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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

CHRISTOPHER D'CUNHA AND ANDREA DE LAAT

Grievors

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as

D'Cunha v. Deputy Head (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor D'Cunha: Himself

For the Grievor de Laat: Dan Fisher, Public Service Alliance of Canada

For the Respondent: Pierre Marc Champagne, counsel

Heard at Kingston, Ontario,

July 24 to 28, 2017, and February 16, 2018.

I. Individual grievances referred to adjudication

[1] Christopher D'Cunha was employed by the Treasury Board (TB or "the employer") and worked for the Correctional Service of Canada (CSC) as a correctional staff training officer classified at the correctional officer ("CX") 3 group and level at the CSC Staff College in Kingston, Ontario. On March 10, 2015, he was suspended without pay from his position. By letter dated October 16, 2015, he was terminated from his position, retroactive to March 10, 2015.

[2] Andrea de Laat was also employed by the TB and worked for the CSC as an administrative assistant classified at the clerical and regulatory ("CR") 4 group and level at the Regional Treatment Centre ("RTC") at Millhaven Institution in Millhaven, Ontario, just west of Kingston. On March 10, 2015, she was suspended without pay from her position. By letter dated October 23, 2015, she was terminated from her position, retroactive to March 10, 2015.

[3] The grievors are married to one another. At the time of the hearing, they had two school-aged children.

[4] The terms and conditions of Ms. de Laat's employment were governed, in part, by an agreement between the TB and the Public Service Alliance of Canada for the Program and Administrative Services group that was signed on March 1, 2011, and that expired on June 20, 2014 ("the collective agreement").

[5] Mr. D'Cunha was not a member of a bargaining unit and was unrepresented.

[6] On October 23, 2015, both grievors grieved their terminations of employment. As corrective action, they requested that they be reinstated into their respective positions with all salary and benefits as well as interest from the date of their suspensions and that all record of the disciplinary investigations and actions taken be purged from their respective personnel files.

[7] Both grievances were heard and denied at the final level of the grievance process, Ms. de Laat's on January 19, 2017, and Mr. D'Cunha's on January 20, 2017. They were referred to the Public Service Labour Relations and Employment Board (PSLREB) for adjudication.

[8] On June 19, 2017, An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the Public Service Labour Relations and Employment Board Act and the Public Service Labour Relations Act to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the Federal Public Sector Labour Relations and Employment Board Act, and the Federal Public Sector Labour Relations Act ("the Act").

II. Summary of the evidence

[9] Ms. de Laat started working for the CSC in 2006 as a casual employee at its Ontario Regional Headquarters in Kingston. Later on, she applied for and was successful in a process for a clerk position at the Royal Military College, also in Kingston. In 2008, she was deployed to the CSC. She worked as an administrative assistant at Kingston Penitentiary ("KP") until it closed in 2014. Through a workforce adjustment, she moved to an indeterminate position as a health care assistant at the RTC at Millhaven Institution.

[10] Diane Russon retired from the CSC in April of 2017. From April of 2015 until her retirement, she was the executive director of the RTC. Before that, she held the same position in the CSC's Atlantic Region for a period of four years. She started her career with the CSC as a CX in 1984. She rose through the ranks to management positions and spent the last 16 years of a 32-year career with the CSC in management.

[11] The RTC houses inmates of all security levels (maximum, medium, and minimum). As of the hearing, it had 96 beds. While it is on the same federal reserve as Millhaven and Bath Institutions and is linked by a hallway to Millhaven Institution, it is located behind that institution and is a separate facility.

[12] Ms. Russon stated that the RTC staff includes CXs for security reasons along with psychiatrists, psychologists, program officers, nurses, and clerical staff. She stated that Ms. de Laat's duties were largely clerical and administrative and that they involved supporting managers and nurses. This was done in an administrative area of the RTC. She stated that Ms. de Laat's contact with inmates was limited because of where she worked and what she did. However, inmates did enter the administrative

areas, and Ms. de Laat could have been in the secure areas. She confirmed that Ms. de Laat reported to her indirectly through the organizational structure.

[13] As of the hearing, Tracy Allison Storring was the CSC's Nursing Project manager at its National Headquarters in Ottawa, Ontario. She had been in that position since April 1, 2015. Between November of 2013 and February of 2015, she was the nursing coordinator at the RTC. Ms. de Laat reported indirectly to Ms. Storring through a nursing supervisor, Noel Napier-Glover.

[14] As of the hearing, Ms. Napier-Glover was the acting chief of health services at the RTC and had held that position since April of 2017. Between November of 2013 and March of 2015, she was a nursing supervisor at the RTC at Millhaven Institution. At that time, she reported to Ms. Storring, and Ms. de Laat reported to her.

[15] As a health services assistant, Ms. de Laat's duties and responsibilities were administrative and consisted of providing support services to nurses and nursing supervisors and the chief of health services, including filling out forms, filing documents, and receiving, sending, and distributing mail.

[16] Mr. D'Cunha started working for the CSC in 2006 as a casual employee. Before joining the federal public service, he worked in Toronto, Ontario, in informatics. In January of 2007, he started training to be a CX and graduated in April of that year. He started working as a CX-01 at Collins Bay Institution in Kingston, moved to KP in November of 2007, and was deployed there in April of 2008. He became a CX-02 in March of 2011 and remained at KP until it closed. He was workforce adjusted and moved to Millhaven Institution in late 2013. Still in late 2013, he successfully competed for a CX-03 staff training officer position at the Regional Staff College. The training was completed in the spring of 2014.

[17] Mr. D'Cunha, while working at KP, was the ION scan operator and later the trainer. ION scanning is a process by which visitors and materials are checked for the presence of narcotics to prevent their entry into a correctional institution.

[18] On October 23, 2015, both grievors received letters terminating their employment with the CSC. Mr. D'Cunha's termination letter was dated October 16, 2015; the relevant portions of it state as follows:

…

Having carefully reviewed the facts and circumstances in this case, I concur with the findings of CSC's disciplinary investigation that, contrary to your denials, on multiple occasions you attended [address deleted], in order to purchase illegal substances. You met with and purchased these substances from members and associates of the … Hells Angels … You were found by the police in possession of marihuana [sic] and have been criminally charged. Further I find that you sent Correctional Service Canada protected information to your unsecured home email account.

Your actions are clear contraventions of the CSC's Standards of Professional Conduct and Code of Discipline — Commissioner's Directive (CD) — 060. Specifically, you have violated:

Standard 2 – Conduct and Appearance

8. c. acts, while on or off duty, in a manner likely to discredit the Service;

8. d. commits an indictable offence or an offence punishable on summary conviction under any statute of Canada or of any province or territory, which may bring discredit to the Service or affect his/her continued performance with the Service;

Standard 4 – Relationships with Offenders

12. c. enters into any kind of personal or business relationship not approved by his/her authorized superior with an offender or ex-offender, or the offender's or ex-offender's friends or relatives;

Standard 5 – Conflict of Interest

13. Staff shall perform their duties on behalf of the Government of Canada with honesty and integrity. Staff must not enter into business or private ventures which may be, or appear to be, in conflict with their duties as correctional employees and their overall responsibilities as public servants.

An employee has committed an infraction, if he/she:

14. a. fails to disclose a conflict of interest as contained in the Conflict of Interest and Post Employment Code for the Public Service, or fails to follow the decision of the Commissioner or his authorized representative with respect to a declaration of conflict of interest.

Standard 6 – Protection and Sharing of Information

18. a. fails to properly safeguard all documents, reports, directives, manuals, or other information of the Service;

18. c. commits a breach or violation of the Policy on Government Security.

> *In addition, I find that your actions are a violation of Commissioner's Directive 226 Use of Electronic Resources when you failed to safeguard protected information.*
>
> *Further you have failed to uphold the Values and Ethics Code for the Public Sector in that you have contravened the ethical value of acting at all times with integrity and in a manner that will bear the closest public scrutiny and in such a way as to maintain your employer's trust.*
>
> *Taking all available information into consideration, I find your actions to be entirely inappropriate. As a Correctional Officer, you are held to a higher standard of conduct than other Public Service employees. Correctional officers are inextricably linked to the integrity and safety of the laws of Canada, the correctional institution, inmates and staff. Your behaviour is not in keeping with the standards of a Correctional Officer or public servant.*
>
> *In determining an appropriate disciplinary measure, I have taken into consideration all mitigating and aggravating factors, including your years of service and employment record. Your misconduct involved premeditated actions occurring over an extended period of time, which violated fundamental CSC and Public Service policy and standards of conduct. I note that, with the exception of forwarding government documents to an unsecured email address, you have not admitted to any of the above misconducts, nor have you offered any information to refute the allegations or findings of the investigation report. Furthermore, several of your statements during this process have contradicted and misrepresented other information obtained during the investigation. In light of the above, and given the severity of your misconduct, I have concluded that the bond of trust essential to your employment with CSC has been irrevocably broken.*
>
> *Therefore, by virtue of the authority delegated to me pursuant to Article 12(1)(c) of the Financial Administration Act, I am terminating your employment with the Correctional Service Canada [sic], effective retroactively to March 10, 2015, the date of your suspension without pay.*
>
> …

[19] Ms. de Laat's termination letter was dated October 23, 2015; the relevant portions of it state as follows:

> …
>
> *Having carefully reviewed the facts and circumstances in this case, I concur with the findings of CSC's disciplinary investigation that, contrary to your denials, on multiple occasions you attended [address deleted], in order to purchase illegal substances. You met with and purchased these substances from members and associates of the Hells Angels Motorcycle Club. You were found by*

the police in possession of marijuana and have been criminally charged… Further I find that you sent Correctional Service Canada protected information to your unsecured home email account.

Your actions are clear contraventions of the CSC's Standards of Professional Conduct and Code of Discipline — Commissioner's Directive (CD) — 060. Specifically, you have violated:

Standard 1 – Responsible Discharge of Duties

6. a. fraudulently records, or fails to record, his/her attendance or that of another employee;

6. b. is late for duty, absent from duty or leaves his/her assigned place of duty without authorization;

Standard 2 – Conduct and Appearance

8. c. acts, while on or off duty, in a manner likely to discredit the Service;

8. d. commits an indictable offence or an offence punishable on summary conviction under any statute of Canada or of any province or territory, which may bring discredit to the Service or affect his/her continued performance with the Service;

Standard 4 – Relationships with Offenders

12. c. enters into any kind of personal or business relationship not approved by his/her authorized superior with an offender or ex-offender, or the offender's or ex-offender's friends or relatives;

Standard 5 – Conflict of Interest

13. Staff shall perform their duties on behalf of the Government of Canada with honesty and integrity. Staff must not enter into business or private ventures which may be, or appear to be, in conflict with their duties as correctional employees and their overall responsibilities as public servants.

An employee has committed an infraction, if he/she:

14. a. fails to disclose a conflict of interest as contained in the Conflict of Interest and Post-Employment Code for the Public Service, or fails to follow the decision of the Commissioner or his authorized representative with respect to a declaration of conflict of interest.

Standard 6 – Protection and Sharing of Information

18. a. fails to properly safeguard all documents, reports, directives, manuals, or other information of the Service;

18. c. commits a breach or violation of the Policy on Government Security.

> *In addition, I find that your actions are a violation of Commissioner's Directive 226 Use of Electronic Resources when you failed to safeguard protected information.*
>
> *Further you have failed to uphold the Values and Ethics Code for the Public Sector in that you have contravened the ethical value of acting at all times with integrity and in a manner that will bear the closest public scrutiny and in such a way as to maintain your employer's trust.*
>
> *Taking all available information into consideration, I find your actions to be entirely inappropriate. As a Peace Officer, you are held to a higher standard of conduct than other Public Service employees. Your behaviour is not in keeping with the standards of a Peace Officer or public servant.*
>
> *In determining an appropriate disciplinary measure, I have taken into consideration all mitigating and aggravating factors, including your years of service and employment record. Your misconduct involved premeditated actions occurring over an extended period of time, which violated fundamental CSC and Public Service policy and standards of conduct. I note that, with the exception of forwarding government documents to an unsecured email address, you have not admitted to any of the above misconducts, nor have you offered any information to refute the allegations or findings of the investigation report. Furthermore, several of your statements during this process have contradicted and misrepresented other information obtained during the investigation. In light of the above, and given the severity of your misconduct, I have concluded that the bond of trust essential to your employment with CSC has been irrevocably broken.*
>
> *Therefore, by virtue of the authority delegated to me pursuant to Article 12(1)(c) of the Financial Administration Act, I am terminating your employment with the Correctional Service Canada [sic], effective retroactively to March 10, 2015, the date of your suspension without pay.*
>
> …

A. CSC policies

1. Standards of Professional Conduct in the Correctional Service of Canada

[20] The Standards of Professional Conduct in the Correctional Service of Canada ("the CSC Standards") read in part as follows:

> ***1. STANDARD ONE***
>
> ***RESPONSIBLE DISCHARGE OF DUTIES***
>
> *Staff shall conduct themselves in a manner which reflects positively on the Public Service of Canada, by working co-*

operatively to achieve the objectives of the Correctional Service of Canada. Staff shall fulfill [sic] their duties in a diligent and competent manner with due regard for the values and principles contained in the Mission Document, as well as in accordance with policies and procedures laid out in legislation, directives, manuals and other official documents.

Employees have an obligation to follow the instructions of supervisors or any member in charge of the workplace and are required to serve the public in a professional manner, with courtesy and promptness.

…

2. STANDARD TWO

CONDUCT AND APPEARANCE

Behaviour, both on and off duty, shall reflect positively on the Correctional Service of Canada and the Public Service generally. All staff are expected to present themselves in a manner that promotes a professional image, both in their words and in their actions. Employee dress and appearance while on duty must similarly convey professionalism, and must be consistent with employee health and safety.

…

4. STANDARD FOUR

RELATIONSHIPS WITH OFFENDERS

Staff must actively encourage and assist offenders to become law-abiding citizens. This includes establishing constructive relationships with offenders to encourage their successful reintegration into the community. Relationships shall demonstrate honesty, fairness and integrity. Staff shall promote a safe and secure workplace and respect an offender's cultural, racial, religious and ethnic background, and his or her civil and legal rights. Staff shall avoid conflicts of interest with offenders and their families.

…

5. STANDARD FIVE CONFLICT OF INTEREST

Staff shall perform their duties on behalf of the Government of Canada with honesty and integrity. Staff must not enter into business or private ventures which may be, or appear to be, in conflict with their duties as correctional employees and their overall responsibilities as public servants.

6. STANDARD SIX PROTECTION AND SHARING OF INFORMATION

Staff shall treat information acquired through their employment in a manner consistent with the Access to Information Act, the Privacy Act, the Security Policy of the

> *Government of Canada, and the Oath of Secrecy taken by all employees of the Public Service of Canada. They shall ensure that appropriate information is shared in a timely manner with offenders, with other criminal justice agencies and with the public, including victims, as required by legislation and policy.*
>
> …

[21] The CSC's commissioner issued "Commissioner's Directive ("CD") 060", entitled "Code of Discipline" ("the Code"), which applies to all persons who work at the CSC. The sections of the Code relevant to the grievors are as follows:

> ***POLICY OBJECTIVE***
>
> *1. To ensure high standards of conduct for employees of the Service.*
>
> ***GENERAL RESPONSIBILITIES***
>
> *2. Management of the Service is responsible for:*
>
> *a. ensuring that all employees are adequately trained and informed of the Standards of Professional Conduct and the Code of Discipline and other directives and regulations;*
>
> *b. promptly and impartially taking appropriate corrective action when necessary.*
>
> *3. Employees of the Service are responsible for adhering to the Standards of Professional Conduct. Arising from the Standards of Professional Conduct are a number of specific rules that employees of the Correctional Service of Canada are expected to observe. Some examples of infractions are given in a list below each specific rule. These lists are not exhaustive.*
>
> *4. Each employee of the Service is also expected to be conversant with, and adhere to the various Acts, Regulations and policies affecting employees of CSC as well as the instructions and directives of the Service.*
>
> ***PROFESSIONAL STANDARDS***
>
> ***Responsible Discharge of Duties***
>
> *5. Staff shall conduct themselves in a manner which reflects positively on the Public Service of Canada, by working co-operatively to achieve the objectives of the Correctional Service of Canada. Staff shall fulfil their duties in a diligent and competent manner with due regard for the values and principles contained in the Mission Document, as well as in accordance with policies and procedures laid out in legislation, directives, manuals and other official documents. Employees have an obligation to follow the instructions of supervisors or any member in charge of the workplace and are required to*

serve the public in a professional manner, with courtesy and promptness.

Infractions

6. An employee has committed an infraction, if he/she:

a. fraudulently records, or fails to record, his/her attendance or that of another employee;

b. is late for duty, absent from duty or leaves his/her assigned place of duty without authorization;

…

Conduct and Appearance

7. Behaviour, both on and off duty, shall reflect positively on the Correctional Service of Canada and on the Public Service generally. All staff are expected to present themselves in a manner that promotes a professional image, both in their words and in their actions. Employees [sic] dress and appearance while on duty must similarly convey professionalism, and must be consistent with employee health and safety.

Infractions

8. An employee has committed an infraction, if he/she:

a. displays appearance and/or deportment which is unbecoming to an employee of the Service while on duty or while in uniform;

…

c. acts, while on or off duty, in a manner likely to discredit the Service;

d. commits an indictable offence or an offence punishable on summary conviction under any statute of Canada or of any province or territory which may bring discredit to the Service or affect his/her continued performance with the Service;

…

Relationships with Offenders

11. Staff must actively encourage and assist offenders to become law abiding citizens. This includes establishing constructive relationships with offenders to encourage their successful reintegration into the community. Relationships shall demonstrate honesty, fairness and integrity. Staff shall promote a safe and secure workplace, free of mistreatment, harassment and discrimination, and respect an offender's cultural, racial, religious and ethnic background, and his/her civil and legal rights. Staff shall avoid conflicts of interest with offenders and their families.

Infractions

12. An employee has committed an infraction, if he/she:

c. enters into any kind of personal or business relationship not approved by his/her authorized superior with an offender or ex-offender, or the offender's or ex-offender's friends or relatives;

…

Conflict of Interest

13. Staff shall perform their duties on behalf of the Government of Canada with honesty and integrity. Staff must not enter into business or private ventures which may be, or appear to be, in conflict with their duties as correctional employees and their overall responsibilities as public servants.

Infractions

14. An employee has committed an infraction, if he/she:

a. fails to disclose a conflict of interest as contained in the Conflict of Interest and Post-Employment Code for the Public Service, or fails to follow the decision of the Commissioner or his authorized representative with respect to a declaration of conflict of interest.

Protection and Sharing of Information

15. Staff shall treat information acquired through their employment in a manner consistent with the Access to Information Act, the Privacy Act, the Policy on Government Security, and the Oath of Secrecy taken by all employees of the Public Service of Canada. They shall ensure that appropriate information is shared in a timely manner with offenders, with other criminal justice agencies and with the public, including victims, as required by legislation and policy.

…

Infractions

18. An employee has committed an infraction, if he/she:

a. fails to properly safeguard all documents, reports, directives, manuals, or other information of the Service;

…

c. commits a breach or violation of the Policy on Government Security ….

…

[22] Both grievors signed written acknowledgements that they had received and reviewed the Code and the CSC Standards.

[23] Neither the Code nor the CSC Standards define the term "offender".

2. CD 226 - Use of Electronic Resources

[24] CD 226, *Use of Electronic Resources*, addresses employees' use of CSC electronic resources. The relevant sections are as follows:

> …
>
> *5. Individuals authorized to use CSC's electronic resources (**authorized individuals**) will:*
>
> *a. abide by the laws, government policies, directives and any other instructions published by CSC, on the use of electronic resources ….*
>
> …
>
> ***AUTHORIZED USES OF ELECTRONIC RESOURCES***
>
> ***Use for Official Business***
>
> *6. Electronic resources must be used for official business. This includes, but is not limited to, creating, accessing, manipulating, storing and transmitting:*
>
> *a. electronic mail messages (email)*
>
> *b. electronic records or information on CSC-managed electronic resources*
>
> *c. information on the CSC Intranet*
>
> *d. information on the Internet.*
>
> …
>
> ***PROHIBITED USES OF ELECTRONIC RESOURCES***
>
> *8. Authorized individuals are prohibited from using government electronic resources to:*
>
> *a. operate, transmit or store games or other entertainment software*
>
> *b. maintain or support a personal private business or to assist relatives, friends, or other persons in such activities, or*
>
> *c. conduct any unlawful or unacceptable activity or to store or transmit information relating thereto, except where specifically authorized as part of an official investigation.*
>
> …
>
> ***DISCIPLINARY MEASURES AND SANCTIONS***

> *17. CSC may pursue disciplinary measures or sanctions in cases of unlawful and/or unacceptable activity related to the use of its electronic resources. Disciplinary measures will be commensurate with the seriousness and circumstances of the unlawful and/or unacceptable activity. In cases where disciplinary measures are required, Labour Relations must be consulted to ensure that the application of disciplinary measures is consistent across CSC.*
>
> *18. Disciplinary measures may include:*
>
> *a. a verbal or written reprimand*
>
> *b. restrictions on access to the electronic resources*
>
> *c. review of an individual's reliability status or security clearance*
>
> *d. suspension or termination of employment.*
>
> …

3. The Government of Canada's Policy on Government Security

[25] A copy of the Government of Canada's *Policy on Government Security*, effective July 1, 2009, and updated April 1, 2012, was entered into evidence.

B. The purchase and possession of cannabis (marijuana)

[26] The majority of the facts and issues relating to each of the grievors' termination of employment stemmed from their purchase and possession of several quantities and varieties of cannabis (marijuana) as discovered by an Ontario Provincial Police (OPP) and Ottawa Police Service (OPS) investigation called "Operation Batlow".

[27] As of the hearing, Rick Weeks was a detective with the OPP's Organized Crime Enforcement Bureau ("OCEB"), and Govert Schoorl was a detective constable with the OPS. Both were involved in Operation Batlow.

[28] Det. Weeks testified that Operation Batlow was run largely by the OCEB and the Biker Enforcement Unit and that it targeted the drug trafficking activities of specific full-patch members of the Hells Angels Motorcycle Club. Det. Schoorl testified that the operation had between 12 and 15 people under surveillance.

[29] Both Det. Weeks and Det. Schoorl identified someone, whom I shall identify in this decision as "Mr. A", as a person of interest in the investigation. At the time the investigation commenced, Mr. A was a full-patch member of the Hells Angels involved

in supplying and distributing illicit drugs, including marijuana. At a date that is not clear but that was during the course of the investigation and before December of 2014, he was no longer a full-patch member.

[30] Both Det. Weeks and Det. Schoorl identified someone, whom I shall identify in this decision as "Ms. B", as another person of interest in the investigation. As of the investigation, she was an associate of Mr. A. The investigators believed that she was distributing illicit drugs, including marijuana, out of her home in the Ottawa suburb of Barrhaven and that Mr. A was her supplier.

[31] At the hearing, a document was entered into evidence entitled "Summary of Evidence & Source Directory - REGINA v [Mr. A], [Ms. B], [someone not relevant to the grievances], Andrea DeLAAT and Christopher D'CUNHA" ("the Batlow Summary"). It was referred in and appended to another document entered into evidence at the hearing that was identified as the "Disciplinary Fact Finding Report - Criminal Charges for Possession for the Purpose of Trafficking Marijuana and Conspiracy to Commit Trafficking Marijuana (D'Cunha and DeLaat) Conspiracy to Commit an Indictable offence/general contrary to Section 465, (1) (c) of the Criminal Code of Canada (DeLaat)", dated April 30, 2015, and authored by Tim Hamilton and Maureen Moran ("the CSC investigation report").

[32] At an early stage of Operation Batlow, a static video camera was installed on a pole outside Ms. B's house, which captured with dates and times video of the front of the house, including the front door and part of her driveway.

[33] As Operation Batlow progressed, the investigators began to more closely monitor Mr. A and Ms. B and her home by a variety of techniques, including audio and video monitoring and recording as well as discrete direct police surveillance and undercover police personnel who interacted directly with Mr. A and another individual close to them, identified in this decision as "Mr. C". At a point that was not disclosed, as part of the surveillance, the cell phone conversations of Messrs. A and C and Ms. B began to be monitored.

[34] Pursuant to a court order dated October 30, 2014, the Operation Batlow investigators entered Ms. B's house, searched it, recorded the illegal substances found there, and installed both video and audio feeds inside.

[35] The Batlow Summary summarizes all the surveillance information gathered by a number of different police officers from all the surveillance. Through the surveillance of Ms. B's house as part of Operation Batlow, the grievors came onto the police investigators' radar.

[36] The evidence disclosed that on 19 separate occasions between November 8, 2013, and December 5, 2014, Ms. de Laat attended Ms. B's house for the purpose of purchasing marijuana. The evidence disclosed that on nine separate occasions between June of 2014 and February 24, 2015, Mr. D'Cunha attended Ms. B's house and purchased several quantities of different types of marijuana for Ms. de Laat.

[37] After October 30, 2014, the Batlow Summary indicated that significant amounts of different types of marijuana were being stored in Ms. B's home, as well as paraphernalia normally linked to dealing it, including an electronic scale, a significant number of plastic lunch bags, large quantities of cash, and at least one firearm.

[38] The information in the Batlow Summary specific to the grievors is found between pages 115 and 168. It sets out in chronological order each attendance of one or the other of the grievors at Ms. B's home, including the following:

- the time either grievor arrived and entered the residence;
- the time either grievor left the residence; and
- the makes, models, and licence plate numbers of the vehicles the grievors drove.

[39] Before October 30, 2014, the static video surveillance captured the grievors entering and leaving Ms. B's residence. Some parts of the Batlow Summary include still photos from the surveillance. The phone surveillance of Mr. A and Ms. B also captured them. After October 30, 2014, the grievors were also captured at times on the audio surveillance installed inside the home, discussing purchasing marijuana.

[40] Ms. de Laat testified that in or about June of 2013, she suffered a serious injury that required donor ligaments and that after surgery, she found that marijuana helped

with the pain. She said that she had purchased marijuana in Kingston but that she had concerns because of her job and the proximity of the drug source to her job. She did not identify the specifics of her Kingston supplier.

[41] Ms. de Laat stated that she had known Ms. B when she had lived in Ottawa and that they had been high-school friends. She said that they had parted ways when she moved to Kingston. However, they had reconnected through Facebook. She admitted that she had smoked marijuana with Ms. B in high school, so after they reconnected, she figured that Ms. B might be able to "hook her up" with someone who could supply her with some.

[42] Ms. de Laat said that the first time she went to Ottawa to meet with Ms. B, she realized that Ms. B could and would be her supplier. She said the following about their first meeting at Ms. B's home: "I told her I needed an ounce of weed. She took out a bag, weighed it for me, and I paid for it." When her representative asked her what happened next, Ms. de Laat said, "We would catch up, roll a joint, socialize together." Going to Ms. B's home to purchase marijuana became a regular event for her.

[43] Ms. de Laat admitted that Ms. B might have been supplying drugs to others too, not just her. While she said that that concerned her, she said that she was looking for a product and that she was ignorant to the fact that in essence, Ms. B was a drug dealer. She later stated that she did know that other people bought marijuana from Ms. B. She said that she had seen purchases taking place.

[44] She admitted that she knew that Ms. B had to get the drugs from somewhere. She stated that she met Mr. A only once, although she had heard about him from Ms. B. She said that Ms. B would tell her about trips that she took with Mr. A and that she described him as "a rough person; lots of violence and retaliation against people." She said that when she learned this about Mr. A, her reaction was "not to ask her questions." When her representative asked her why, her response was, "Red flags went up, and I didn't want to know more. I thought something else was going on." When she was asked what that was, she said, "She would tell me that Mr. A had just been there and just left and she had supply. The violence she spoke of was extreme violence, and it was definitely a red flag."

[45] Ms. de Laat said that she enjoyed driving to Ottawa (when she went to purchase the drugs), her visits with Ms. B, and their discussions about their lives and families. She indicated that Ms. B was somewhat of a party animal, and she found that the stories provided some release. She said that in high school, Ms. B always drank, smoked marijuana, and looked for action and that Ms. B was never boring. She said that Ms. B's house was in total disarray; there was clutter everywhere, and a refrigerator was in the living room. She said that Ms. B had a son who lived with his grandmother. She stated that those facts and the fact that purchasing marijuana breached the Code were red flags for her.

[46] When her representative asked her why, given what she knew, she kept going, Ms. de Laat stated, "She had what I was looking for: marijuana."

[47] In discussing the red flags about the contact with Ms. B, Ms. de Laat said that her husband (Mr. D'Cunha) did not know Ms. B, but she admitted that the red flags about her involvement, including the risk to her job and family, were there before Mr. D'Cunha ever met Ms. B to purchase marijuana for her.

[48] Ms. de Laat stated that Mr. D'Cunha offered to pick up the marijuana for her. When her representative asked her why she had involved her husband, she stated simply, "I was looking to acquire it, ignoring red flags; didn't think I would get caught."

[49] Ms. de Laat said that in January of 2015, Ms. B told her that she was to move north. She further admitted that at this time, she had a familiarity with Mr. A. She said that Ms. B told her that Mr. A would take her place. Ms. de Laat agreed because she had nowhere else to get her marijuana. She stated that while she had concerns about dealing with Mr. A, she had concluded that he was Ms. B's supplier.

[50] Ms. de Laat said that she dealt with Mr. A only once and that her contact was still through Ms. B, whom she called via cell phone and who set up the February 24, 2015, meeting to purchase drugs, which was done by Mr. D'Cunha. When her representative asked her about having to call Mr. A and deal with him directly, her response was that she had been in the process of getting a medicinal licence for marijuana.

[51] In cross-examination, Ms. de Laat stated that she first started purchasing marijuana from Ms. B sometime shortly after her accident in June of 2013. While she did not state exactly how often she went to Ms. B's home, she did indicate that it could have been weekly or biweekly, depending on the amount of her use at that time.

[52] Mr. D'Cunha testified that he had had no performance issues at work. He had not been on the National Attendance Management Program, and he had been a member of the CSC Honour Guard. It attends funerals for staff members, the graduation ceremonies from the staff college, and police and peace officer memorial events.

[53] Mr. D'Cunha described his participation in purchasing marijuana for Ms. de Laat as being a "logistical cog in the wheel." He said that he purchased it for her as it helped her address her pain, allowed her to be functional, and helped her manage, which motivated him to help her.

[54] Pages 117 and 121 of the Batlow Summary record a visit to Ms. B's house by Mr. D'Cunha on May 9, 2014, between 12:33 p.m. and 12:44 p.m. Included are six still photographs taken from the static video surveillance camera. The information recorded as well as shown in the photographs disclosed that he arrived at the residence, walked to the front door, and entered the house. Also recorded and shown in the photos was a portion of a motorcycle and someone opening the front door for Mr. D'Cunha. The motorcycle was parked in the laneway. In no way could Mr. D'Cunha have not seen it, as he would have had to manoeuvre around it to park his vehicle.

[55] Det. Weeks testified that the photographs reproduced in the Batlow Summary are low resolution and that they were taken from the static video surveillance camera. He also stated that he reviewed the actual video surveillance footage that clearly disclosed that on May 9, 2014, when Mr. D'Cunha arrived at Ms. B's home, the motorcycle in the laneway had markings and colours clearly visible on it that were associated with the Hells Angels. He also testified that the person who answered the door of Ms. B's home and invited Mr. D'Cunha inside was Mr. A and that at that time, Mr. A was wearing his Hells Angels vest with its full patch and colours. Det. Weeks testified that displaying the patch and colours is a message that the location is connected to that organization.

[56] Det. Weeks was cross-examined by Mr. D'Cunha, who did not ask any questions about the surveillance information, including the pictures from May 9, 2014.

[57] Mr. D'Cunha testified that his understanding was that Mr. A was a friend of Ms. B. In his evidence in chief, Mr. D'Cunha addressed the evidence with respect to his May 9, 2014, visit to Ms. B's home. He stated the following:

- the date was not May 9, 2014, but September 5, 2014;
- he saw the motorcycle in the laneway;
- Mr. A held the door for him, and they passed each other as Mr. A exited the residence and Mr. D'Cunha entered it;
- he saw that Mr. A was wearing a motorcycle vest; and
- he never saw the back of the vest.

[58] With respect to the May 9, 2014, incident (which Mr. D'Cunha suggested was really on September 5, 2015), he was asked if he had a discussion about Mr. A with Ms. de Laat after that purchase. He replied, "No."

[59] There was a dispute as to whether the date the photos attributed by the Batlow Summary as May 9, 2014, was in fact September 5, 2014. Mr. D'Cunha suggested it was the latter date, while the report suggested the former. Based on all the other photographs of the grievors coming and going from Ms. B's home, it would appear that the date is September 5 and not May 9 because the date stamp recorded on all the still photos reproduced from the static video camera recorded the date with the numbers for the month first; i.e., for June 3, 2014, the date stamp read "06/03/14". The date stamp for Mr. D'Cunha's alleged May 9, 2014, attendance was "09/05/14" on all six photos taken that day. However, for the purpose of this decision, nothing turns on the difference in the date.

[60] Mr. D'Cunha stated that his next contact with Mr. A was on January 30, 2015, at which time he said that Mr. A told him about a fight he had been in and mentioned a hole in his jacket. He said he found it disturbing how freely Mr. A shared private information and questionable conduct with him. He said that he wanted nothing to do with Mr. A, that he would not associate with him, and that he did not want a relationship with him.

[61] That said, Mr. D'Cunha testified that his final contact with Mr. A was on February 24, 2015, when he went to Ottawa after Ms. de Laat had arranged a purchase with Ms. B. He said that after that visit with Mr. A (which was the day before the morning police raid), he shared his concerns with Ms. de Laat and suggested that they were putting themselves "at too much risk at this point." He said that at that point, the potential Hells Angels ties came up. He stated, "I had said I had seen a motorcycle in the driveway at one point." He said that on that night, they decided to stop dealing with Mr. A and Ms. B and to explore other alternatives. He also stated that before February 24, 2015, Ms. de Laat had not raised her concerns with him about Mr. A.

[62] In cross-examination, he said that he had received little training with respect to drugs but that the training he had received was with respect to operating the ION scanner and was about drugs in a prison environment.

[63] In cross-examination, it was pointed out to Mr. D'Cunha that he said that after his meeting with Mr. A on January 30, 2015, he was no longer comfortable with Mr. A, but he was comfortable with giving his and Ms. de Laat's mobile telephone numbers to Ms. B, who would not be in Ottawa but who would coordinate buys for them from Mr. A. It was also pointed out that he freely disclosed to Mr. A and Mr. C that he was a CSC employee. He said that Mr. A and Mr. C already knew it because Ms. B had told them.

C. Arrest, detention, and questioning by police on February 25 and 26, 2015

[64] On February 25, 2015, Operation Batlow culminated with multiple police raids at different locations throughout the province, including a 6:00 a.m. raid at the grievors' home. Roughly two ounces of marijuana were recovered from their dining-room table. They testified that upon being detained by the police that morning, they asked one of the arresting officers to call the CSC and notify it that neither of them would be at work. They were taken into custody and transported to the Ottawa Police Headquarters, where they were interviewed by Det. Schoorl. Evidence disclosed that while in police custody, they were provided with an opportunity to speak to legal counsel (which they did) before Det. Schoorl interviewed them.

[65] Between 8:24 p.m. and 8:45 p.m., Det. Schoorl interviewed Ms. de Laat, and between 8:52 p.m. and 9:04 p.m., he interviewed Mr. D'Cunha. Both interviews were recorded for video and audio. Transcripts of the interviews were entered into evidence.

[66] Ms. de Laat's transcript indicates that while Det. Schoorl asked a significant amount of questions or made a number of statements seeking some confirmation of their validity, Ms. de Laat rarely actually answered any questions, provided any information, or validated any statements with respect to purchasing or possessing marijuana, attending at Ms. B's home, or interacting with Messrs. A and C and Ms. B. With respect to direct questions or statements about what could be clearly identified as potential criminal activity, Ms. de Laat stated that she would not comment or make a statement.

[67] Mr. D'Cunha's transcript indicates that during the course of his interview with Det. Schoorl, he made the following admissions:

- his arrest had something to do with his visit the previous day to Ms. B's house;
- the time at which he believed he arrived at Ms. B's house the day before;
- two of Ms. B's friends were at the house, one of whom was Mr. A.;
- the purpose of being at Ms. B's house was to purchase marijuana for Ms. de Laat;
- Ms. de Laat used marijuana;
- Ms. de Laat would purchase an ounce or less at a time, which would last a couple of weeks;
- he and Ms. de Laat purchased from Ms. B because Ms. de Laat trusted her since she had been a childhood friend;
- when the police raided his house on the morning of February 25, 2015, there were about two ounces of marijuana on the coffee table that he had purchased the previous day;
- the dollar value that he had paid for that marijuana;
- he paid Mr. A for the marijuana;
- he had gone to Ms. B's house in the past to pick up marijuana, but the quantities had been less than what he had purchased on February 24, 2015;
- he and Ms. de Laat would make a purchase every couple of weeks;
- Ms. de Laat had been using marijuana for as long as he has known her;
- he had used marijuana in the past but not in the past three years;

- he would go to Ottawa to purchase it in the winter because Ms. de Laat did not feel confident driving in the winter;
- Ms. de Laat had told him that Mr. A had ties to the Hells Angels;
- due to the nature of his work, Mr. A's ties to the Hells Angels were a big red flag for him;
- Mr. A was already at Ms. B's house when he arrived there on February 24, 2015;
- it was the first time that he had bought from Mr. A, since in the past, his dealings had been with Ms. B;
- he knew that he was to see Mr. A about the purchase because Ms. B, who was out of town, had arranged it;
- he was at Ms. B's house for about 10 minutes, and Mr. A had to weigh the package;
- he purchased double the usual amount, at Ms. de Laat's request;
- he has been working on trying to get Ms. de Laat to either quit or reduce her usage of marijuana; and
- he was trying to get Ms. de Laat to do that because of the negative effect it would have on their careers as they both worked for the CSC, and her mother and grandmothers had also warned her of the risks, not just him.

[68] Both grievors were released early in the morning of the February 26, 2015, on a promise to appear.

D. News coverage of the grievors' arrests

[69] News of the grievors' arrests was publicized in the following newspapers:

- the *Kingston Whig Standard* on February 27 and 28 and March 2, 2015;
- the *Ottawa Sun* and the *Ottawa Citizen* on February 27 and 28, 2015, respectively;
- the *Peterborough Examiner* on February 28, 2015;
- the *Orleans Star* on March 3, 2015; and
- the *Wawa News* on March 14, 2015.

[70] All the newspaper reports were largely the same. They reported on the wide extent of raids and arrests related to Operation Batlow, identified the grievors as CSC

employees in Kingston, and stated that Ms. de Laat had been charged with conspiracy to traffic cannabis and that Mr. D'Cunha had been charged with possession for the purpose of trafficking.

E. The CSC's investigation

[71] On February 25, 2015, Theresa Westfall, the acting assistant deputy commissioner ("A/ADC") for correctional operations in the CSC's Ontario Region, issued a convening order authorizing a board of investigation, the relevant portions of which stated as follows:

> …
>
> ***WHEREAS*** *on or about February 25, 2015, Chris D'Cunha, A/Block Trainer, Regional Staff College, Ontario, and his spouse Andrea De Laat, CR 04 at Millhaven Institution/ Regional Treatment Center [sic] have both been allegedly questioned, charged and released on a promise to appear for Drug Related Charges.*
>
> ***THEREFORE****, I, Theresa Westfall, Acting Assistant Deputy Commissioner of Correctional Operations of Regional Headquarters, Ontario Region, do hereby appoint Tim Hamilton, AWO [Assistant Warden Operations], Bath Institution as Chairperson and Maureen Moran as Board Member of the Disciplinary Investigation.*
>
> ***I DIRECT AND CHARGE*** *the person (s) so appointed to faithfully execute the duties entrusted to them in the conduct of this investigation and to provide me with the complete circumstances surrounding the above-mentioned incident including:*
>
> *a) a background of the incident;*
>
> *b) description of the allegation(s); and;*
>
> *c) the chronology of the events.*
>
> *In the event that other misconduct is discovered during the course of the above mentioned investigation, and such misconduct is significantly different from the misconduct currently subject to investigation, The Board is required to obtain an amended Convening Order pertaining to same.*
>
> ***I FURTHER DIRECT*** *that the Board specifically analyse the following issues including any issues of compliance to law, policy and procedure:*
>
> *a) Review the circumstances surrounding the allegations of inappropriate conduct and provide any relevant findings;*
>
> *b) Possible damage to the reputations of the Correctional Service of Canada and the Public Service*

> *c) any other matter which is deemed relevant.*
>
> ***AND I FURTHER DIRECT*** *the Board to provide me with its finding on the above matters….*
>
> [Emphasis in the original]

[72] The convening order required that Ms. Westfall issue a final report by March 30, 2015. On March 26, 2015, the order was amended to change that date to April 30, 2015.

[73] As of the hearing, Maureen Moran was in an acting position as the administrator for security and intelligence at the Ontario Regional staff college. Her substantive position was as a correctional manager at Bath Institution, which she had held since 2006. She had been with the CSC for 21 years. During the investigation, she was in her substantive position. Mr. Hamilton did not testify. The evidence disclosed that the CSC investigators interviewed both grievors twice but separately each time.

[74] Mr. D'Cunha was interviewed on March 10, 2015, and again on April 24, 2015. At pages 12 through 14 of the CSC investigation report, Mr. D'Cunha is reported to have advised the CSC investigators as follows:

- that he had signed and understood the oath and affirmation document and the declaration on the CSC Standards and the Code;
- that Ms. B was the only person he knew from the list of people arrested;
- that he would not and did not go to any house in Ottawa to purchase drugs;
- that he went to Ottawa approximately four to six times in the past year and that, however, it could have been more often;
- that he had received sufficient training to stay away from people who may be associated with criminal organizations;
- that he had sent CSC documents from the CSC's network to his home email but that they were never forwarded to anyone else and that they were only for his review, at home;
- that on the advice of legal counsel, he would not comment on anything related to his criminal charge;
- that he attended Ms. B's home six to eight times in 2014 to 2015;
- that his attendances there had been only social visits;

- that he was not aware if Ms. de Laat was involved in anything related to drugs;
- that he did not know anyone named "Mr. A" or any of his associates;
- that he did not see anyone at Ms. B's house wearing gang colours; and
- that he knows that the Hells Angels is a criminal organization.

[75] Ms. de Laat was interviewed on March 11, 2015, and again on April 25, 2015. Both times, she was accompanied by a bargaining agent representative. At pages 10 through 12 of the CSC investigation report, it is reported that she advised the CSC investigators as follows:

- that she had signed and understood the oath and affirmation document and the declaration on the CSC Standards and the Code;
- that Ms. B. was the only person she knew from the list of people arrested;
- that she had seen Ms. B approximately eight times in the past two years;
- that she never knew Ms. B to do or sell any drugs;
- that she associated in public with Ms. B;
- that Ms. B lives in Barrhaven, Ontario;
- that she was not guilty and had not been convicted of the criminal charges;
- that she would never do anything like this to compromise her family's reputation;
- that she would not want her children around drugs;
- that she knows it is wrong and illegal to purchase drugs;
- that she went to Ottawa once every couple of months;
- that she never used sick leave to go to Ottawa;
- that the only emails she forwarded to her home email were about facial hair because her husband has a goatee;
- that she could not comment on the question about purchasing narcotics from Ms. B's home, on the advice of legal counsel;
- when she was asked to clarify her trips to Ms. B's home, she stated that she went there six or seven times during 2014 that 2015 and that her only relationship with Ms. B was as a friend from childhood;

- that she never went to Ms. B's home during working hours;
- that she was never aware that narcotics were sold at Ms. B's home;
- that she never aware that Mr. D'Cunha went to Ms. B's home to purchase narcotics; and
- that she did not know anyone named "Mr. A" or any of his associates.

[76] On April 24, 2015, Mr. D'Cunha emailed Ms. Moran the following:

> …
>
> *On a related note, upon further reflection after our meeting today, I would like to state for the record that during my entire tenure with the Service, I have never* ***knowingly associated*** *with anyone who had a criminal record, and furthermore, that I am also aware of the policies in the Code of Conduct governing such associations. Our discussions during the meeting in this regard were entirely hypothetical, as I have never been presented with such a situation in actual fact.*
>
> …
>
> [Emphasis in the original]

[77] The CSC investigation report disclosed the following:

- 10 times between April 8, 2014, and February 1, 2015, Mr. D'Cunha sent work-related documents to his home email address;
- some of the documents were training materials, and some appear to have been general information emails that could otherwise be in the public domain in some format;
- 4 times between July 12, 2011, and January 20, 2015, Ms. de Laat sent work-related documents to either her home email address or to that of Mr. D'Cunha; and
- some of the emails that Ms. de Laat forwarded contained personal and private information related to employees, including their home addresses and salary and pay details.

[78] The CSC investigation report was completed and delivered to Ms. Westfall on April 30, 2015. By courier, each of the grievors was provided with a redacted version of it on Friday, July 17, 2015. Redacted in the grievors' respective versions was information about the other grievor. The Batlow Summary, which is an appendix to the CSC investigation report, was not included in the versions that the grievors received.

[79] When the grievors were provided with the CSC investigation report, they were each invited to disciplinary hearings on July 23, 2015, at 1:00 p.m., in different rooms. They were also invited to provide written comments on the report at that time. At their request, the disciplinary hearings were postponed. Both were rescheduled to August 5, 2015.

[80] On August 5, 2015, the CSC investigators received a written response from Mr. D'Cunha to the redacted version of the CSC investigation report, the relevant portions of which are as follows:

> *Before getting started, I would like to inform you that my counsel has advised me of a reduction in my charge, of which I am providing attached information. As stated in previous meetings, I am not guilty of the charges before me, and I anticipate that the charge will be withdrawn.*
>
> …
>
> ***I will also repeat my statement, made previously in person, that I never knowingly associated with anyone who had a criminal record, or potential associations with organized crime groups.***
>
> …
>
> … ***At all times, I answered all questions to the best of my knowledge, truthfully, and necessarily constrained by instruction from counsel on offering comments to specific questions****….*
>
> …
>
> [Emphasis in the original]

[81] On August 5, 2015, the CSC investigators received a written response from Ms. de Laat to the redacted version of the CSC investigation report, the relevant portions of which are as follows:

> *Before getting started, I would like to inform you that my counsel has advised me of a reduction in my charges, of which I am providing attached information. As stated in previous meetings, I am not guilty of the charges before me, and I anticipate that they will eventually be withdrawn.*
>
> …
>
> *… According to Appendix I (Andrea DeLaat HRMS record), there are 4 days of Unauthorized LWOP recorded in 2013. All other leave had been entered and accounted for. The unauthorized leave was signed off by my supervisor Sarah Forbes and she was fully*

> *aware of it at the time. This leave was recorded as unauthorized leave without pay due to insufficient sick leave credits available. No other concerns with regard to my attendance were ever discussed between my managers and me,* ***and there certainly was NEVER any discussion of fraudulent or falsified activity with regards to my leave.*** *Every instance where leave was incurred, it was documented, submitted and approved in HRMS, with full knowledge of my supervisors. Are there specific documented instances that you are relying on to make the assertion of fraudulent leave? If so, where are they?*
>
> …
>
> [Emphasis in the original]

[82] Criminal defence counsel for each of the grievors wrote to the employer requesting for several reasons that the disciplinary hearings not proceed. One reason was that the Batlow Summary had been excluded from the CSC investigation report. On Wednesday, September 2, 2015, they were sent copies of the Batlow Summary, which they received on Friday, September 4, 2015. They maintained that they were still prejudiced as the CSC investigation report provided to each of them had been redacted.

[83] A second discipline hearing was held for each of the grievors on September 15, 2015. They attended the hearings with their representatives. A third disciplinary hearing was held for each of them, for Ms. de Laat on October 21, 2015, and for Mr. D'Cunha on October 23, 2015.

[84] Mr. D'Cunha testified that he cooperated with the CSC investigation. In cross-examination, a memo dated June 1, 2015, which he sent to A/ADC Westfall, was put to him. In it, he stated as follows:

> …
>
> *Ms. Westfall, throughout this entire process, I have cooperated fully with the investigators and other staff who have dealt with me, and I have dealt with the Service in good faith, knowing that I have done nothing wrong. I hope and expect that the Service will respond in kind, knowing its obligations under law and policy to treat me fairly.*
>
> …

[85] In cross-examination, it was suggested to Mr. D'Cunha that he did not fully cooperate with the investigation. He responded by stating that he did not answer all

the questions on instructions from his legal counsel not to answer any with respect to the criminal matter. He was brought to the transcript of his interview with Det. Schoorl and was pointed to where he had received legal advice to not speak, yet despite it, he had spoken quite freely and had provided a significant amount of relevant information to Det. Schoorl. When the dichotomy was put to him, he stated, "I was just trying to be cooperative." He admitted that he had been evasive on purpose during the CSC investigation.

F. Criminal proceedings

[86] A copy of the charge against Mr. D'Cunha was entered into evidence as part of the CSC investigation report. It stated that on or about February 25, 2015, in Kingston, for the purpose of trafficking, he unlawfully possessed a substance included in Schedule II of the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19, as amended), being 3 kg or less of cannabis marijuana, contrary to s. 5 of that Act. Thus, he committed an indictable offence under s. 5(3)(A.1) of that Act.

[87] A copy of the charge against Ms. de Laat was not entered into evidence. However, as part of the CSC investigation report, a copy of the undertaking she signed on her release on February 26, 2015, indicated that she had also been charged under s. 5 of the *Controlled Drugs and Substances Act* of possessing of 3 kg or less of cannabis marijuana for the purpose of trafficking. Thus, she committed an indictable offence under s. 5(3)(A.1) of that Act and under s. 465 of the *Criminal Code* (R.S.C., 1985, c. C-46, as amended), which was conspiracy to traffic a substance under Schedule II of the *Controlled Drugs and Substances Act*.

[88] On January 18, 2017, the grievors attended court in Ottawa to dispose of the charges against them. A certified copy of the transcript of the plea and sentencing before the Honourable Justice Paciocco ("the plea transcript") was entered into evidence.

[89] As part of a plea agreement with the Crown, Ms. de Laat pleaded guilty to the following charge that was read into the record that day:

> …
>
> *… on or between the 8th day of November 2013, and the 25th day of February in the year 2015, the City of Kingston and at the City of*

> *Ottawa, in the East Region, unlawfully did possess a substance included in Schedule II of the Controlled Drugs and Substances Act with cannabis marijuana, contrary to Section 4(1) of the said Act, thereby committing an offence under section 4(4) of the said, Act….*
>
> …

[90] The plea transcript indicated that the Batlow Summary was entered into evidence, and it was confirmed that both grievors had received copies of it. It further indicated that the evidence against Ms. de Laat was found on pages 115 to 169, 208, and 209, although the index at the front was off by a page. In actuality, the facts with respect to the grievors are set out on pages 115 to 168, 207, and 208.

[91] The plea transcript stated that the following summary was made by the Crown attorney presiding, after the Batlow Summary was entered into evidence as an exhibit:

> …
>
> *Ms. DeLaat attended a residence in Ottawa [address withheld] approximately 19 times between November the 8th, 2013 and December the 5th, 2014, purchasing cannabis marijuana at each of those visits… Each time at each visit she purchased between one and two ounces of cannabis marijuana and that a search warrant was executed at her home at [address withheld] in Kingston on February the 25th, 2015, and a further 55 grams or approximately 2 ounces of cannabis marijuana was found in her residence and she admits that she possessed that marijuana as well. That's a summary of what is contained in the document that I've handed up. The Crown is relying on that document, the allegations in that document and my understanding is she's admitting all of the information in the document I've handed with respect to her, not against anybody else.*
>
> …

[92] The plea transcript stated that Ms. de Laat confirmed that she had read pages 115 to 169, 208, and 209 of the Batlow Summary, that she agreed with the Crown that the information in it was true, and that the summary that the Crown attorney provided to Justice Paciocco was true.

[93] Ms. de Laat was given an absolute discharge and was ordered to enter into a peace bond in the sum of $1000.00 for a period of 12 months.

[94] Part of the plea arrangement with the grievors was that the charges against Mr. D'Cunha would be withdrawn on the understanding that he would enter into a peace

bond and recognizance in the amount of $1000.00 for a period of 12 months, which he did.

G. Ms. de Laat's leave

[95] As part of the CSC investigation report, Ms. de Laat's leave record for the period including 2013 to 2015 was produced.

[96] Ms. de Laat testified that she had had a flexible work arrangement. She stated that she would work either from 8:00 a.m. to 4:00 p.m. or from 9:00 a.m. to 5:00 p.m. She also said that she ran a number of errands for the office. The RTC for maximum-security inmates was at Millhaven Institution, while the RTC for medium-security inmates was at Collins Bay Institution. She said that she had to carry supplies back and forth between the two institutions. She stated that she had made an agreement that she would receive compensatory time for gas and mileage for doing these tasks.

[97] Both Ms. Napier-Glover and Ms. Storring testified that Ms. de Laat was a day employee who worked an eight-hour shift Mondays through Fridays that started as early as 8:00 a.m. or as late as 9:00 a.m. and that finished as early as 4:00 p.m. (if she started at 8:00 a.m.) or as late as 5:00 p.m. (if she started at 9:00 a.m.). They also agreed that Ms. de Laat was often tasked with picking up supplies for the office, which included going to Kingston Oxygen Supply. This arrangement was fluid, meaning that sometimes, she would run these errands either on her way into work, and arrive a little later, or she would leave early and pick things up on the way home and bring them in on the next workday.

[98] Ms. Napier-Glover confirmed in cross-examination that Ms. de Laat sometimes had to go to Collins Bay Institution with respect to supplies. Other than the reference to Kingston Oxygen Supply, I was not advised as to what other supplies Ms. de Laat was asked to purchase or pick up or from where. I assume that they were office supplies, given that she worked as an administrative assistant.

[99] In cross-examination, it was put to Ms. Napier-Glover that Ms. de Laat had a flexible working arrangement. Ms. Napier-Glover stated that while there was an arrangement for picking up supplies, other than the flexibility of starting sometime between 8:00 a.m. and 9:00 a.m. and ending sometime between 4:00 p.m. and 5:00

p.m., there was no such arrangement. No specific details of the arrangement were put to either Ms. Storring or Ms. Napier-Glover.

[100] Ms. Storring testified that Ms. de Laat had to account for being away from work and that leave was to be entered into the electronic leave system within five days.

[101] Of the 19 times between November 8, 2013, and December 5, 2014, on which police surveillance recorded Ms. de Laat entering and exiting Ms. B's home, 16 were weekdays on which Ms. de Laat would normally have been at work unless she was on some form of authorized leave. The following is a list of the 16 dates, with Ms. de Laat's arrival and departure times and the total time she spent at Ms. B's home:

Date	**Arrival time**	**Departure time**	**Visit duration**
Friday, November 8, 2013	1:13 p.m.	2:41 p.m.	1 hour 28 minutes
Monday, December 16, 2013	2:07 p.m.	2:48 p.m.	41 minutes
Thursday, May 22, 2014	2:08 p.m.	2:34 p.m.	26 minutes
Tuesday, June 10, 2014	2:29 p.m.	2:49 p.m.	20 minutes
Friday, June 27, 2014	2:12 p.m.	2:47 p.m.	35 minutes
Thursday, July 3, 2014	2:35 p.m.	2:47 p.m.	12 minutes
Friday, August 1, 2014	12:34 p.m.	1:26 p.m.	52 minutes
Friday, August 8, 2014	1:20 p.m.	2:14 p.m.	54 minutes
Thursday, August 14, 2014	1:20 p.m.	2:27 p.m.	1 hour 7 minutes
Monday, August 25, 2014	1:19 p.m.	2:06 p.m.	47 minutes
Friday, September 19, 2014	11:47 a.m.	12:44 p.m.	57 minutes
Thursday, September 25, 2014	12:02 p.m.	1:03 p.m.	1 hour 1 minute
Tuesday, October 7, 2014	2:04 p.m.	2:21 p.m.	17 minutes
Friday, November 14, 2014	1:39 p.m.	2:32 p.m.	53 minutes

Friday, November 21, 2014	12:38 p.m.	1:33 p.m.	55 minutes
Friday, December 5, 2014	1:21 p.m.	2:12 p.m.	51 minutes

[102] Depending on the part of Kingston Ms. de Laat left from, her route, and the time of day, the one-way drive between Kingston and Ottawa took about 2 hours. Except for the 3 occasions when she was at Ms. B's house for 20 minutes or less, Ms. de Laat spent between half an hour and an hour there. Thus, a round trip for her would have taken somewhere in the range of at least 4.5 hours if not closer to between 5 and 6 hours.

[103] On the two occasions in 2013 on which Ms. de Laat was observed entering and exiting Ms. B's house, she was on leave from work due to an undisclosed disability. On June 10 and 27 and September 19 and 25, 2014, when she was observed entering and exiting Ms. B's house, she was on vacation leave or had taken her personal leave day.

[104] For May 22, August 1, 8, 14, and 25, and October 7, 2014, when Ms. de Laat was observed entering and exiting Ms. B's house, the employer's leave records did not disclose that she was on any type of leave.

[105] On November 14 and 21 and December 5, 2014, when Ms. de Laat was observed entering and exiting Ms. B's house, the employer's leave records disclose that she had entered into the leave system that she was sick. Since she did not have any sick leave credits available then, the time was recorded as sick leave without pay ("SLWOP").

[106] On July 3, 2014, Ms. de Laat had entered into the leave system that she had been on family related leave for 3.5 hours.

[107] Set out in Appendix A-1 of the collective agreement are the pay grids for the different groups. The CR pay grid discloses that the rates of pay for a CR-04 were between $45 189.00 and $48 777.00.

H. The CSC's contact with the Canada Border Services Agency

[108] The evidence disclosed that Ms. de Laat ran a small jewellery business and that as part of it, she maintained a post office box on Wellesley Island in the State of New York in the United States. She also testified that she had family that lived in the U.S. As

such, she stated that she, Mr. D'Cunha, or both of them would travel to the U.S. every couple of weeks. The evidence disclosed that as part of the CSC investigation, the investigators were in touch with the Canada Border Services Agency (CBSA).

[109] The grievors took issue with the CSC investigators contacting the CBSA as part of the investigation.

I. Ms. de Laat's prior discipline

[110] On January 31, 2014, Ms. de Laat received a written reprimand for leaving work early on December 27, 2013, without authorization from a manager. There is no evidence that the written reprimand was grieved or set aside.

J. The grievors' privacy complaint

[111] Both grievors filed a privacy complaint against the OPS for inappropriately disclosing personal information pertaining to criminal charges against them to the CSC, contrary to the Ontario *Municipal Freedom of Information and Protection of Privacy Act* (R.S.O. 1990, c. M.56). On July 27, 2017, the Ontario Information and Privacy Commissioner found that that disclosure of their personal information was not consistent with s. 32 of that Act.

[112] At the completion of the evidence, a copy of the "Privacy Complaint Report" dated July 27, 2017, was filed in evidence. No witnesses were asked any questions about it.

K. Ms. de Laat's termination

[113] Ms. Russon testified that before April of 2015, she had never interacted with Ms. de Laat. She said that she was briefed on the situation involving Ms. de Laat when she arrived at the RTC. She said that she had been responsible for reviewing Ms. de Laat's suspension and meeting with and assisting the investigative team. She confirmed that in either April or May of 2015, she received and reviewed the CSC investigation report, which included an unredacted version of the Batlow Summary. She confirmed that she met with Human Resources representatives as well as Ms. Westfall. She said that she convened a disciplinary hearing and that she determined that based on the information she had received, discipline was warranted.

[114] As set out earlier, the disciplinary hearing was scheduled and rescheduled several times, and it eventually took place on September 15, 2015. Ms. Russon stated that at that hearing, Ms. de Laat was asked specific questions about her attendances at Ms. B's home and the purchase of drugs, if she had a drug problem, and if she was aware that it was inappropriate for her to have a connection with the Hells Angels while working for the CSC. She stated that Ms. de Laat told her that she would not answer questions related to the Batlow Summary and the criminal charges. She stated that as for a drug problem, Ms. de Laat said that she did not have one. And with respect to the question about the Hells Angels connection, she stated that Ms. de Laat acknowledged that it was inappropriate.

[115] When Ms. Russon was asked if she felt that Ms. de Laat had displayed any remorse for what she had done, Ms. Russon said that Ms. de Laat had not done so and that she had not apologized.

[116] Ms. Russon felt that termination was warranted for the following reasons:

- Ms. de Laat had been charged with buying (illicit) drugs on numerous occasions;
- she had been seen in a house that was frequented by a member of the Hells Angels and that was a known location for the sale of illicit drugs;
- CSC staff are expected to be role models for inmates;
- many inmates are in federal penitentiaries for drug-related offences, including dealing drugs, and when a staff member behaves in the same manner that caused inmates to be incarcerated, it is a risk to the CSC, its staff, and the inmates;
- the CSC and its staff lose trust in an employee who is charged criminally, which could include that the staff fears for its safety;
- Ms. de Laat sending protected information to her home brought up the question of whether it was shared with or seen by anyone unauthorized to see it; and
- CSC employees are expected to account for their time, and Ms. de Laat had been absent without leave ("AWOL") and had stolen time from the employer.

[117] Ms. Russon stated that Ms. de Laat had breached Standard One of the CSC Standards, related to the responsible discharge of her duties, by being AWOL a number of times and by failing to record leave or to have it approved.

[118] Ms. Russon said that Ms. de Laat breached Standard Two of the CSC Standards, related to conduct and appearance, by acting in a manner that was likely to discredit the CSC. Namely, she had been charged with criminal offences with respect to the possession of and for the purpose of trafficking illicit drugs, which did not reflect positively on the CSC.

[119] With respect to Standard Four of the CSC Standards, on relationships with offenders, Ms. Russon said that Ms. de Laat frequented a location that a Hells Angels member also frequented. She referred to him as an ex-offender. As such, Ms. de Laat would have required authorization from her superior to meet with him.

[120] With respect to Standard Five of the CSC Standards, on conflicts of interest, Ms. Russon testified that Ms. de Laat breached it by not being forthcoming and honest with the CSC investigation. CSC employees are expected to be honest and forthcoming and to not commit crimes that are contrary to its ethics. In addition, time theft goes to the person's honesty and integrity.

[121] With respect to Standard Six of the CSC Standards, about protecting information, Ms. Russon said that by sending protected information to her home through unsecure channels, Ms. de Laat breached the employer's security policies.

[122] Ms. Russon did not identify any mitigating factors but instead referred to aggravating factors, including a limited number of years of service and an instance of discipline on file. When she was asked why termination was chosen as opposed to some other form of discipline, she replied, "I don't believe someone who buys drugs from known bikers should be working in our system. It puts people at risk. It puts staff and inmates at risk." She said that she believed that the bond of trust had been broken and that it could not be repaired.

[123] Ms. Russon was asked in cross-examination why she did not wait for the outcome of the criminal proceedings before she determined the discipline. She answered that the onus was on the CSC to expedite disciplinary matters; the threshold for discipline is different than in criminal proceedings. She confirmed that her decision to terminate was based largely on the Batlow Summary.

[124] In cross-examination, Ms. Russon confirmed that she did not look into Ms. de Laat's work performance; nor did she speak to her supervisors. She also agreed that what appeared in the newspapers about the arrest and the criminal investigation might not have been entirely accurate.

L. Mr. D'Cunha's termination

[125] David "Scott" Edwards retired from the CSC in early 2017. From October of 2015 until his retirement, he was the warden of Millhaven Institution. He had a 28-year career with the CSC, starting in 1989 as a CX and working his way up through the ranks to management positions staring in about 1997 as a correctional manager.

[126] In October of 2017, when Mr. Edwards arrived as Millhaven Institution's warden, the investigation process with respect to the grievors had been concluded. As Mr. D'Cunha's substantive position reported up to Mr. Edwards in the organization, the discipline decision fell to him.

[127] Mr. Edwards testified that he determined that Mr. D'Cunha should be terminated from his CSC position based on his misconduct in relation to the CSC Standards that had been breached as set out in the Code.

[128] Mr. Edwards stated that Mr. D'Cunha breached Standard Two of the CSC Standards, on conduct and appearance, by his off-duty conduct of attending at a house in Barrhaven where he met with the Hells Angels member, purchased illicit drugs, and brought them to Kingston.

[129] Mr. Edwards said that Mr. D'Cunha breached Standard Four of the CSC Standards, about relationships with offenders or ex-offenders, by his contact and business relationships with Mr. A and Ms. B and by attending at the home in Barrhaven where he purchased the illicit drugs.

[130] Mr. Edwards said that Mr. D'Cunha breached Standard Five of the CSC Standards, on conflicts of interest, again with respect to his relationship with Mr. A and Ms. B and the business of attending the house in Barrhaven to purchase illicit drugs. He said that that did not conform to Mr. D'Cunha conducting his duties, as a member of the CSC, with honesty and integrity. He was a peace officer; he should not

have been hanging around with or doing business with Hells Angels or drug dealers, who do not have high morals or integrity.

[131] Mr. Edwards said that with respect Standard Six of the CSC Standards, on protecting information, Mr. D'Cunha breached it by sending protected information to his home email address. He knew or ought to have known what was protected and what was not protected and what he could or could not send. He also referred to Mr. D'Cunha breaching the government security policy.

[132] With respect to mitigating factors, Mr. Edwards said that he took into account that Mr. D'Cunha had had eight years of service and a discipline-free record. He also took into account that he was the ION scan operator and trainer, as well as his level of experience and initiative. He said that despite the mitigating factors, the fact that Mr. D'Cunha was involved in drug activity made it difficult. He also pointed to the fact that Mr. D'Cunha had not been forthcoming or cooperative in the CSC investigation, which supported the finding that he did not possess a high level of honesty.

[133] In cross-examination, Mr. Edwards stated that the breach of the security policy related to Mr. D'Cunha sending information over an unsecure network. He confirmed that had Mr. D'Cunha printed the material and taken it home, it would not have been a breach of that policy. The problem was the unsecure network, which could have allowed protected information to go astray.

M. Post-termination

[134] Referenced in the plea transcript were discussions about Ms. de Laat having obtained a prescription and a medical licence for possessing and using medicinal marijuana. She testified that she obtained the licence in August of 2015, after being referred to a new physician in or about May or June 2015. No copy of this medical licence or prescription or referral was produced at the hearing.

[135] Both grievors testified as to the effects that the arrests, criminal proceedings, and terminations had on them and their families.

[136] Initially due to the arrest, neither grievor was allowed to volunteer with their children's schools. This was particularly difficult with respect to one child, who is disabled. The disability was not disclosed to the hearing.

[137] At the hearing, Ms. de Laat indicated that she had gone back to school and that she was completing a law clerk program.

[138] At the hearing, Mr. D'Cunha indicated that he had not been able to secure employment since his termination.

III. Summary of the arguments

A. For the employer

[139] The test in cases such as these is set out in *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 CLRBR 1 ("*Wm. Scott*"): Was there misconduct by the grievors? If so, was the discipline imposed by the employer an appropriate penalty in the circumstances? If it was not appropriate, what alternate penalty is just and equitable in the circumstances?

[140] The CSC is a special employer with a special mandate that relies on public trust.

[141] While Ms. de Laat testified about her health issues and pain, no medical evidence was brought forward to substantiate these facts or the need for her to self-medicate. Her actions were still illegal. She purchased an illegal drug from a friend and needed a lot of it. At the same time, she worked for an organization with the purpose to keep people from committing crimes. She must have known that her actions were wrong and not in line with her duties and that they could get her into trouble.

[142] Ms. de Laat explained that she purchased her drugs in Ottawa rather than in Kingston, where she lived. She felt it was better not to buy locally, potentially from an offender. In short, she did it so she could not be caught, and she thought that she would not be caught.

[143] Unfortunately for the grievors, Ms. B's home was under police surveillance. Perhaps they should have considered that possibility. Ms. de Laat knew that Ms. B was a drug dealer who likely had relationships with inappropriate people. Both grievors identified Mr. A as someone who raised in their words "red flags". They identified those red flags, which particularly included violent behaviour.

[144] Ms. de Laat brought her husband, Mr. D'Cunha, into this circle. They both worked at the CSC, and she should have known that as a CX, he certainly should not have been involved in this type of activity.

[145] The grievors' marijuana purchases continued for a prolonged period. It was not a one-off event. They did not get involved accidentally. Ms. de Laat maintained the relationship and fed and nourished the situation. Clearly, the relationship was not in line with the employer's values and ethics. They willfully and knowingly associated with criminals — people who were doing illegal things. Over a period of years, they kept up their association and activities with these individuals, buying a lot of drugs while knowing that doing so breached the employer's values.

[146] Once they were caught, the grievors not only denied the charges against them but also did not cooperate with the employer's investigation. They insisted on obtaining an un-vetted copy of the police report before participating in the final meetings as part of the discipline process.

[147] While Ms. de Laat did plead guilty and did receive an absolute discharge, she could have had a legal way to purchase marijuana medicinally, but she chose not to. She is stuck with what she did. Both grievors would like things to be different. The fact that laws did change does not erase drug trafficking crimes.

[148] The employer's position is that the coming change in the laws with respect to cannabis should not alter the fact that the grievors did something illegal.

[149] The employer conceded that there is no evidence that either Ms. B or Mr. A were ever convicted of a criminal offence or were offenders as defined by the CSC Standards or the Code.

[150] Ms. de Laat's termination was also for time theft. She suggested that she had a deal in place with her superiors for flexible time. However, the employer's evidence was not challenged, which is a breach of the rule in *Brown and Dunn*, (1893) 6 R. 67 (H.L.). Ms. de Laat purchased drugs on the employer's time. This is important.

[151] Mr. D'Cunha's misconduct was related not only to purchasing the marijuana but also to sending information to his home email account. That should not have been done; private information could have been compromised on a non-secure network.

[152] While Ms. de Laat was not a CX or a peace officer, Mr. D'Cunha was. There are differences between the two grievors. Most notably, he should have known given his position and training that Mr. A was a member of the Hells Angels.

[153] The employer referred me to Richer v. Deputy Head (Correctional Service of Canada), 2012 PSLRB 10, Sather v. Deputy Head (Correctional Service of Canada), 2013 PSLRB 95, Hughes v. Parks Canada Agency, 2015 PSLREB 75, Braich v. Deputy Head (Correctional Service of Canada), 2017 FPSLREB 47, Gravelle v. Deputy Head (Department of Justice), 2014 PSLRB 61, Murdoch v. Deputy Head (Canada Border Services Agency), 2015 PSLREB 21, Peterson v. Deputy Head (Correctional Service of Canada), 2017 PSLREB 29, Yayé v. Deputy Head (Correctional Service of Canada), 2017 PSLREB 51, Knox v. Deputy Head (Canadian Food Inspection Agency), 2017 PSLREB 40, Lapostolle v. Deputy Head (Correctional Service of Canada), 2011 PSLRB 138 (upheld in 2013 FC 895, Stokaluk v. Deputy Head (Canada Border Services Agency), 2015 PSLREB 24, Basra v. Deputy Head (Correctional Service of Canada), 2014 PSLRB 28, Stene v. Deputy Head (Correctional Service of Canada), 2016 PSLREB 36, Petrovic v. Deputy Head (Correctional Service of Canada), 2015 PSLREB 16, Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services) (2012), 226 L.A.C. (4th) 205 ("OPSEU"), and Alberta v. Alberta Union of Public Employees, Local 012 (2011), 206 L.A.C. (4th) 282 ("Alta. v. AUPE").

[154] The grievors repeatedly and knowingly breached the CSC's *Rules of Professional Conduct*, the Code, and values and ethics. As they continued to do what they did, they displayed a lack of concern for their employer and its operations and cared only for themselves. They acted as if they would not be caught. They must face the consequences of their actions, for which they took no responsibility. The employer determined that they cannot be trusted; their behaviour was unacceptable and cannot be tolerated.

[155] The employer submitted that the general public would be of the view that the grievors should not be allowed to work for the CSC.

[156] The employer requested that the grievances be dismissed.

B. For Ms. de Laat

[157] Ms. de Laat stated that this is a matter of quantum of discipline. She is not seeking a reimbursement of any lost salary, merely reinstatement to her position.

[158] The letter of termination lists four grounds upon which the employer based the decision to terminate Ms. de Laat, namely, the following:

- she attended an address in Barrhaven to purchase illegal substances;
- in doing so, she met with Hells Angels members and associates;
- the police found that she was in possession of marijuana, and she was charged criminally; and
- she failed to enter leave into the leave system her trips to Barrhaven.

[159] Ms. de Laat stated that the employer did not come to the process with clean hands. It did not put forward the relevant salient document it relied on in its investigation, which should be set off against her misrepresentations.

[160] Ms. de Laat stated that the employer did certain things, such as contacting the CBSA, and that it shared information when it should not have.

[161] With respect to the criminal proceedings, Ms. de Laat received an absolute discharge, yet the headlines of what happened raises eyebrows. This is a matter of proportionality. Discipline should be corrective. While there was talk of potential security breaches, the fact is that none occurred. While Det. Weeks inferred that drugs could have potentially infiltrated into correctional institutions, there is no evidence that it happened or that it would happen. This is a case of simple possession.

[162] Ms. de Laat's conduct merited some discipline but not termination. Note the mitigating criteria set out by Justice Paciocco in the plea transcript. In viewing the sentencing, Justice Paciocco asked the question of whether it was likely that Ms. de Laat would offend again, to which the answer is no. She purchased the marijuana to medicate herself without procuring it through the proper channels.

[163] While on the face of it, Ms. de Laat's behaviour appeared serious, it was not so serious if it is considered that the law covering marijuana was about to change. Det. Weeks referred to the grievors as "small fries who were in the wrong place at the wrong time."

[164] It appears that the investigators obtained a copy of the police report and said that the situation looked terrible and therefore was terrible without looking closer at the facts. Not all the facts set out in the police report with respect to Ms. de Laat are necessarily accurate.

[165] Ms. de Laat was sufficiently contrite. She showed remorse and accepted responsibility for her actions. That should weigh significantly in the determination. Her evidence was candid, forthcoming, truthful, and not argumentative.

[166] Ms. de Laat submitted that the employer's actions in dealing with the police report should be considered a mitigating factor.

[167] Ms. de Laat stated that her failure to enter leave in the leave system would not merit the termination of her employment. The evidence did not disclose that she was not meeting her time requirements. While Ms. Napier-Glover was a stickler for entering leave into the system, the facts disclosed that often, Ms. de Laat was permitted the flexibility of purchasing supplies for the office when it was convenient for her. This does not excuse her actions of purchasing drugs, but it is not evidence that she was AWOL, as was submitted.

[168] Ms. de Laat was guilty of the simple criminal possession of marijuana. She was not a CX or a parole officer; nor was she a manager. She worked in an administrative capacity. She did not and does not present a security risk.

[169] Ms. de Laat might not have cooperated with the CSC investigation. However, she acted on legal advice.

[170] Ms. de Laat stated that she used marijuana medicinally, albeit obtaining it through illegal channels.

[171] Ms. de Laat did not suggest that she needed an accommodation; one cannot express remorse and contrition if one required an accommodation.

[172] Ms. de Laat is not a drug dealer. There is no evidence that she was responsible for drugs within the CSC's institutions. There is no evidence that she was a poorly performing employee.

[173] No evidence suggested that Ms. B or Mr. A have criminal records. The evidence did suggest that Ms. de Laat purchased her drugs from them and that she did know that Ms. B was selling drugs to others. There is no evidence that Ms. de Laat knew the full extent of the criminal activity of either Ms. B or Mr. A.

[174] The jurisprudence with respect to discipline cases is fairly straightforward. In answer to the first question of the *Wm. Scott* test, conduct occurred that warranted discipline. The issue from Ms. de Laat's point of view is whether the amount of the penalty, the termination, was appropriate, and if not, what the appropriate penalty to render should be in the circumstances.

[175] Ms. de Laat referred me to *Braich* and compared the facts in that case to those of this case. While in *Braich*, the adjudicator found the association by CSC employees with criminal gangs deeply troubling, the facts in this case do not disclose a similar situation. The evidence did not clearly show that Ms. de Laat had a proximity to the Hells Angels; there was no evidence that she dealt with a gang.

[176] In *Soegard v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 52, the grievor in that case did not disclose the facts of his arrest and detention to the employer although he was required to by the CSC Standards and the Code. Despite holding back on that information, the adjudicator found that he had displayed a serious understanding of his misconduct and reinstated him. Ms. de Laat explained her actions, and her version of events was consistent with a finding that she is credible.

[177] In *Shandera v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 26, the grievor in that case had been terminated from his CX position based on a finding that he had stolen money and equipment from the employer. The employer in that case stated that as a CX, Mr. Shandera was to be held to a higher standard. In this case, Ms. de Laat was not a CX but an administrative assistant who had very little risk of inmate contact. No evidence was adduced that reinstating her would pose a risk. No

suggestion was made of information being disseminated improperly or of improper conduct with inmates.

[178] In *Chatfield v. Deputy Head (Correctional Service Canada)*, 2017 PSLREB 2, the grievor, Ms. Chatfield, was terminated from her employment as a CX-02 after the CSC discovered that she had lied about the death of her father and had led it to believe she was on bereavement leave when in fact she was on vacation in Mexico. The question of her mental state was discussed when addressing the issues of discipline and the amount of it. In this case, Ms. de Laat admitted that what she did was wrong. Who she is and where she was in her life should be examined. She described who she was and explained her actions. Despite being labelled a "small fry" in the grand scheme of the investigation, in executing a warrant, the police broke into her house. She and Mr. D'Cunha had their names splashed on the front pages of newspapers, and they both lost their jobs. She has suffered sufficiently for her misdeeds.

[179] Ms. de Laat referred me to paragraphs 73 and 74 of *Chatfield*, where it states that even when an employee has engaged in an act of theft, termination of employment is not always justified. Adjudicators and arbitrators apply a balancing approach to determine whether an employer had just cause to dismiss an employee. A number of factors must be considered when determining ultimately whether the trust can be restored that is the foundation of all employment relationships. Those factors are set out in detail at paragraph 74 of that decision.

[180] Ms. de Laat has learned her lesson. She is able to purchase marijuana legally, and the risk of her reoffending is nil.

[181] It is true that Ms. de Laat was less than candid when she was caught. However, she is not looking for sympathy; she and Mr. D'Cunha have suffered enormous hardship. She understands the CSC's role and responsibilities. The bond of trust has not been broken, and she has rehabilitative potential.

[182] Ms. de Laat pled guilty and received an absolute discharge. In weighing the criteria set out in paragraph 74 of *Chatfield*, she submitted that there are sufficient facts to merit her reinstatement.

[183] *Rahim v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 121, in referring to *Bristow v. Treasury Board (Canada Employment and Immigration Commission)*, PSSRB File No. 166-02-14868 (19850422), [1985] C.P.S.S.R.B. No. 114 (QL), holds that absent a long service record, credibility and the expression of remorse is sufficient. At paragraphs 78 and 79, the adjudicator references Mr. Rahim's lack of remorse and his intent and states that ignorance is not a defence. Ms. de Laat has never pleaded ignorance, and she spoke candidly about her actions. At paragraph 83 of *Rahim*, the adjudicator determines that the critical issue is whether or not the employment relationship was irreparably severed such that it can be concluded that in the future, such misconduct would not be engaged in. In this case, the very basis of the reasoning behind Ms. de Laat's actions, possessing marijuana, would be legal.

[184] Ms. de Laat referred me to *Matthews v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 38, stating that while lying can be serious, the employer's actions during the investigative process neutralized her lies to it.

[185] With respect to the cases submitted by the employer, while Ms. de Laat did commit misconduct, the evidence does not meet the second part of the *Wm. Scott* test, namely, whether the discipline imposed was excessive.

[186] Ms. de Laat did not act in a manner that was a serious breach of the *Criminal Code*. Her actions did not bring the CSC's reputation into disrepute.

[187] With respect to *OPSEU*, Ms. de Laat went to Ms. B's house to purchase marijuana, not to hang around and socialize. She did not buy the marijuana to resell or distribute it. The association with Ms. B was not such as to meet the test set out in *OPSEU*.

[188] With respect to *Alta. v. AUPE*, Ms. de Laat's role was not the same as that of a CX, which should have some impact on the decision. She attracts a lower standard than Mr. D'Cunha.

C. For Mr. D'Cunha

[189] Mr. D'Cunha submitted that the following three things led to his dismissal:

- the purchase of the illegal drugs;
- their purchase from a Hells Angels member; and

- sending protected documents to his home email account.

[190] Mr. D'Cunha submitted that the criminal charges against him were withdrawn.

[191] Mr. D'Cunha submitted that he admitted to purchasing the marijuana. However, he took issue with the depth and perception that the employer attributed to him of his knowledge that Mr. A was a member of Hells Angels, and he challenged the employer's credibility on this point. He submitted that regardless of the level of training in or lack of training related to organized crime groups, his training had been from an institutional standpoint, and his common-sense knowledge of the subject matter was not brought into play in his dealings with Ms. B and Mr. A at the time.

[192] Mr. D'Cunha did admit that both Ms. B and Mr. A were unsavoury characters. However, nothing had led him to believe that they had a direct connection with any organized crime group.

[193] Mr. D'Cunha pointed to his statement to police on the night of his arrest, in which he said that his wife had told him that Mr. A had ties to the Hells Angels. He went on to state that his comments to police were enthusiastic extrapolations done in the confusion and frustration of the day. He said that he did not attempt to mislead the police but that he attempted to be cooperative and to share information.

[194] Mr. D'Cunha submitted that he understands how the employer can view purchasing drugs from a Hells Angels associate as a serious issue. However, he referred to Det. Weeks's comments that he and Ms. de Laat were not the targets of the investigation and search warrants until the last possible moment.

[195] Mr. D'Cunha also submitted that there was no evidence of any illegal activity related to him and the CSC's institutions.

[196] Mr. D'Cunha submitted that at the time he interacted with Mr. A, Mr. A was no longer a Hells Angels member.

[197] Mr. D'Cunha stated that the employer emphasized that the purchase of the drugs was not a one-time event but that he and Ms. de Laat had purchased them several times. They did so because they purchased them when they could afford to.

[198] With respect to the proportionality of the discipline, the employer submitted that Mr. D'Cunha was both dishonest and uncooperative. In this respect, he submitted that in the circumstances, including the heavy redaction of documents by the employer and the providence of the police report, a hostile environment was created for him in terms of the disciplinary process. He was naturally hesitant to share information in such an environment.

[199] Mr. D'Cunha referred me to *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134 at para. 129, where the adjudicator commented as follows about the use of police reports:

> *[129] I would now like to comment on the use of the police reports. It is clear from the evidence that the CSC received police reports for both incidents. The Kingston Police Force did not authorize the release of the reports for non-law-enforcement purposes. It seems odd that the CSC obtained the police reports when it was clear from the beginning that they would not be used for law enforcement purposes. The CSC intended to consult the reports only for employment-related reasons. It is hard to determine if the failure of the CSC to be clear about the reports' intended use was duplicitous or if it was in ignorance. Whatever the reason, it is an embarrassment to the CSC that it misused police reports in that manner. I do not have sufficient evidence about the circumstances surrounding the obtaining of the police reports to make any finding of bad faith. Mr. Costa was not called as a witness to answer whether the information that he put in his SIRs came directly from the police reports or from another source.*

[200] Mr. D'Cunha submitted that the employer relied on the police report to support the termination of his employment. The only part of the termination that was not linked to the police report was him sending the email to his home account.

[201] Mr. D'Cunha stated that he had a discipline-free and exemplary record, was a member of the CSC Honour Guard, and was an ION trainer and that there was no suggestion of concern with respect to his activities at an institution.

[202] Mr. D'Cunha referred me to the Ontario Information and Privacy Commissioner's decision with respect to the CSC receiving the police report as evidence that the CSC did not come to the table with clean hands.

[203] Mr. D'Cunha stated that he admitted his misconduct and that he has expressed remorse. He stated that as a CX, he was well aware of the impact his actions could have had inside an institution.

[204] Mr. D'Cunha submitted that I should take into account the following:

- the purchase of the drugs was for his spouse's personal consumption;
- the drugs never entered any institution; and
- there is no demonstrated business with organized crime except for the purchase of the drugs.

[205] Mr. D'Cunha also relied on *Braich* and *Rahim*.

[206] Mr. D'Cunha relied on *Soegard* in stating that he notified the employer appropriately when he was arrested and that he displayed remorse.

[207] Mr. D'Cunha relied on *Shandera* in stating that the employer did not demonstrate that his misconduct affected the institution.

[208] Mr. D'Cunha stated that he took responsibility for his conduct. He stated that the employer submitted that he and Ms. de Laat could not get away with everything and that they must suffer the consequences. He submitted that he and his spouse have suffered significantly.

[209] Mr. D'Cunha submitted that the actions that led to him and his wife being charged will soon be legal for all Canadians. He stated that if a person on the street were asked about his behaviour but was also told about his expressions of remorse and lack of employability, he believes that that average person would not agree with the employer's decision to terminate the grievors. He stated that he does not buy drugs and that he has no other blemish on his record. He is active in the community and with his children's school.

[210] Mr. D'Cunha stated that the employment relationship has not been severed and that there is a future prospect that trust could be rebuilt.

[211] Mr. D'Cunha submitted that while his behaviour did not align with the CSC's expected values and ethics and did merit some discipline, he does not believe that it

merited terminating his employment. He requested that his grievance be allowed and that he be reinstated into his position without the repayment of any lost salary or benefits.

D. The employer's reply

[212] The grievors tried to reduce the matter to the simple possession of marijuana. They were not terminated simply because they possessed drugs. While Mr. D'Cunha took responsibility for purchasing the drugs, they disputed much of the rest of the facts and reasons for their terminations.

[213] Mr. D'Cunha appeared to maintain that he did not know that Mr. A was a member of the Hells Angels and that he was dealing with a member or an associate of a criminal organization. The same is true for Ms. de Laat in that she alleged that she did not know that she was dealing with a member or an associate of a criminal organization. The decisions in *Braich*, *Lapostolle*, and *Stokaluk* all address this issue.

[214] Ms. de Laat receiving an absolute discharge and the charges against Mr. D'Cunha being withdrawn do not alter the facts. The grievors suggested that they are fully remorseful. The employer disagreed.

[215] Mr. D'Cunha stated that he was fully truthful with the employer. This is not true. Although he did notify the employer that he would not be at work when he was arrested, his reason was not that he was arrested and was in custody but that there were "family issues".

[216] The grievors submitted that they are not a threat to the employer as they are fully rehabilitated. The employer submitted that for me to be able to ask and answer that question, I have to conclude that the decision to terminate them was wrong. This is *post facto* evidence. In this respect, the employer referred me to *Basra*, at para. 158, and stated that an adjudicator must focus on the situation in place when the decision was made.

IV. Reasons

A. Sealing order

[217] The Batlow Summary that the employer submitted and that formed part of the CSC investigation report is not just about the grievors but also Mr. A and Ms. B, and it references many other individuals who were caught in the web of the police investigation.

[218] In *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120 at paras. 9 to 11, the former Public Service Labour Relations Board stated as follows:

> *[9] The sealing of documents and records filed in judicial and quasi-judicial hearings is inconsistent with the fundamental principle enshrined in our system of justice that hearings are public and accessible. The Supreme Court of Canada has ruled that public access to exhibits and other documents filed in legal proceedings is a constitutionally protected right under the "freedom of expression" provisions of the Canadian Charter of Rights and Freedoms; for example, see Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Mentuck, 2001 SCC 76, Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41(CanLII).*
>
> *[10] However, occasions arise where freedom of expression and the principle of open and public access to judicial and quasi-judicial hearings must be balanced against other important rights, including the right to a fair hearing. While courts and administrative tribunals have the discretion to grant requests for confidentiality orders, publication bans and the sealing of exhibits, it is circumscribed by the requirement to balance these competing rights and interests. The Supreme Court of Canada articulated the sum of the considerations that should come into play when considering request to limit accessibility to judicial proceedings or to the documents filed in such proceedings, in decisions such as Dagenais and Mentuck. These decisions gave rise to what is now known as the Dagenais/Mentuck test.*
>
> *[11] The Dagenais/Mentuck test was developed in the context of requests for publication bans in criminal proceedings. In Sierra Club of Canada, the Supreme Court of Canada refined the test in response to a request for a confidentiality order in the context of a civil proceeding. As adapted the test is as follows:*
>
> > *1. such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and*

> *2. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*
>
> …

[219] The subject matter of this hearing was whether the grievors' actions amounted to misconduct. The Batlow Summary has 208 pages, of which only 53 are about their activities. Both Mr. A and Ms. B were charged criminally. Given the nature of the Batlow Summary, there could well be other court proceedings involving them and potentially others who are named in it and who are not parties to these proceedings. A serious risk exists to those parties, and their personal circumstances are irrelevant to the matter before me. The charges against them might have been withdrawn, they could have been acquitted, or they could have been convicted and received a pardon or record suspension.

[220] Also in the CSC investigation report, at Tab O, are copies of emails that the grievors forwarded to their home email addresses. Four of the pages are emails or parts of them or documents that contain the names of employees and information about their pay and benefit situations. None of this information is relevant to the hearing except that it was private and personal and that it was sent to the grievors' home email addresses.

[221] Therefore, I find that the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. I order sealed the following:

- the document identified as the Batlow Summary, submitted as part of Exhibit E-2, Tab H; and
- four pages at the beginning of Exhibit E-2, Tab O, being the second through to and including the fifth page and marked in handwriting on the bottom right-hand corner with one of the following numbers: 86, 87, 88, or 89.

B. The disclosure issue

[222] Adjudication hearings with respect to discipline under s. 209(1)(b) of the *Act* are hearings *de novo*, and the burden of proof is on the respondent.

[223] In their evidence, the grievors clearly established that during the course of the CSC investigation and for a significant period, they were not initially provided the specifics about aspects of the criminal investigation and the Batlow Summary. It is equally clear that the CSC investigation was largely based on Operation Batlow and the Batlow Summary.

[224] While it is unfortunate that CSC management withheld this crucial information from the grievors as part of the investigatory process, it is equally clear that it was eventually in their hands before the disciplinary process completed. In any event, they received the information long before the hearing before me and were certainly aware of the misconduct allegations that had been levelled against them. Any irregularities are certainly remedied by virtue of this *de novo* hearing.

C. The merits of the grievances

[225] The usual basis for adjudicating discipline issues is by considering the following three questions (see *Wm. Scott.*): Was there misconduct by the grievors? If so, was the discipline imposed by the employer excessive in the circumstances? If it was excessive, what alternate penalty is just and equitable in the circumstances?

[226] Credibility issues are dealt with by the test articulated in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, in which the British Columbia Court of Appeal stated as follows:

> …
> *If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility… A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.*

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried 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****….*
>
> (Emphasis added)

…

1. Was there misconduct by the grievors?

[227] The employer alleged that Mr. D'Cunha was culpable of misconduct because of the following:

- attending at Ms. B's home to purchase different types of marijuana, which at the time were controlled substances, the possession and sale of which were illegal under federal statutes; and
- sending work-related material from his CSC account to his home email account via an unsecured electronic network.

[228] The employer alleged that Ms. de Laat was culpable of misconduct because of the following:

- attending at Ms. B's home to purchase marijuana, which at the time was a controlled substance, the possession and sale of which were illegal under federal statutes;
- doing so while she was otherwise supposed to be at work or on sick leave (time theft); and
- sending work-related material from her CSC account to her home email account and that of Mr. D'Cunha via an unsecured electronic network.

a. Purchasing marijuana

[229] The undisputed facts are the following:

- 9 times between June 2014 and February 24, 2015, Mr. D'Cunha met with either Ms. B or Mr. A and purchased unknown quantities of a controlled substance (different types of marijuana) for his wife, Ms. de Laat;

- at least 2 of those times, he met with Mr. A, who was, during part of that period, a member of the Hells Angels, which is an organization that Mr. D'Cunha knew was involved in criminal activities; and

- 19 times between November 2013 and December 2014, Ms. de Laat met with either Ms. B or Mr. A and purchased unknown quantities of a controlled substance (different types of marijuana).

[230] I set out at paragraph 226 of *Stene* as follows:

> *[226] At paragraph 46 of Tobin [Tobin v. Canada (Attorney General), 2009 FCA 254], the Federal Court of Appeal stated as follows:*
>
> > The power to promulgate the *Code of Discipline* implies the right to assess employee conduct against the terms of that Code, otherwise it serves no useful purpose. I reviewed the links in the chain of delegated authority from the Treasury Board to the Commissioner of the CSC. If there is a missing link in this chain, it has not been shown to us. The Treasury Board's authority to establish standards of discipline in the public service was delegated to the Commissioner who exercised it by promulgating the *Code of Discipline*.

[231] The employer maintained that the grievors' behaviour in attending Ms. B's home in Barrhaven and meeting with her and Mr. A there to purchase the marijuana breached Standards Two, Four, and Five of the CSC Standards, which in turn amounted to a breach of the Code.

[232] Standard Two of the CSC Standards states that an employee's behaviour, both on and off duty, shall reflect positively on the CSC and the federal public service generally and that employees are to present themselves in a manner that promotes a professional image in both words and actions. Mr. D'Cunha's attendance at Ms. B's home on 9 separate occasions over a period of approximately 10 months, and Ms. De Laat's attendance on 19 separate occasions over a 14-month period for the purpose of purchasing a controlled substance that was illegal under federal statutes cannot be considered behaviour that reflects positively on either the CSC or the public service, and it certainly did not promote a professional image.

[233] I am mindful of the fact that today, what would be considered the simple possession of marijuana is no longer an offence under the *Criminal Code*; however, at the relevant time, it was an offence, and both grievors certainly knew it is was. It is also public knowledge that many persons incarcerated in the federal penal system are

there on criminal convictions, including those arising out of the trafficking and trade in illegal drugs. As CSC employees, both grievors would have known this. This is especially so for Mr. D'Cunha as he had been a CX, and he had worked in both medium- and maximum-security institutions. In addition, at one point in his career, he was the officer at KP who operated the ION scanner and then was the trainer for it. He was certainly aware that keeping drugs, including marijuana, out of institutions is important.

[234] In addition, the fact that the law with respect to the purchase and possession of marijuana has been changed to decriminalize certain aspects of it does not assuage the situation. It is also a matter of public knowledge that other drugs can be purchased and possessed perfectly legally that can also be harmful and deadly and that pose a serious risk to the health and safety of Canadians (i.e., fentanyl and OxyContin). Strict rules regulate the purchase, sale, and possession of such products, and some purchasing, possession, and sale of these products can be viewed as criminal and can attract criminal charges and proceedings. The same can be said about tobacco and alcohol. The context and character of the activity separates legal activities from those that are inappropriate at the very least and criminal at the most.

[235] Mr. D'Cunha stated in his evidence and in his submissions that he did not know that Mr. A was a member of the Hells Angels. Det. Weeks testified that on September 5, 2014 (erroneously identified as May 9, 2014), when Mr. D'Cunha attended at Ms. B's residence to purchase marijuana from Ms. B, the video clearly shows that the motorcycle in Ms. B's laneway (the front of which is visible in the photograph in the Batlow Summary) had visible insignia that was unmistakably identified with the Hells Angels. He also testified that Mr. A, who opened the door and invited Mr. D'Cunha in, was wearing his Hells Angels vest with the club's colours and insignia.

[236] Mr. D'Cunha stated that he did not see the markings on either Mr. A or his motorcycle. I find this difficult to believe for a number of reasons. First, the Hells Angels insignia, through many media sources, have become extremely well known. Second, given his proximity to Mr. A and his motorcycle, one would have to be blind not to see the markings. Third, given that it was only Mr. D'Cunha's second time (at least according to the Batlow summary) purchasing marijuana for his wife, one would assume that he would have been extremely aware of his surroundings, given that he

was carrying out an illegal activity that he knew could get him into serious trouble not only under the *Criminal Code* but also with his employer.

[237] In his evidence, Mr. D'Cunha suggested that the first time he and Ms. de Laat discussed Mr. A's Hells Angels connection was in the evening of February 24, 2015, the night before the morning raid in which they were arrested. This alleged discussion does not meet the test in *Faryna* as being in "… 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."

[238] Only once, as set out in the Batlow summary, was Mr. A wearing his Hells Angels colours when either of the grievors was present; that was on September 5, 2014. Yet, on January 30, 2015, Mr. D'Cunha attended at Ms. B's home to purchase marijuana. Mr. A was present, and a discussion was recorded that included Mr. A telling Mr. D'Cunha about how he had been assaulted and stabbed. On February 24, 2015, Mr. D'Cunha again met with Mr. A to purchase marijuana, yet the Batlow Summary does not disclose anything that would suggest that Mr. A was a violent individual, although the meeting on January 30, 2015, certainly did.

[239] In addition, during his interview with Det. Schoorl (in the evening of February 25, 2015), Mr. D'Cunha stated that he knew that Mr. A had ties to the Hells Angels and that because of the line of work he was in, it was a big red flag for him. According to Ms. de Laat, Ms. B had told her about how Mr. A was violent and had ties to bikers, and she stated that it was a big red flag for her. Yet, the last time she went to Ms. B's home to purchase marijuana was December 5, 2014, and Mr. D'Cunha made all purchases after that (December 18, 2014, and January 2 and 30 and February 6 and 24, 2015). It is not in line with the test set out in *Faryna* that Ms. de Laat would have let her husband, the father of her children, without warning him ahead of time, enter a situation with a person she believed had a propensity for not just violence, but as she testified before me "extreme violence", which raised red flags for her.

[240] Based on the facts, I find that both grievors were well aware of Mr. A's ties to the Hells Angels and that they turned a blind eye to it. This is also clearly a breach of Standard Two.

[241] Standard Four relates to staff activities involving offenders. It states that staff shall actively encourage and assist offenders to become law-abiding citizens, which includes establishing constructive relationships with offenders to encourage their successful reintegration into the community. Those relationships shall demonstrate honesty, fairness, and integrity.

[242] "Offender" is not defined in either the CSC Standards or the Code. However, it is a term idiomatic to the CSC. It refers to people convicted of criminal offences and sentenced to terms of incarceration in CSC institutions.

[243] I was provided with no evidence whatsoever that either Mr. A or Ms. B could be considered, at the time Mr. D'Cunha met with them and purchased the illegal drugs from them, offenders as the CSC uses and refers to that term. Therefore, I find that there is no basis upon which to hold that the grievors breached Standard Four of the CSC Standards.

[244] Standard Five of the CSC Standards states that staff shall perform their duties on behalf of the Government of Canada with honesty and integrity and that they shall not enter into business or private ventures that may be **or appear to be** in conflict with their duties as correctional employees and their overall responsibilities as public servants.

[245] For the reasons already outlined, the grievors' actions of attending Ms. B's home on 28 separate occasions over a period of approximately 16 months for the sole purpose of purchasing a controlled substance that was illegal under federal statutes was entering into business or a private venture that was in conflict, or at the very least, appeared to be in conflict with Mr. D'Cunha's duties as a member of CSC staff.

[246] Based on the evidence before me, the employer established that both grievors' behaviour with respect to purchasing marijuana from either Ms. B or Mr. A amounted to misconduct and a breach of the CSC Standards and the Code, specifically those provisions that deal with Standards Two and Five.

b. The grievors sent work-related material from their CSC accounts to their home email accounts via an unsecured electronic network

[247] Standard Six of the CSC Standards provides that staff shall treat information acquired through their employment in a manner consistent with certain federal legislation and the Oath of Secrecy. It was alleged that both grievors breached this standard by emailing material to their home through an unsecure network (the Internet).

[248] With respect to Mr. D'Cunha, Mr. Edwards stated that the misconduct was not that he possessed the material or that he possessed it at his home but that it was sent over the Internet.

[249] A review of the material that was attached to the CSC investigation report indicates that some of the material that Mr. D'Cunha sent comprised training manuals and that other material discussed security issues. Clearly, those materials should not necessarily be in the public domain.

[250] Like Mr. D'Cunha, some of the material Ms. de Laat sent home via the Internet contained sensitive information, including the pay and benefits information of other employees. Again, like Mr. D'Cunha, had that been her only transgression, I expect that the discipline would have been a lot less severe, certainly not the termination of her employment.

[251] Based on the evidence before me, the employer established that both grievors' behaviour with respect to using the CSC's electronic network amounted to misconduct and breaches of the CSC Standards and the Code, specifically those provisions that deal with Standard Six, protecting information.

c. Ms. de Laat's theft of time

[252] The employer also alleged that Ms. de Laat was guilty of time theft. Several times, she travelled to buy illicit drugs from Ms. B in Ottawa when she should have been at work. She either did not enter anything into the leave system to account for her absence or claimed SLWOP or family related leave.

[253] Ms. de Laat submitted that she had a flexible work arrangement and that she was entitled to take compensatory time, which she did when she travelled to Ottawa to buy drugs while she should have been working.

[254] There was no documentary evidence of such a flexible work arrangement. Undisputed was that Ms. de Laat's start and finish times were flexible, which allowed her to start working at sometime between 8:00 a.m. and 9:00 a.m. and to finish time eight hours later, sometime between 4:00 p.m. and 5:00 p.m. She was also sometimes asked to pick up supplies for the office. Other than the reference to the Kingston Oxygen Supply, no details were provided. Given her administrative assistant position, I assume that she was asked to pick up office supplies.

[255] There was no evidence, let alone documentary evidence, of when and how often Ms. de Laat picked up supplies, or from where.

[256] Both Ms. Storring and Ms. Napier-Glover testified that the arrangement with respect to picking up supplies was that Ms. de Laat would be asked to pick up supplies and would either leave early to pick them up or pick them up on the way to work and arrive a little later than usual.

[257] Millhaven Institution is west of Kingston just outside the town of Millhaven, which is on the Lake Ontario shore. The grievors lived in Kingston. While they did not describe exactly where they lived, I certainly can take notice that it is common in every Canadian city the size of Kingston to readily find more than one "big box" store selling stationery and other related supplies

[258] The evidence also disclosed that between November of 2013 and December of 2014, Ms. de Laat was the registered owner of two vehicles and that she used one or both in her commute. While perhaps she might have had to go a little out of her way to pick up supplies, based on the evidence, I do not believe that she was entitled to any special arrangement with respect to compensable time for using her vehicle.

[259] I was provided with no evidence as to how many times over the course of the period during which Ms. de Laat had returned to work from her injury (sometime in late 2013 or early of 2014) to when she was arrested and suspended from work (February 25, 2015) she ran errands. Indeed, the employer's going rate for using

personal vehicles during this period was somewhere in the range of $0.50 to $0.55 per kilometer.

[260] It is no secret that Ottawa is northeast of Kingston. The drive from Kingston to Ottawa is roughly 185 to 200 km, depending on the route, and takes in the vicinity of approximately 2 to 2.5 hours. Set out earlier in this decision are the times at which Ms. de Laat arrived at and departed from Ms. B's residence. A round trip from her home to Ms. B's home with no traffic or weather issues takes about 4 to 4.5 hours. Add the time she spent at Ms. B's home, and the trip is somewhere between 4.5 and 6 hours.

[261] Six times, Ms. de Laat attended at Ms. B's home and no type of leave was registered on what otherwise were days on which she should have been at work, namely, May 22, 2014; August 1, 8, 14, and 25, 2014; and October 7, 2014. Once, Ms. de Laat entered family responsibility leave into the leave system, and three other times, she entered SLWOP. The total lost time to the employer is approximately 71.5 hours. Of it, she was paid for 49 hours.

[262] Ms. de Laat's salary is set out in the PA collective agreement. Based on the salary grid for employees classified at the CR-04 group and level, she would have been entitled to a salary somewhere in the range of $45 189 and $48 777 annually or roughly $23.10 to $24.93 hourly.

[263] Therefore, Ms. de Laat defrauded the employer of somewhere in the range of $1131.90 to $1221.57.

[264] Ms. de Laat would have had to accumulate a significant amount of mileage before it would have equalled the dollar value of an hour of her time, let alone somewhere between $1131.90 and $1221.57.

[265] Based on the evidence before me, I am satisfied that Ms. de Laat did not have an arrangement as she alleged she had and that she defrauded her employer, which clearly breached Standard One of the CSC Standards.

2. Was the discipline excessive in the circumstances?

[266] At paragraphs 51 and 60 through 62 of *Tobin*, the Court addressed the question of discredit and harm to the employer's reputation as follows:

[51] In the same way, the Standards of Professional Conduct and the Code of Discipline deal with conduct which will bring discredit to the CSC. Having regard to the CSC's mission, the assessment of whether a criminal conviction, and the circumstances of that conviction, will bring discredit to the CSC are factors to be considered in assessing the appropriateness of the penalty imposed on Mr. Tobin.

…

[60] The adjudicator does not specify the form such evidence should take. There may be a role for direct evidence of loss of reputation in some circumstances but it was clearly unreasonable for the adjudicator to set a standard which, for all practical purposes, could never be met. The reputation of a national institution cannot be measured or assessed in the same way as the reputation of a person in the community. How did the adjudicator conceive such evidence might be put before him? Would it be by the way of public opinion surveys? Quite apart from the issue of cost and the judicious use of public funds, it seems to me that the design of such surveys would be fraught with difficulties. For example, how would the employer know to begin the process of collecting evidence of its reputation before the incidents in question? The idea that the state of the CSC's reputation can be gauged with arithmetical precision and that changes in that reputation can be attributed with certainty to one factor or another is simply unreasonable.

[61] The passage which the applications judge cited from Fraser v. Canada (Public Service Staff Relations Board), [1985] 2 S.C.R. 455 [Fraser] at paragraph 50 of his Reasons is particularly apposite in this regard. The issue in Fraser was whether a public servant's criticism of government policy resulted in a perception of an impairment of his ability to discharge his duties as a public servant. The concept of impairment, like the concept of discredit, is rather elastic. This is what the Supreme Court said:

> *Turning to impairment in the wider sense, I am of the opinion that direct evidence is not necessarily required. The traditions and contemporary standards of public service can be matters of direct evidence. But they can also be matters of study, or written and oral argument, of general knowledge on the part of experienced public sector adjudicators, and ultimately of reasonable inference by those adjudicators.*
>
> *Fraser, supra at paragraph 48*

[62] The same is true of the question of whether certain conduct brings the CSC into discredit. The question is one which calls for the application of common sense and measured judgment.…

[267] While the Crown chose not to pursue Mr. D'Cunha under the *Criminal Code*, and he was not convicted of the offence he had been charged with, the evidence before me disclosed that he certainly participated in purchasing and possessing marijuana on at least nine occasions. At the time, doing so was an offence under the *Criminal Code* that was either indictable or punishable on summary conviction.

[268] Mr. Edwards stated that he determined that part of the basis for discipline for Mr. D'Cunha's conduct was that he breached the CSC Standards and the Code, including Standards Two and Five as it related to attending Ms. B's home and purchasing marijuana from her and Mr. A. Likewise, while Ms. de Laat had not been convicted of a criminal offence at the time discipline was rendered, Ms. Russon testified that her decision to terminate Ms. de Laat's employment was based on the underlying facts that led to the criminal charges laid against Ms. de Laat that arose out of Operation Batlow.

[269] I find that the behaviour of both grievors of attending at Ms. B's home and purchasing marijuana on numerous occasions over an extended period comprised serious misconduct that a reasonable and informed observer would view as behaviour that would likely discredit the CSC. Actual discredit need not be proved.

[270] In addition, the letter of termination received by Mr. D'Cunha stated that he had failed to uphold the *Values and Ethics Code for the Federal Public Sector* in that he had contravened the ethical value of acting at all times with integrity and in a manner that would bear the closest public scrutiny and in such a way as to maintain the employer's trust. While a copy of that code was not entered into evidence, Standards Two and Five of the CSC Standards certainly allude to if not refer directly to a similar obligation of acting ethically and with integrity. I find that attending at Ms. B's home to purchase marijuana was not acting ethically or with integrity or in a manner that would bear the closest public scrutiny.

[271] Mr. D'Cunha testified before me and suggested in some of the written documentation that he cooperated fully with the CSC investigation. He stated that when he did not cooperate, it was due to advice from his legal counsel.

[272] Heeding good legal advice from criminal defence counsel when your liberty is at stake is sound decision making, and I do not fault either grievor for doing so, even in the face of the ongoing CSC investigation. However, their lack of cooperation strayed far from the right to remain silent. Rather than remaining silent and not answering questions, they chose to answer some questions in a manner that could be described only as outright lies that had nothing to do with choosing to follow legal advice silent. These include the following:

For Mr. D'Cunha:

- that the only person he knew from the list of persons arrested was Ms. B, when in fact he knew Mr. A, having purchased marijuana from him at least twice and having seen him at least three times;
- that he would not and did not go to any house in Ottawa to purchase drugs, when in fact he had gone to Ms. B's house nine times to purchase drugs;
- that he went to Ms. B's home only for social visits, when in fact they were to specifically purchase illicit drugs;
- that he was not aware if Ms. de Laat was involved in anything related to drugs when he knew full well that she was involved in purchasing drugs from Ms. B, that he was purchasing the drugs at Ms. B's home at the behest of and for the use of Ms. de Laat, and that she had used drugs for "as long as [he] had known her" (from the transcript of Det. Schoorl's interview on February 25, 2015); and
- that he did not know anyone named Mr. A, when he had met with Mr. A twice to purchase drugs.

For Ms. de Laat:

- that the only person she knew from the list of persons arrested was Ms. B, when in fact she knew Mr. A;
- that she never knew Ms. B to do or sell drugs when in fact she knew that Ms. B had smoked marijuana in high school and that she had done so with Ms. B in high school, she thought that Ms. B might be able to connect her with someone who could sell her marijuana, she had smoked marijuana with Ms. B when she visited her to purchase marijuana, and she had purchased marijuana from Ms. B;
- that she would not want her children to be around drugs, yet when she was arrested, the illicit drugs were found on the grievors' dining-room table;
- that she went to Ottawa every couple of months, when in fact she went far more often than that, and in fact, in August of 2014, she went there weekly;

- that she never used sick leave to go to Ottawa, when on three occasions, she used SLWOP to go to Ottawa and buy illicit drugs;
- that the only emails sent to her home address were about facial hair when in fact some were about some staff members' pay and benefits;
- that she went to Ms. B's only 6 or 7 times in 2014-2015 when in fact, she went 17 times;
- that her only relationship with Ms. B was as a childhood friend, when in fact Ms. B was her drug dealer;
- that she did not know that narcotics were sold out of Ms. B's home, when in fact Ms. de Laat purchased her drugs from Ms. B there;
- that she was unaware that Mr. D'Cunha was at Ms. B's home to purchase narcotics when in fact she and he had agreed that he would go to Ms. B's home to purchase marijuana on her behalf; and
- that she did not know Mr. A, when in fact she did know him.

[273] While the grievors certainly had reason to be frustrated and upset with the CSC in its dealings with them in the course of its investigation, by its failure to provide to them a copy of the Batlow Summary, it certainly did not justify them lying to and misleading the investigators.

[274] In his evidence and submissions, Mr. D'Cunha did admit to what he had done and did express remorse. However, given the seriousness of the offence, the fact that he committed it on multiple occasions, and his conscious misrepresentation of the facts to his employer, I am satisfied that the penalty imposed by the deputy head was appropriate and not excessive in all the circumstances. I decline to substitute a lesser penalty.

[275] Again, while today legislation exists largely decriminalizing the simple possession of marijuana, for the reasons already set out, it does not lessen Ms. de Laat's behaviour or mitigate her actions. Indeed, after she was arrested and charged, she might have applied for and obtained a medical licence. However, doing so had been open to her at the material times, and she chose not to pursue it. Indeed, her time driving back and forth to and from Ottawa 19 times could have been spent researching and engaging the appropriate medical professionals such that the actions that led to her arrest could have been avoided.

[276] While Ms. de Laat did not hold a position with much, if any, contact with inmates, in many respects her behaviour was more egregious than that of Mr. D'Cunha. Not only did she purchase drugs 19 times, on 6 of those times, but also, she was AWOL and yet collected her pay. This was time theft. It amounts to fraud. As I stated in *Murdoch*, it strikes at the very core of the employment relationship, which is the exchange of labour for remuneration.

[277] *Pinto v. Treasury Board (Revenue Canada, Customs and Excise)*, PSSRB File No. 166-02-16802 (19880411), [1988] C.P.S.S.R.B. No. 95 (QL) at 18, states as follows:

> *I concur with the reasoning of my colleague, Mr. J.M. Cantin, Vice-Chairman, in* ***Bristow*** *(supra), when he states:*
>
> > *Fraud, as is known, is a very serious act of misconduct. It must be likened to theft which is, according to Brown and Beatty, "one of the gravest if not the gravest, charges of misconduct in an employment relationship" (see Canadian Labour Arbitration, ed 1, no 7:3310, page 387). As such, fraud usually leads to discharge, unless there are extenuating or mitigating circumstances. (p. 34)*
>
> [Emphasis in the original]

[278] In her evidence before me, when she responded to a question put to her by her representative about what she would do when she met with Ms. B on the occasions she went to her home to purchase marijuana, Ms. de Laat answered by stating that they did several things, including smoke marijuana. It could hardly be said that smoking marijuana and then getting back into your vehicle and driving on the highway for two hours is prudent behaviour that reflects positively on the CSC.

[279] Ms. de Laat also co-opted her spouse, albeit he was willing. Unlike Mr. D'Cunha, she did not have a discipline-free record as she had been disciplined in the past for misconduct relating to taking leave.

[280] Based on all the evidence and the submissions, I do not feel that the discipline imposed on Ms. de Laat was excessive and inappropriate in all the circumstances. I am not prepared to alter it.

[281] While I am satisfied that the grievors did breach Standard Six of the CSC Standards with respect to the grievors emailing some sensitive material to their home email accounts, this action certainly was not worthy of a termination of employment.

Had it been their only transgression, I suspect that the discipline likely would have been limited to an oral or written reprimand. Despite this, their behaviour and conduct as it related to going to Ottawa to purchase marijuana was sufficiently serious to justify the discipline imposed.

V. Miscellaneous

[282] The grievors took issue with the CSC contacting the CBSA during the course of its investigation. I fail to see how this was in anyway inappropriate in all the circumstances. The CSC and CBSA are federal government departments, and employees of them are employees of the TB. The CBSA is responsible for protecting Canada's borders and does so in conjunction with other law-enforcement agencies, including the United States Customs and Border Protection Agency. Given that the Operation Batlow investigators observed the grievors attending Ms. B's home and purchasing unknown quantities of drugs, and knowing that the grievors did travel on a regular basis to New York, I do not see anything inappropriate, suspicious, malicious, or vindictive in getting in touch with the CBSA, given what the CSC knew at the time.

[283] The privacy complaint and the associated report have no relevance to this proceeding. This Board is not bound by the Ontario Information and Privacy Commissioner's decision. The legislation and regulations creating and governing the Board permit it to accept evidence that may not necessarily be accepted in a court of law.

[284] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[285] Exhibit E-2, Tab H, is sealed, entitled "Summary of Evidence & Source Directory - REGINA v [Mr. A], [Ms. B], [someone not relevant to the grievances], Andrea DeLAAT and Christopher D'CUNHA" (the Batlow Summary).

[286] Four pages are sealed in Exhibit E-2, Tab O, being the second through to and including the fifth page of that tab and marked in handwriting on the bottom right-hand corner with one of the following numbers: 86, 87, 88, or 89.

[287] The grievance in file 566-02-12091 is dismissed.

[288] The grievance in file 566-02-12564 is dismissed.

July 31, 2019.

John G. Jaworski,

a panel of the Federal Public Sector Labour Relations and Employment Board