence was reliable, that is, it did not have the deficiencies I have identified, this may well have been one of those rare cases where conditional reinstatement was appropriate.

[177] The employer also relied on another Canada Safeway case at tab 5 of their material, by Arbitrator Smith *Re Canada Safeway Ltd. And United Food and Commercial Workers, Local 401*, (2001), 94 L.A.C. (4th) 86. He cited two different paragraphs found at pages 110-111:

*With regard to the issue of mental illness, it is clear that merely being ill does not negative intent, nor in every circumstance excuse the Grievor from the consequences of her conduct. I view with favour the comments of the arbitration board in *Re Maritime Paper Products Ltd.*, supra, at pp. 6-7 that:*

We must conclude therefrom that it is not so simple a matter as establishing that the grievor has a mental disorder but rather the effect of such disorder on the grievor's blameworthy state of mind. The required assessment is therefore to determine whether the mental disorder is sufficient to undermine the grievor's capacity to understand the full significance of his actions. If such is affirmed, then the responsibility and accountability of the grievor is diminished and the matter may be considered non-culpable. If, however, the assessment is otherwise, then it is a culpable matter. This certainly appears more appropriate to the established employment relationship than does acceptance of the existence of a mental disability as complete and sufficient reason to preclude an employee from responsibility for misconduct in any and all situations.

...

First, it must be noted that while I have no doubt about the sincerity of Dr. O'Kelley's views, he is the treating

psychiatrist who must have as his primary focus the successful treatment of the Grievor and not the truth or accuracy of her recitation of the events. From his perspective the needs of the patient and her requirements are paramount and not the needs of the Employer. To that extent, some of his responses during cross-examination revealed that he was acting more as an advocate, than an objective observer. Such detracts from the strength of his evidence. ...

and at pages 113-114:

...

The Grievor is asking to be restored to a position of the utmost trust, a position whose core functions involve the handling of cash [page 114] as the most important, if not the only important component of the job. In that sense, this situation is to be distinguished from reinstatements that occurred after theft at the worksite, but involving individuals whose jobs did not directly at all times involve handling cash or where the conduct was so aberrant as to confirm the disabling mental condition. The difficulty in this case is, whether the Grievor deliberately stole or stole because she did not know what she was doing, the consequences are the same to the Employer. She cannot be trusted to be honest. I therefore see no possibility of the employment relationship being rehabilitated.

Furthermore, the Employer's operation is such that it cannot closely supervise the Grievor to make sure that she is carrying out her job in an honest fashion, and I see no compelling argument for the conditional reinstatement suggested by the Union. Brown and Beatty, Canadian Labour Arbitration quotes Arbitrator Adams at p. 7-91 as follows:

"... in a very general sense, honesty is a touchstone to viable employer-employee relationships. If employees must be constantly watched to insure that they honestly report their comings and goings, or to insure that valuable tools, material and equipment are not stolen, the industrial enterprise will soon be operated on the model of a penal institution. ...

[178] Central to the case cited is the employee's position, a position of trust.

[179] The employer argued that the case before me is guided by the above case law which holds that the employer must perform his assessment of the facts on a preponderance of probabilities and what accords with the realities of life.

[180] First, on whether or not there was an illness or condition experienced by the grievor: while the experts are not in complete agreement, there does appear to be a consensus. The employer took this into consideration and gave the grievor the benefit of the doubt on this. That benefit of the doubt led to the maintenance of his employment.

[181] On the next point, the need to establish a link between the illness and the behaviour, the union bears the burden of proving there exists a link between being depressed and stealing gas. The employer submits there is no link. According to the employer, the motivation for the theft of gas is clear; the grievor was in a financial squeeze. As Dr. Rosenberg puts it, the stealing of gas was the most expedient way out. Remembering where the burden lies in this case, has a link been established between mental state and theft as a causation? Neither Dr. Sheard nor Mr. Yorke were even looking in that direction. They were not looking back, they were looking forward; they were treating, they were not assessing.

[182] Dr. Sheard said he was not a motivational expert; he sees forests, not the trees. Mr. Yorke did not know how many thefts took place or over what period they occurred. Like Dr. Sheard, he was interested in treatment, not in forensic psychiatry. There is no true evidence of a link, only two patient advocates doing their best for their patient. Only in Dr. Rosenberg's evidence is there a look backward to ask those questions.

[183] What did Dr. Rosenberg conclude? First, that the grievor knew that what he was doing was wrong; second, he was not acting as an automaton; third, he saw choices before him and chose the wrong one and fourth, his motivation for doing this was to find a way out of his financial crisis.

[184] Pulling back from what the expert said, does the grievor's defence accord with the realities of life? Why would the illness only manifest itself in one area: theft of gas? The evidence is uncontradicted; no one had any concern about the grievor's decision making at work during the period of the thefts. The question was put to all witnesses; they had no concerns. Common sense suggests, in addition to the evidence heard, that there is no nexus between the grievor's condition and his behaviour. Despite some diminished capacity, motivation and opportunity were the cause of the thefts. As Dr. Rosenberg stated, the grievor chose the most expedient way out.

[185] Moving to the third element of the four-prong test, the employer claimed that even if a condition was established, there must be sufficient displacement of responsibility to render the conduct less culpable. The evidence is crystal clear to the effect that the grievor knew that what he was doing is wrong. During the periods of equilibrium when he felt what he was doing was wrong, the grievor had a responsibility to seek help or to report himself.

[186] On this point, the employer referred to page 115 of the *Canada Post* decision (supra) where it is stated "... but it was concluded that he was still responsible because he had been fully aware of his problem and he was fully aware of the avenues open to him to have his problem dealt with."

[187] The grievor has a heavy burden; he had an obligation to seek help. Representatives of management approached him three times. He said he was fine. The grievor only sought help when he was caught. Another problem the grievor has with displacement of responsibility is the length of time over which the thefts occurred.

[188] When Dr. Sheard and Mr. Yorke were asked about the fact that the grievor felt sick each time he stole gas, Dr. Sheard stated it signifies that he was having more of the normal human responses. Mr. Yorke stated he was hitting a point of equilibrium. The position of the employer is that at that point, the employee should seek help or report himself. He has to do something to stop the thefts. The grievor did nothing until he was caught. The grievor stole 25 times from February to September; broken down month by month, this represents a huge amount of opportunities. On that basis alone, the grievor fails point 3 of the test by his failure to report or to seek help.

[189] More than the question of whether this is sufficient displacement of responsibility, the grievor is faced with the problem of motivation and the gap between April 2000 when the ATV accident occurred and February 2001 when his daughter left home. This is when she went back and forth to Sydney. The grievor needed gas to keep her at home. The problem with the clear motive suggests a rational choice, not a displacement of responsibility.

[190] The employer reviewed Exhibit E-6, which it argued was an accurate transcript of a meeting which occurred within a week of one of the thefts and "out of the blue for the grievor". The employer refers to the fourth page (019/024) to illustrate that at that

point the grievor knew he was found out. This is not self-reporting. On the next page, the grievor mentions stealing twenty to twenty-five times. The grievor testified that when he was speaking to the investigators, he was trying to tell the truth. On the same page, the grievor goes on to say that it was for personal use. Later on page 022/024, the grievor admits that as recently as a week before the interview, the thefts were still occurring and that they usually occurred in the evening.

[191] On September 13, 2001, according to Exhibit E-4, which Tim Reynolds testified was an accurate account of what occurred at the disciplinary meeting, the grievor says "I keep battering my wife with budget talk. Get finances in order. I drove her crazy with it." Then he says "I knew what I was doing about the fuel was wrong. Knew I had to do something about it. Waiting for Sandy to come back."

[192] The grievor knows what he is doing is wrong, that he has to report, but he keeps stalling.

[193] On the last page of Exhibit E-4, it is indicated that the following question was asked by Mr. McLain: "Do you recall when you first took gas?" The answer was: "John - When Chrissy left in February. I don't know exactly when. It was snowing. Towards the end of winter." These statements were made in the fall of 2001 when the events were fresher. The grievor had an incident to which he tied the time when the thefts started. Tying a date to an event can ensure its accuracy. Secondly, this is consistent with the grievor's motivation of keeping up with the increased cost of gas. Mr. Yorke's evidence is consistent with this motivation. Mr. Yorke testified that the gas was used to assist the grievor in dealing with the problematic nature of his daughter and to make these trips.

[194] In Dr. Rosenberg's report, Exhibit E-2, on page 2, there is also the following reference:

In the late winter and early spring of 2001, Mr. Spawn "had an idea to steal gas to keep my daughter on the road. I thought it would help me. Every time I did it, I got physically ill. I took the gasoline about ten to fifteen times, and put it into my own vehicle. I knew I was doing wrong, but I would do anything to keep my family together."

[195] Dr. Rosenberg, on page 6 of his report, goes on to say:

Although Mr. Spawn stated that it was the fatal ATV accident involving a neighbour girl that caused him most distress, that accident did not, in my opinion, play any part in Mr. Spawn's thinking regarding the illicit use of gasoline. Rather, it was Mr. Spawn's concern regarding family functioning, and his inability to deal with behavioral difficulties in his daughter, that he stated gave rise to an illicit use of gasoline from his employer, which amounted to theft.

[196] When put together, the facts of the motive are clear in terms of point three. The motive cuts in the opposite direction; it suggests rational thought. There is the uncomfortable part of the grievor's testimony where he denied making those statements to Dr. Rosenberg. The grievor had an obligation to report; there was EAP available so there is not sufficient displacement of responsibility.

[197] Point four deals with the issue of potential rehabilitation. The evidence given by Dr. Sheard and Mr. Yorke is that of patient advocates. Dr. Rosenberg's quoting of statistics on potential chances of relapse is the best evidence available. In the context of the grievor's actual job, this was theft by a person in a position to guard against theft. He knew that what he was doing was wrong but continued to do it.

[198] This brings up the issue of post-termination evidence. The evidence of this case is interesting. No one suggested that the decision to demote was wrong when it was made. At best, the expert witnesses for the grievor stated it was a year after the demotion that he was better. Dr. Sheard also said that Mr. Spawn was not on his feet in January 2003.

[199] The Supreme Court addresses the issue of post-termination evidence in the decision at tab 8 of the employer's book of authorities *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 S.C.R. 1095. The employer referred to paragraphs 11, 12 and 13. The issue is what information the employer had at the time it made its decision. If light is shed on the facts known at the time, the employer had cause when the decision to demote was made; even according to his own witnesses, the grievor was not yet out of the water. The basis of the grievor's defence is post-termination evidence.

[200] In terms of Public Service Staff Relations Board (PSSRB) jurisprudence, the issue of post-termination evidence is dealt with in *Funnell and Treasury Board (Department of Justice)*, PSSRB File No. 166-2-25762 , (1995) (QL). In that case, the adjudicator applied the *Cie minière Québec Cartier (supra)* decision. The employer referred to pages 18 and 19 of the decision and argued that post-termination evidence is not accepted unless it can shed light on the situation at the time of termination. No one suggests the grievor was better at the time that the employer took the decision to demote him.

[201] In conclusion, the employer indicated that it had already tempered its decision with mercy. What kind of message is being sent to employees? A number of people suffer from depression, they do not all steal and not over an eight-month period. The grievor's poor judgement manifested itself only in one area of employment. Carol Whitfield and Tim Reynolds gave the grievor the benefit of the doubt and had already mitigated the consequences of the thefts, particularly for someone who was responsible for guarding invaluable assets of Canada. It is not appropriate to reinstate the grievor and have the employer constantly looking over its shoulder and to assume such a risk.

[202] With regard to the remedial authority of the adjudicator, the employer referred to *Tourigny and Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-2-16434 (1987) (QL). It was a case of discharge. The adjudicator felt it was too severe and gave the employer the option of placing the grievor in a position located in another workplace. The Federal Court of Appeal maintained the adjudicator's decision.

[203] The principle of providing the employer with an option to reinstate but in a different position was applied a number of times by the PSSRB. The employer referred also to *Fontaine-Ellis and Treasury Board (Health Canada)*, PSSRB File No. 166-2-27804 (1998) (QL).

[204] The remedial authority to offer the employer an option was exercised where the discipline imposed was found not to be justified. In the present case, it is the employer's position that the disciplinary demotion is within the reasonable range of response to repeated thefts. It gives the grievor the benefit of the doubt and mitigates the employer's response.

Arguments for the Grievor

[205] The grievor agrees that this case is about mitigation. He distinguishes the application the employer made of the *Faryna and Chorny (supra)* decision from the facts of this case. In the present case, there are the testimonies of the grievor, Dr. Sheard, Mr. Yorke, Ms. Reeves, Mr. Taylor and Mr. McLain all saying the same thing about the likelihood of the grievor re-offending.

[206] In his testimony, Dr. Rosenberg stated that statistics showed that there was a 60% chance of relapse for a patient suffering major depression; he specifically stated he was not referring specifically to Mr. Spawn but was referring to statistics. In discussing the general statistical numbers, Dr. Rosenberg went on to say that in spite of major depression, such persons as Abraham Lincoln and Winston Churchill could lead responsible lives.

[207] Dr. Rosenberg, in 2002, also gave Mr. Spawn a health mark of 80%, saying he was more normal than most of us.

[208] With respect to the Christie decision in *Canada Post (supra)* and the four-point test, the grievor points out that the case dealt with alcoholism and gambling. In that case, bipolar disorder was not established. The grievor pointed to the evidence in that case to the effect that Dr. Sheard (the same person also called as an expert witness in the present case) stated that the grievor in *Canada Post (supra)* needed five years or longer of treatment. What was missing in the *Canada Post (supra)* case was prognosis.

[209] The grievor, with regard to the *Canada Safeway (supra)* case at tab 4, said that, in that case the evidence of impaired judgement was found to be not sufficiently reliable. In the present case all three experts concluded that the grievor suffered an illness that impaired his judgement.

[210] The grievor disagrees with the employer's characterization of Dr. Sheard and Mr. Yorke as patient advocates. All experts were chosen by one side or the other; none of them offered independent opinion. The grievor submits they all had credibility.

[211] The grievor invites me to read page 402 of the *Canada Safeway (supra)* decision at tab 5 very carefully. The grievor refers to the second sentence of the quotation the union made of the *Maritime Paper Products Ltd.* case: "The required assessment is therefore to determine whether the mental disorder is sufficient to undermine the

grievor's capacity to understand the full significance of his actions." In this regard, all three medical practitioners, including most notably Dr. Rosenberg, have explained that Mr. Spawn had been acting with diminished capacity.

[212] The grievor referred to Exhibit E-2, Dr. Rosenberg's report on page 7:

Depressive illness is characterized by low mood, changes in appetite or weight, sleep disturbance, loss of interest in pleasures, and impairments in ability to think and/or concentrate and/or make decisions. As well, it is not uncommon for individuals suffering with depression to demonstrate defective judgement (the mental act of comparing choices between a given set of values in order to select a course of action). (For example, shoplifting is a not infrequent accompaniment to major depressive illness.)

[213] The grievor, in referring to the *Canada Safeway (supra)* case pointed out that several factors were held against the grievor, namely concealment, selective memory plus a bad prognosis.

[214] Going back to the four-prong test mentioned in *Canada Post (supra)*, the grievor submitted that in regard to the first point, all three medical experts are in agreement that the grievor suffered from an illness which began with the death of a young girl in the ATV accident.

[215] On the second point, the grievor argues that Dr. Sheard stated there was a causal link between the illness and the theft and that it all went back to emotional instability. Mr. Yorke, when asked similar questions, stated that the illness led to the theft, that because the grievor saw the victim of the ATV accident and later saw his daughter as the victim.

[216] Point three in the employer's argument is a repetition of point 2 to which the following statement "the arbitration board must still be persuaded that there was a sufficient displacement of responsibility" should be added. The case is specifically about gambling and alcohol addictions and that many persons addicted to gambling and alcohol do not steal. In the present case, all three medical experts, Dr. Rosenberg, Dr. Sheard and Mr. Yorke stated in one form or another that Mr. Spawn was better and re-offending is not likely to happen. They all said the acts of theft were done with defective judgement and diminished capacity.

[217] The grievor was not aware of his problem prior to September 10, 2001. After his emotional apology, which Mr. McLain said was very remorseful, the grievor promised that he would call the EAP number at Mr. McLain's suggestion. It was then that Mr. Spawn became aware and called Mr. Yorke.

[218] Point number four is about the board of arbitration being satisfied that the grievor is rehabilitated. There is no absolute certainty. The evidence revealed there is no likelihood of reoccurrence. Ms. Reeves, Mr. Taylor and Mr. McLain, who all knew Mr. Spawn, stated they would trust him and their opinion is in harmony with the medical evidence. Mr. Reynolds and Ms. Whitfield did not know the grievor.

[219] The grievor disagrees with the employer's argument that no one had any concern about the grievor's decision-making at work. There were concerns as is evidenced by Ms. Reeve's letter of October 16, 2001 (Exhibit G-4). Mr. McLain talked to Mr. Spawn on three occasions. Mr. McLain found Mr. Spawn was not in his normal outgoing mood, not his normal self.

[220] While the grievor was not aware of his problem, he can remember being sick on at least one occasion when taking gas. No one asked him what his thinking was in each action of theft. In cross-examination, the grievor stated he was bewildered at the disciplinary hearing, which confirms a diagnosis of emotional instability.

[221] Dr. Rosenberg stated that Mr. Spawn did not suffer from post-traumatic stress disorder because there were no flashbacks. However, when confronted with page 2 of his report (Exhibit E-2), Dr. Rosenberg stood corrected on that.

[222] Dr. Sheard's prognosis was categorical that Mr. Spawn would not do it again because he had help, he had no criminal mind, he had admitted to theft and there was no element of deceit. Dr. Sheard is firmer today on this than he was when he wrote his report because he knows the grievor was acting out of character.

[223] In response to the argument of motivation that the grievor stole because of financial difficulties as mentioned in Exhibit E-6, page 4, the grievor stated that it is only one element of what was mentioned. The grievor believed he had financial difficulties, but in looking back, he did not. Living pay cheque to pay cheque was the norm; he could pay all his bills. Dr. Rosenberg did not ask Mr. Spawn if he had financial difficulties; he assumed it. The truth, however, was otherwise.

[224] Exhibit E-6, when looked at as a whole, is an early admission by a person going alone for an interview without representation. It was an admission, forthright and showing remorse and acceptance of responsibility. What is interesting about Exhibits E-6 and E-4, is that the statements made by the grievor at the time were never questioned. The facts as given were accepted.

[225] Mr. Yorke, with regard to motivation, had diagnosed acute, not chronic post-traumatic stress disorder and went into the details of that condition. Mr. Yorke saw the patient more than 25 times over two years. He said Mr. Spawn has gone beyond the post-traumatic stress disorder and will not re-offend because it was out of character. He based this on the fact he had no criminal mind and this was derived from an assessment of Mr. Spawn's value system. Mr. Spawn had re-entered the fire service and had dealt with an incident of failure to resuscitate. His evidence was that it was highly possible that his diminished and inappropriate behaviour can be related to post-traumatic stress disorder.

[226] Dr. Rosenberg said he agreed with the paragraph on page 2 of Exhibit E-3(d) which reads:

It is possible that the chain of events that occurred prior to his act of theft, came together and overwhelmed Mr. Spawn to such an extent that his sense of judgement became distorted and confused, his actions becoming those of an individual with diminished capacity. ...

[227] The question was put to Mr. Reynolds and Ms. Whitfield whether they took into consideration Mr. Spawn's illness and his diminished capacity. They said no, even if this was an assessment by Dr. Rosenberg chosen by the employer while the final level reply was held pending.

[228] The grievor did not want to go see Dr. Rosenberg but he went and cooperated. The relationship between the employer and the grievor at the time obviously suggested that acting in good faith would presumably have an influence if the results of the assessment came back and showed that the grievor had a condition or illness that was treatable and bore a link to the act of thefts.

[229] The grievor points to this fact because of the employer's reliance on *Cie minière Québec Cartier (supra)* in an attempt to dismiss the medical evidence.

[230] The grievor disagrees with the employer's argument that no one suggested that the decision to demote was wrong. Mr. McLain had made recommendations of a two-to four-week suspension with continued counselling by Mr. Yorke as well as restitution. The grievance was filed by the bargaining agent and Ms. Reeves wrote a letter (Exhibit G-4) on October 16, 2001.

[231] On the issue of paragraph 13 of the *Cie minière Québec Cartier (supra)* case, the grievor refers to Exhibit E-6. The grievor did not know the medical terms but he knew something was wrong with him. The letter from Mr. Yorke (Exhibit E-3(f)) was handed in at the disciplinary hearing. The grievor referred more specifically to the second paragraph. The evidence reveals that the employer did have quite a bit of information prior to September 19, 2001.

[232] The employer had Exhibit E-3(f), Mr. Yorke's letter, and it had Mr. Sandy McLain at the meeting talking about post-traumatic stress disorder. The employer knew about the Christine Kennedy affair and about the others affecting Mr. Spawn. It was all out there and should have been assessed.

[233] In the *Cie minière Québec Cartier (supra)* case, the arbitrator had made a fateful finding that dismissal was justified at the time. The Québec *Labour Code* specifically gave jurisdiction to arbitrators to remedy in disciplinary cases but not in non-disciplinary cases such as the one that was the object of that decision.

[234] The grievor referred to page 18 of the *Funnell (supra)* decision in the third paragraph, the quote from *Cie minière Québec Cartier (supra)*, where it is stated:

This brings me to the question I raised earlier regarding whether an arbitrator can consider subsequent-event evidence in ruling on a grievance concerning the dismissal by the Company of an employee. In my view, an arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented. ...

[235] With respect to the argument that Mr. Reynolds and Ms. Whitfield did not know at the time that the grievor had an illness that could be treated, the grievor stated that they had lots of evidence and Mr. Yorke's letter. In all fairness, it should have been

considered. The post-termination evidence is now shedding light on the appropriateness of the disciplinary action.

[236] With regard to tab 13, *Re New Tel Communications and Communications, Energy and Paperworkers Union of Canada, Local 410* (1998), 71 L.A.C. (4th) 73, the grievor made the distinction that it was a gambling case that involved falsification and denial. The arbitrator found in that case that gambling was not related to theft and did not cause the theft. The case, on page 93, points to one of the problems with the *Cie minière Québec Cartier (supra)* case, specific to the remedial section of the Québec *Labour Code*.

[237] The PSSRB has always had the power to vary discipline in a disciplinary case. The present case is a disciplinary one; it is not talking of innocent absenteeism. *Cie minière Québec Cartier (supra)* says nothing of the PSSRB power to vary penalty if it is appropriate to do so.

[238] The grievor referred to an article by Morgan Cooper and Andrew Luchak from the *Labour Arbitration Yearbook*, page 13, entitled "Post-Discharge Evidence of Rehabilitation: Can It Be Used at Arbitration?" The grievor referred to pages 20 and 21:

... It follows that arbitrators asked to rely on post-discharge evidence of rehabilitation should carefully review the relevant statutory and collective agreement provisions relating to their remedial authority. On reviewing the provisions of the Quebec Labour Code addressing the powers of the arbitrator, it is apparent that the section permitting an arbitrator to set aside the decision of an employer and to substitute therefore the decision he deems just and reasonable is prefaced by the words "in disciplinary matters." Whereas the remedial powers granted by section 100.12(f) of the Quebec Labour Code are clearly confined to disciplinary rather than non-disciplinary matters, arbitrators should note that the remedial powers granted by statute to arbitrators in jurisdictions other than Quebec may be capable of a more liberal interpretation.

[239] Regarding the remedial authority of the PSSRB, it is clear the adjudicator cannot make an appointment. It is clear and mentioned in *Fontaine-Ellis (supra)*, as well as other cases, that an adjudicator can recommend options.

[240] Mr. Spawn is looking for reinstatement to his substantive full-time firefighter/security position, which he held for 10 years, just like Mr. C.B., who was

returned to his full-time substantive position. The grievor asks that the adjudicator retain jurisdiction if he should be reinstated and the parties encounter difficulties in implementing the decision.

[241] The grievor disagrees with Ms. Whitfield's statement that the usual penalty for theft is termination. It is not automatic; the proof is that all three employees were reinstated, two were demoted. One of the demoted employees was not penalized because he was on D.I. Mr. C.B. now works the full year. Mr. Spawn was demoted to a GL-ELE-3 position, working five months of the year. If an "awful or whatever" message would be sent by reinstating Mr. Spawn it was already sent because all three culprits were reinstated.

[242] There are other mitigating factors. Mr. Spawn had 13 years of service: the first couple as an electrician, then as a firefighter/security person. He worked on a full twelve months a year basis until he was made full-time indeterminate. His disciplinary record was clean. His performance was good all around; he was among the top two or three among the fire-watch staff.

[243] Another mitigating factor is the trust of those who knew him and who said they would trust him again: Mr. Taylor, Mr. McLain and Ms. Reeves.

[244] Other factors are remorse and full acceptance of responsibility.

[245] The employer witnesses testified to the effect that all this was looked at when the disciplinary committee met by conference call. There was a high level of disagreement in the committee. Mr. McLain was asked if he would trust Mr. Spawn, and he said he would. There was disagreement and demotion is what came of it. It is a mitigating factor that Mr. McLain was never asked about his views again.

[246] The medical evidence on the likelihood of the grievor re-offending is also a mitigating factor. Mr. Reynolds was asked if he took into consideration the grievor's diminished judgement. He said the employer had no medical evidence on which to make this determination.

[247] The grievor also submitted that there was unequal penalty with respect to Mr. C.B. Ms. Whitfield stated that they did not check Mr. C.B.'s story or if gas stations were open after he got off work. Mr. C.B. was caught red-handed. It is not known whether he would have self-reported. Mr. McLain testified that Mr. C.B. told him that

he took 10 litres of gas the first two times and 17 litres the last time. Ms. Whitfield's reasoning for his discipline was that he only did it once, so he was returned to his full-time position.

[248] The grievor is not denying he took the gas; he did so. He is not saying he was acting as a robot when he did so and he is now very remorseful. Mr. Spawn has been severely punished for his wrongdoing. Over 2 years, he has been at the GL-ELE-3 level, one of the lowest jobs in Parks. He has been on probation for two years. He has sustained a very heavy penalty.

[249] The mitigating factors relate to Mr. Spawn's rehabilitative potential; that is what basically is at issue here.

[250] The grievor then referred to Brown and Beatty's *Canadian Labour Arbitration*, chapter 7:4422 on Rehabilitative potential, more specifically at page 7-250:

... Although opinion is divided on this issue, several arbitrators have held that such an assessment may include an evaluation of an employee's behaviour during the period between the date of the discharge and the arbitration hearing. Thus, many arbitrators have explicitly examined and ultimately relied upon the rehabilitative potential of persons who, for example, had seriously threatened, or actually physically abused members of management, or engaged in an act of theft or even sabotage. ... Similarly, some arbitrators, by implicitly assuming that an employee who immediately admits his wrongdoing and/or tenders an apology following his misconduct thereby recognizes the impropriety of his behaviour and thus would more likely be capable of conforming to the expected norms, have relied on that fact as a basis on which to ameliorate the discipline imposed. ...

[251] With respect to the economic state, although Mr. Spawn has electrical papers, there is no work for an electrician. He is the sole provider; he cannot make it on a seasonal groundskeeper job. He is a mature worker in a small town. These are factors of hardship.

[252] The grievor then referred to chapter 7:3544 of Brown and Beatty (*supra*) regarding to disciplinary demotion. He cited page 7-160:

After some reasonable period of time, which necessarily will vary with the facts of each case, the employer will be expected to reassess the suitability of the

grievor for his former position. As one arbitrator has said, "If demotion is to be used as a penalty, it must be administered with precise limitations and not have the effect of putting the grievor in the position of any other employee seeking a promotion to the grievor's former position." On this view, the employee is entitled to know that the demotion is temporary and she will be returned to her former position, or that she can bid on the next vacancy. As well, it has been held that while it is implicit in the nature of a demotion that an employee will not be able to bid for the job from which he was demoted during the period of the demotion, it would not be proper to deny the employee the opportunity to be considered for every vacancy that is posted under the agreement.

The demotion of Mr. Spawn currently acts as an ongoing penalty since he is in a seasonal GL-ELE-3 position.

[253] The grievor also referred to chapter 7:3300, Dishonesty, and more specifically to the bottom of paragraph 7:3310 Theft, on page 7-62:

... However, in the vast majority of the more recent awards, after examining the particulars of the circumstances surrounding the grievance, arbitrators have come to the conclusion that the competing interests of the employer and the grievor could be reconciled in a way and with a penalty less severe than discharge, and that this balancing exercise should take place even regarding a temporary reinstatement pending adjudication.

[254] Then the grievor referred to chapter on penalty 7:3314 at page 7-104:

7:3314 Penalty. As noted above, it is now widely accepted by a majority of arbitrators that a person cannot automatically be terminated from his employment because he has engaged in one or more acts of theft. ...

[255] The grievor then referred to the *Ronald Hampton* decision (PSSRB File No. 166-2-28445 (1998) (QL)) where an employee was discharged; he had obtained the questions and answers to a competition in which he was a candidate. The grievor cited the last paragraph on page 19, the full first paragraph on page 20 and the last paragraph on page 21. At the top of page 22, it is also stated:

... as well as Mr. Donaldson's testimony to the effect that the grievor's misconduct was entirely out of character, strongly supports this conclusion, particularly when considered in light of his thirteen years of exemplary service. ...

[256] In *Hampton (supra)* the grievor was reinstated with 4 months' suspension even without medical evidence. Mr. Spawn's mitigating factors are stronger than in *Hampton (supra)*.

[257] The grievor then referred to the *John W. Taylor* decision (PSSRB File No. 166-2-28563 (1999) (QL)) at page 21:

The board has previously noted that an employer has a responsibility to assist employees in dealing with their illnesses through treatment and rehabilitation programs. Board member Simpson stated in Herrit, (supra), (at page 13):

Alcoholism and drug addiction are generally considered to be illnesses. As such, the employer bears some responsibility for assisting the employee in dealing with these illnesses through treatment and rehabilitation programs.

[258] The employer knew Mr. Spawn had a serious condition. It had Mr. McLain's evidence and the knowledge of the Christine Kennedy incident.

[259] The grievor then cites page 24, the fourth paragraph of the *Taylor (supra)* decision. The third and sixth paragraphs on page 26 read:

To his credit, however, Mr. Taylor has gone to some length towards self-help by attending AA meetings and participating in EAP sessions (with Ms. McKenna). He had been attending EAP sessions both before his termination and in the nine months since his discharge. The important part is that he recognized before his discharge that he needed help.

...

... both agree that Mr. Taylor has made great progress from the time of his first visit. He attends his EAP and AA meetings on a regular basis. He is also improving himself by going to college.

These are conditions adjudicators take into consideration. Those conditions are also present here.

[260] The grievor then referred to the *Tasso Vasilas* decision (PSSRB File No. 166-2-28149 (1998) (QL)). The case refers to fraud in the amount of \$18,000. The adjudicator compares Vasilas and another employee who was also involved in the

fraud but who was not discharged, and reinstates Vasilas. The grievor refers to page 17.

Reply for the Employer

[261] On the issue of trust, the employer refers to the Federal Court's judicial review decision in *Carl S. Gannon* [2004], F.C.J. No. 1947 (QL), paragraph 20:

... The applicant contends there is no evidence that his immediate manager and others he interacted with on the job had lost trust in him and, as such, the adjudicator's finding was patently unreasonable and reviewable. This argument is simply without merit. Senior management in any organization is responsible for the overall management of the operation and must be able to trust that employees will properly carry out their mandated responsibilities. ...

[262] In their testimonies Ms. Whitfield and Mr. Reynolds spoke to the level of trust required by senior management.

[263] The second point is that there is a difference between some element of diminished capacity and sufficient diminished capacity such as to undermine culpability. The medical evidence is clear on this; Mr. Spawn knew what he was doing was wrong. He saw options open to him and chose the wrong one. It was not an irresistible impulse. Dr. Rosenberg stated Mr. Spawn chose the most expedient course to keep his daughter at home. This is not sufficient to mitigate culpability.

[264] The third point is that all three doctors said Mr. Spawn was better but in fairness to Dr. Rosenberg, his reliance on the 60% statistical analysis should be given weight. The fourth: no restitution was made. More efforts at restitution could have been made if Mr. Spawn was truly remorseful.

[265] On the point regarding *Cie minière Québec Cartier (supra)* what matters is not what the employer should have known at the time of the discipline but what was known. At that time, Mr. Spawn was a long way from being better and this is by his own doctors' accounts. In *Funnell (supra)*, the adjudicator mentions the issue of rehabilitation in the foreseeable or near future.

[266] Although Parks Canada does not come under the *Public Service Employment Act*, (PSEA), there is a similar authority that applies to Parks. The adjudicator does not have the authority to appoint.

[267] Some fairness to Ms. Whitfield and Mr. Reynolds should be given on the issue of discriminatory discipline. The employer relies on *Canada (Treasury Board) v. Barratt (F.C.A.)*, [1984] F.C.J. No. 240 (QL) at page 9. In essence, what the Federal Court said is that management can only deal with what management knew at the time and that came up at the adjudication. Ms. Whitfield was of the belief that Mr. C.B. only did it once. Ms. Whitfield and Mr. Reynolds were acting in good faith; the charge of discriminatory discipline is unfair.

[268] The allegation that demotion is an ongoing penalty should be seen in the light that disciplinary demotion is unusual. It is not seen much in this universe. It should be seen in the context that 72% of the staff is seasonal and that a position was created that wasn't there. Mr. Spawn is free to compete for another position.

[269] On the argument that the actions of the grievor were out of character, the employer submits that character evidence is not terribly reliable. It should not be very persuasive. Each party could be calling evidence of that nature to build up its case. There would be no end.

[270] The grievor asked to respond to the employer's submission on the *Gannon (supra)* and *Barratt (supra)* decisions. He stated that *Gannon* was in a totally different context.

[271] With regard to *Barratt (supra)*, the grievor submitted the *Monique Laurin* decision (PSSRB File No. 166-2-28147 (1998) (QL)) and referred to the bottom of page 11.

Reasons for Decision

[272] The issue I have to decide is the appropriateness of the employer's decision to demote Mr. John Spawn from a full-time Firefighter/Security Person position, GS-PRC-6 to a seasonal (40% of the time) position of Groundskeeper, GL-ELE-3.

[273] There is no dispute regarding the fact that the grievor repeatedly took gasoline from his employer for a period roughly from late February, early March 2001 to early September 2001. When confronted pursuant to an investigation of the thefts of gas, Mr. Spawn confessed to thefts beyond what the investigation had revealed and expressed remorse.

[274] Mr. Spawn was one of three Firefighter/Security Persons caught by the investigation. None of the gasoline thieves was dismissed; all were demoted.

[275] During the disciplinary hearing, Mr. Spawn was cooperative and remorseful. He gave indications to the employer that there was something wrong with him. Mr. Spawn informed the employer of personal problems and several traumatic experiences. Mr. Spawn sought help through EAP and underwent treatment for his condition.

[276] Medical evidence was presented by both sides. The employer's expert, Dr. Rosenberg, saw Mr. Spawn on September 17, 2002. Dr. Rosenberg disagrees with Mr. Spawn's experts on the diagnosis and prognosis of the grievor's illness.

[277] I don't have to make a determination as to which diagnosis may be more accurate since all experts agree that Mr. Spawn suffered from severe depression, which in turn caused his judgement to become impaired. They all agreed that Mr. Spawn knew the difference between right and wrong, although Mr. Yorke, in Exhibit E-3(d), found that his actions had become "those of an individual with diminished capacity".

[278] Mr. Spawn meets the first two prongs of the four-prong test argued by the employer and referred to by arbitrator Ish in *Re Canada Safeway Ltd. and R.W.D.S.U. (MacNeill)* (1999), 82 L.A.C. (4th) 1 but fails the third point of the test. Mr. Spawn knew that what he was doing was wrong. His judgement was impaired but not to the extent of completely absolving him of responsibility for his actions. Mr. Spawn deserves to be disciplined for his conduct.

[279] The purpose of discipline is to correct behaviour and, in some cases, to act as a deterrent. I believe that demotion as a disciplinary sanction must meet the corrective criteria in order to be justified. A demotion from a higher to a lower rate and from a full-time to a seasonal position which is equivalent to 40% of a full-time position is too severe. It is a drop in salary and prestige and carries with it another sanction that of a prolonged seasonal lay-off. In severity this is akin to a discharge. I don't believe it was warranted in the present circumstances. Mr. Spawn was a long-term employee. His misconduct is an aberration which occurred during a stressful episode in an otherwise fully satisfactory career. Mr. Spawn has been open and candid about his misconduct. At no time did he try to deceive the employer or anyone about it. The different recollection that Mr. Spawn had of his statements to Dr. Rosenberg is more a perception problem on his part than an attempt to change facts.

[280] Of three Firefighter/Security Persons caught stealing gas, he was the most severely punished. One employee was returned to his substantive position at the GL-ELE-3 level on a full-time basis after a two-week suspension. Another was notified of demotion but because he was on long-term disability and then retired for disability reasons, he incurred no punishment for having stolen gas for an extended period while away from work. The reason for the discrepancies in penalties do not bear scrutiny.

[281] I am not satisfied that Mr. Spawn's misconduct was that more serious than that of Mr. C.B. Ms. Whitfield based her assessment of a lesser misconduct on the assumption that Mr. C.B. had stolen only once, on the occasion when he was caught red-handed. She took into consideration that he had a gambling problem which led to financial problems and that he had an alcohol problem. The evidence of Mr. McLain, who attended all disciplinary interviews on September 13, 2001, was that Mr. C.B. admitted to three occurrences and that he had amounts for each. This evidence was not rebutted. Mr. C.B. was acting as a Firefighter/Security Person and was returned to his substantive full-time position of GL-ELE-3, a much more favourable situation than that of Mr. Spawn.

[282] The recommendation of the former manager in charge of the security staff was for a lengthy suspension for Mr. Spawn. Mr. McLain was of the opinion that Mr. Spawn's behaviour was out of character and related to his mental condition following stressful events in his life. He was of the opinion that Mr. Spawn would not likely engage in this type of behaviour again. His opinion was confirmed by two medical experts.

[283] On the question of prognosis, Dr. Rosenberg cited statistics of a general nature. He found Mr. Spawn able to return to the workplace when he saw him in September 2002. Dr. Rosenberg said that based on statistics there was a 60% chance of the depression recurring. Dr. Rosenberg had also indicated that not all individuals suffering from depression steal.

[284] Mr. Spawn's medical practitioners stated that Mr. Spawn is unlikely to re-offend and offer a much more optimistic prognosis. All experts considered that depression can be a symptom of post-traumatic stress disorder. All experts, whether in their testimony or their reports, agree that Mr. Spawn, knowing of his condition, will likely seek help should its symptomatology manifests itself again. This is an additional mitigating factor.

[285] The employer asked that I not consider the post-discipline evidence for two reasons, one based on *Cie minière Québec Cartier (supra)*; secondly, on the grounds that Dr. Sheard and Mr. Yorke were acting as advocates of Mr. Spawn because they were treating him on an ongoing basis.

[286] I do not believe *Cie minière Québec Cartier v. Quebec (supra)* is applicable to the present case. The case can be distinguished for the following reasons: 1) this is a case of a disciplinary demotion where the issue is a disciplinary sanction, not of dismissal for non-disciplinary absenteeism where the issue is the maintenance of the employment bond; 2) the disciplinary action was still under review by the employer under the grievance procedure therefore not finalized until the final level reply on October 22, 2002. The evidence available up to that date or considered by the employer is relevant in assessing the final decision of the employer; 3) the restriction applicable to arbitrators in Québec does not apply under the PSSRA, the Supreme Court might have found differently under this legislation; 4) Mr. Reynolds, though not aware of all the details of Mr. Spawn's condition at the time of his decision to demote was aware that he was receiving help from a professional psychologist and was aware of Mr. McLain's observations; 5) the post-discipline medical evidence is relevant to shed light on the situation as it existed at the time of the initial decision to demote.

[287] I reject the argument that the medical experts of the grievor, because they were treating Mr. Spawn on an ongoing basis, were therefore acting as his advocates. First, I find that the fact that they were treating him renders their evidence very useful. They have a greater knowledge of Mr. Spawn and of his condition than does Dr. Rosenberg, who only saw the grievor for a couple of hours. I find nothing in Mr. Yorke's and Dr. Sheard's testimonies that raises doubt on the reliability of their professional medical opinion, particularly as to the prognosis of Mr. Spawn's likelihood of re-offending. Nobody can offer guarantees when prognoses are made, but both Mr. Yorke and Dr. Sheard were of the opinion that Mr. Spawn does not possess a criminal mentality. Their opinion was based on their professional assessment of Mr. Spawn and unlike Arbitrator Smith in *Re Canada Safeway (supra)*, I found nothing in their responses during cross-examination which indicated that they were acting as advocates.

[288] The factor that I cannot ignore is that Mr. Spawn knew that what he was doing was wrong. His judgement was impaired but he knew stealing was wrong. While his

medical condition is a mitigating factor, it does not entirely excuse his conduct. His conduct warranted discipline but I find that demotion to a seasonal position is too severe in the circumstances. To be corrective, a sanction cannot be excessive.

[289] I therefore order that Mr. Spawn be reinstated to a full-time, indeterminate position. The employer may choose to assign Mr. Spawn to a position other than that of Firefighter/Security Person but it must be indeterminate, full-time and in the same geographical area. If no such position is available, then Mr. Spawn is to be reinstated in his Firefighter/Security Person position within three weeks of the date of receipt of this decision.

[290] Mr. Spawn will not be compensated for the time he has not worked and he needs to reimburse the employer for the gas he has taken. The responsibility for figuring out what is owed to the employer lies both with Mr. Spawn and his managers. This issue must be attended without further delay.

[291] Mr. Spawn will consult with Mr. Yorke to assist him in figuring out how much gas he may have taken. It may help Mr. Spawn to use the maintenance and oil change records of his vehicles, if he has them, to assist him in estimating how much gas was used by his vehicles, then how much was purchased and how much was taken. I recommend that Mr. Spawn seek the help of Mr. Yorke to overcome any potential avoidance reactions at facing the reality of what he may have to disclose to the employer.

[292] On its part, the employer should also attempt to provide some estimates by comparing gasoline consumption during the period in which the thefts took place and during the same months in the year following. This should take into account what others may have taken and all the factors that would account for differences in comparing the two similar periods of March 1 to September 10.

[293] Mr. Spawn is to reimburse the employer as quickly as possible by a mutually agreeable method or by salary deductions of no more than 10% of his net pay until his debt of gas is fully paid.

[294] Mr. Spawn's reinstatement is conditional on his following the programs and/or taking the medication prescribed by his medical practitioners. During the two years

following reinstatement, the employer may require that Mr. Spawn provide periodic evidence of his fitness to work and/or yearly reports from Mr. Yorke or Dr. Sheard.

[295] I will remain seized for 90 days from the date of the decision should the parties incur difficulties in implementing this decision.

**Evelyne Henry,
Board Member**

OTTAWA, April 5, 2004.

