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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

PHILLIPPE CARIGNAN AND JONATHAN GRIMARD

Grievors

and

**DEPUTY HEAD
(Correctional Service of Canada)**

Respondent

Indexed as

Carignan v. Deputy Head (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour
Relations and Employment Board

For the Grievors: Dany Milliard, counsel

For the Respondent: Philippe Giguère, counsel

Heard at Sherbrooke, Quebec,

March 12 to 15, 2019.

(FPSLREB Translation)

I. Individual grievances referred to adjudication

[1] The video is particularly disturbing, even shocking. A bare-chested inmate turns his back to the camera and is sprayed three times, for a few seconds, with oleoresin capsicum (OC), which is cayenne pepper in an oil base. Finally, he gestures to three correctional officers, signaling them to handcuff him. There is no soundtrack.

[2] Based on the video and the subsequent investigation, two of the correctional officers, Jonathan Grimard and Philippe Carignan (“the grievors”) were disciplined for excessive use of force. Mr. Grimard received a financial penalty equal to four days of pay. Mr. Carignan was suspended for five days without pay. Each filed a grievance that contested the discipline, the length of the disciplinary investigation, and the investigators’ lack of impartiality.

[3] Having considered all the evidence, and for the reasons that follow, I find that the grievors acted in accordance with the directives of the Correctional Service of Canada (CSC or “the respondent”) as they knew them at the moment of the events that led to the discipline. They acted in good faith, with the goal of calming a situation as quickly as possible that they judged was dangerously precarious. The grievances are allowed.

II. Summary of the evidence

[4] The CSC called the following to testify: Benoît Juneau, the chairperson of the investigation committee; François Anctil, the warden of Cowansville Institution, who imposed the disciplinary measures (he was the deputy warden at that time); and Daniel Lévesque, a CSC instructor. The grievors testified for themselves and called Mathieu Filion, who accompanied them to the investigation interviews as a union representative.

[5] Anne-Marie Laurendeau is the third correctional officer who appears on the videotape with Messrs. Carignan and Grimard. She witnessed the entire situation. She did not testify at the hearing, for medical reasons. On consent, the parties filed the recording of her interview from the investigation, which I listened to at the hearing with the parties present. Also on consent, they filed as evidence stenographic notes from the grievors’ interviews during the investigation. Mr. Filion was present at all three interviews.

A. The events of September 6, 2018

[6] The grievors are correctional officers classified at the CX-01 group and level. They work for the CSC at Cowansville Institution, which is a medium-security institution that houses approximately 430 inmates.

[7] Mr. Carignan has been a correctional officer since 2011. He has always worked at Cowansville Institution. He was part of the Emergency Response Team (ERT). Since 2018, he has been an instructor for that team, which is responsible for intervening in difficult situations.

[8] Mr. Grimard has been a correctional officer since May 2009. He spent seven years at the Port Cartier Institution, a maximum-security facility. He had been at Cowansville Institution for several months when the use-of-force incident occurred.

[9] This was the first time that either grievor had been disciplined. They both filed their performance evaluations in evidence. Mr. Carignan's manager mentioned the following in his 2015-2016 evaluation:

[Translation]

... He is also a conscientious officer who conducts his security rounds within the required times and prepares timely reports in the event of observations or incidents. He also has an excellent approach and attitude toward inmates in the cell block... Finally, he has just been added to the ERT. This demonstrates his credibility with his colleagues and the management team. Congratulations!

[10] Notably, in his 2016-2017 evaluation, the manager wrote the following comment: “[Translation] ... He has a good approach and attitude towards inmates in general, being firm but courteous.” In the 2017-2018 evaluation, he mentioned that Mr. Carignan received a penalty for deploying gas in a use of force (the penalty at issue in this grievance). All other comments are positive. It ends with the following sentence: “[Translation] We are satisfied with Mr. Carignan's good work.”

[11] Mr. Grimard's performance evaluations are equally positive. In his 2014-2015 evaluation, his manager wrote:

[Translation]

Jonathan is able to work effectively with others. He listens attentively to their views, considers them, and incorporates them. He shows respect for government assets and resources and uses those resources responsibly, particularly by being familiar with and applying relevant government policies.

[12] In his 2016-2017 evaluation, his manager wrote, “[translation] Mr. Grimard has a certain amount of experience. It allows him to perform his work with professionalism.”

[13] On their belts, correctional officers carry an OC spray referred to as MK4. The cayenne concentration (capsicum part) in an oil base (oleoresin) is about 0.2 for MK4. Correctional officers use it in the event of a sudden attack. MK9 canisters are kept at the control posts inside locked trunks. They contain 340 grams of OC at a concentration of 1.3. The OC (regardless of concentration) acts immediately if it contacts mucous membranes; the eyes close, and the airways fill with mucus. If the OC contacts only the skin, a burning effect occurs that is not paralyzing. However, if the mucous membranes are affected (eyes, nose, or mouth), a paralyzing effect will happen. The higher concentration of OC in MK9 makes it a weapon that is used at a greater distance than MK4. For MK4, the range is approximately 1 to 2 feet, while for MK9, it is 6 to 9 feet.

[14] As part of Mr. Juneau’s testimony, the CSC began its evidence by presenting a series of video sequences recorded by stationary cameras. The videos do not have soundtracks. I have indicated in parentheses the time indicated on the video sequence. The evidence also included a recording of about 5 minutes with a soundtrack that was made with a portable camera. It consists of an interview of the manager of unit 10 that reports on the incident. It includes a brief interview of the inmate who was sprayed with OC, to obtain his comments. For the purposes of this decision, the inmate shall be referred to as “inmate D”.

[15] The first sequence (08:57) shows a corridor of cells, which will be identified as corridor 1B of unit 10. Mr. Carignan and Ms. Laurendeau are walking in the corridor. They look into each cell, stop somewhat longer in front of one cell, then walk the rest of the corridor (09:00). They return toward the cell (09:14) where they had stopped, and they enter it. They then leave (09:15). Ms. Laurendeau is in the corridor, and Mr. Carignan remains in the doorway, facing inside the cell. Inmate D comes out of the cell. He is dressed in sports pants that come to his knees. He turns to the wall, puts his hands on it, and then turns to the correctional officers, who say something to him. He

returns to the wall and again puts his hands on it. Mr. Carignan performs a quick pat-down search. Inmate D lowers his arms, and he and the correctional officers exchange some words. Finally, they all head toward an end of the corridor, with inmate D in front. He is not held or handcuffed and walks on his own.

[16] The second sequence (09:16) shows a small room with a refrigerator, two tables, and pots. It is a kitchen for inmates. A window in the room opens into a hall, where the control post is located (not seen in the video). In the room, someone is mopping. The correctional officers and inmate D arrive at the door. Inmate D enters the kitchen. The cleaner (another inmate) is asked to leave. The door closes. Inmate D immediately kicks the door violently and then shakes the handle as if he wants to exit. He then backs up and looks out the window, swaying slightly. The two grievors are on the other side of the window. The door opens, and Mr. Carignan seems to exchange words with inmate D, who makes a gesture. Mr. Carignan gives a sign, and Mr. Grimard enters the room and sprays the inmate with OC. Inmate D turns his back. Mr. Grimard sprays three times, the first for five seconds, the other two for about two seconds (at 09:17:42, 09:17:49, and 09:17:57), still at inmate D's back, who begins slipping on the floor, now covered in oil. Between the second and third sprays, inmate D turns and holds out his arms. After the third spray, inmate D makes a gesture that seems a signal to the correctional officers to enter. Inmate D puts his hands behind his back, and the three correctional officers handcuff him (09:18). They leave the kitchen with inmate D handcuffed at 09:18:33.

[17] In another sequence, we see an exterior courtyard. Eight correctional officers are running. At 09:19, the inmate enters the courtyard, framed by two correctional officers. His eyes are wide open, and he seems to have no trouble breathing.

[18] Inmate D arrives at the decontamination shower at 09:23. He is in it at 09:24. In such a case, the inmate decides the length of the shower. According to the testimonies, inmate D remained in the shower for about 20 minutes.

[19] Recordings with the manager of unit 10 were made between 13:25 and 13:30. The inmate is visible with his hands on his head. He seems relatively relaxed. The manager asks him for his comments on the use of force. He replies that it was a bit much in terms of force, that there was no situation, and that nothing happened. Inmate D says, “[translation] The officer must have acted on an impulse.” He adds,

“[translation] It burns; it’s not fun.” The manager says that it was not a desirable event, to which he responds, “[translation] Well I hope not”, and then, “[translation] I’m not a problem guy.” He ends with, “[translation] I’m in shock a bit, that’s all.” According to the nurse’s report, inmate D complained about a burning sensation in his back.

[20] Mr. Carignan explained how the events took place from his perspective. On that day, he was doing the morning rounds. Correctional officers walk through the cell corridor to ensure that the inmates wake up for the day. As they passed inmate D’s cell, they heard him swear. He was obviously in a bad mood. They found it strange, because he is generally quite calm. Mr. Carignan and Ms. Laurendeau decided to finish the round and then return to inmate D to find out what was disturbing him so much.

[21] They returned to the cell, opened it, and entered. Ms. Laurendeau immediately noticed the smell of “[translation] brew”, the illegal alcohol that inmates secretly make. They decided to search the cell to see if there were any brew-making instruments. They felt it was best to have the inmate exit.

[22] He was in a very bad mood. He steadily swore at the correctional officers. Mr. Carignan tried to calm the situation by repeating that everything was fine, that the inmate would be taken care of, and that he could speak with a correctional manager, to explain himself. In her interview with the investigators, Ms. Laurendeau strongly emphasized Mr. Carignan’s calm tone and constant discourse to calm the inmate.

[23] For his part, Mr. Carignan testified that in such a situation, his goal is always to reduce tension and avoid the situation turning violent. When inmate D left his cell, he was somewhat cooperative, but he made insulting statements. Mr. Carignan decided that it was better to search the cell with inmate D out of the way. So, he and Ms. Laurendeau escorted inmate D to the kitchen, which is located one level above, in front of the control post.

[24] At the hearing, Mr. Carignan explained that the kitchen is often used to temporarily hold an inmate. The door can be locked, and the inmate can be seen through the window. Mr. Carignan and Ms. Laurendeau first considered asking the correctional manager responsible for unit 10 to speak with inmate D, but she was in a meeting elsewhere in the institution.

[25] When inmate D was placed in the kitchen, the correctional officer responsible for the control post, Mr. Janicek, was at the control post with Mr. Grimard, who that day was carrying out escorts outside the penitentiary. While waiting for the inmate he was to escort to be ready, he chatted with Mr. Janicek. Mr. Grimard testified that he had his back to the kitchen when inmate D was placed there.

[26] Mr. Grimard heard noise and heard inmate D yell. Mr. Carignan asked him to prepare MK9, just in case. Mr. Janicek, as the person responsible for the control post, unlocked the trunk containing MK9.

[27] What is striking about the events in the kitchen is the contrast between the video, without sound, and the descriptions of Mr. Carignan, Mr. Grimard, and Ms. Laurendeau. From their perspective, most important is the noise caused by the kick and the handle shaking as well as inmate D's increasingly hostile tone; he continued to insult Mr. Carignan. His fear was that inmate D would take action. He was in a kitchen with heavy pots and pans. The glass would have broken into pieces had a pot been thrown at it. In the video, inmate D looks through the window and sways but cannot be heard.

[28] In her interview as part of the investigation, Ms. Laurendeau explained how the atmosphere had been tense because the inmate had shouted. When the investigators showed her the video, in which the inmate can be seen but not heard, she exclaimed, “[translation] Ah well. What you see and our experience are like different worlds.”

[29] At the hearing, Mr. Carignan explained the sequence of events that led to using MK9. He stated that in unit 10, the inmates are free to move about during the day. They often pass the control post on their way to activities. In addition, in the video of the kitchen, an inmate can be seen climbing stairs, and a correctional officer makes him turn back to prevent him from arriving on the scene.

[30] Mr. Carignan feared that the tone would rise too much and that other inmates would arrive and incite inmate D to become violent. In short, he feared an escalation of the scene that would be difficult to control. Therefore, he thought to suggest to inmate D to go to the central post (which the correctional officers call “Keeper Hall”) to speak with a correctional manager, rather than the correctional officers with whom he was visibly upset.

[31] He opened the door to inform the inmate that they would take him to the central post but that he would need to be handcuffed, given his state. Inmate D responded with insults. Then, Mr. Carignan told him that he would give him an order three times. On the third time, he would resort to OC, if necessary. Inmate D responded, “[translation] Spray me.” Mr. Carignan gave three orders of “[translation] Present yourself”, meaning, “Put your hands behind your back”, to be handcuffed. Each time, inmate D replied, “Spray me.”

[32] Given the refusal to comply, Mr. Carignan followed the instructions he had been given and used the OC. Given the size of the room, MK4 would not have been enough, so he had to use MK9. He gestured to Mr. Grimard, who sprayed inmate D 3 times, never making contact with his face. The canister was emptied; it had contained 340 grams of OC. There remained 2 grams after it was used.

[33] Correctional officers are trained to react to the many situations that may arise in a penitentiary. They receive initial training and yearly update training. Mr. Carignan filed as evidence copies of examinations from that training. The correct answer to the question of how to respond when a verbal order is refused includes using inflammatory agents, such as OC.

[34] Through Mr. Juneau, the CSC filed as evidence a document entitled, “Situation Management Model” (SMM). It is fundamental to understanding both the grievors’ perspective and the CSC’s in managing a situation like the one on September 6, 2016.

[35] The document begins with the following:

[Translation]

Each situation must be assessed in terms of the CAPRA problem-solving model.

This acronym is made up of the following components: CLIENT, ACQUIRING AND ANALYZING, PARTNERSHIP, RESPONSE, ASSESSMENT.

The CAPRA model facilitates acquiring and analyzing client and situational information and, through partners, considering response strategies. Continually assessing the effectiveness of the response is an integral part of the process.

The inmate’s current behaviour, situational factors (e.g., the location, the possibility of using weapons, the presence of other inmates, etc.), tactical considerations (the inmate’s past behaviour,

the inmate's size, the officer's skills, the available backup, etc.), and the risk posed by the incident will be continually assessed.

The responses taken will be adapted to any significant changes and the risk that the new state of affairs represents. The control of any situation must be carried out through the most reasonable and safe intervention possible and will be limited to what is necessary and proportional to preventing or resolving the situation.

When necessary and possible, staff will consider isolating the inmate, containing the incident, withdrawing, reassessing the situation, and planning new interventions so that the most appropriate steps are taken. The effectiveness of previous interventions must be considered as part of their ongoing assessment of the situation.

[Emphasis in the original]

[36] The SMM is illustrated in a drawing of concentric circles, at the heart of which is the acronym CAPRA, surrounded by the words, "Assess Situation". The first circle describes the possible behaviour of an inmate as cooperative, verbally resistive, physically uncooperative, assaultive, grievous bodily harm or death, and escape. Surrounding this circle is another one, setting out intervention strategies. As the inmate's hostility rises, the circle widens to include the material available to a correctional officer to deal with the situation.

[37] Therefore, the drawing must be interpreted as a guide for determining the most appropriate action or tool to respond to a situation. It is encompassed by a final circle that emphasizes reassessing the situation.

[38] The proposed actions for a cooperative inmate include the following options: dynamic security, staff presence, and verbal intervention. When an inmate's behaviour becomes verbally resistive, the option of "Conflict Resolution" and the tool "Restraint Equipment" are noted.

[39] For inmates who are physically uncooperative, the recommended option is "Negotiation" and the tool is "Inflammatory Agent".

[40] When an inmate becomes violent, the option of "Verbal Orders" is provided, and the tools are "Chemical Agents" and "Physical Handling".

[41] The last step in the behavioural continuum is "Escape", which corresponds simply to "Firearms".

[42] The document describes a physically uncooperative inmate as follows:

[Translation]

The inmate refuses to comply with staff directions or orders (e.g., refuses to leave an area or a cell). The inmate may be physically resistive but not violent by moving away, fleeing, or resisting staff efforts to have the inmate stand.

[43] The document indicates that “[translation] staff must choose the appropriate management strategies after making an assessment as described in the previous paragraphs [on inmate behaviour].”

[44] Using restraints (e.g., handcuffs) is explained as follows:

[Translation]

Restraint materials may be used in common situations (e.g., when an inmate must be escorted or transferred) when relevant policies provide for using them on cooperative inmates.

Restraints are one of several measures that can be used to manage a situation in which an inmate’s behaviour is within the spectrum from cooperative to violent.

[45] Finally, the section entitled “[translation] Chemical or inflammatory agents and physical control” states the following:

[Translation]

These three measures are generally used in conjunction with each other to manage situations in which inmates offer physical resistance.

Staff may use such measures when verbal intervention and restraints have proven ineffective or have been judged unsuitable for the situation.

[46] Mr. Carignan testified that he had precisely that model in mind to respond to the situation, particularly constant reassessment. Ms. Laurendeau indicated in her interview that she had noted that Mr. Carignan seemed confident in managing the situation well, which was why she followed rather than led the action, even though her rank (CX-02) was higher than his.

[47] According to Mr. Carignan, the situational assessment began as soon as inmate D was seen to be in a bad mood in his cell. The correctional officers took the time to finish their round before focusing on inmate D. Noting a smell of brew when they

entered his cell (which, according to Mr. Carignan, might have explained inmate D's grumpy mood), they decided to take him out of his cell. Given his mood, they felt it was best for inmate D to not be present while his cell was searched. They moved him to the second level, so he could speak with the unit manager and so he could be placed in the kitchen. The manager was not there. Inmate D was placed in the kitchen, but his tone got worse. He showed his bad mood with the violent kick, by shaking the handle, and by continuing to insult Mr. Carignan.

[48] In his reassessment of the situation, Mr. Carignan then considered the danger of the pots in the kitchen, the inmate's rising tone, and the presence of other inmates in the unit. Their movements could not be prevented without causing discontent. And always present was the risk that they would incite inmate D, who was already worked up, to become physically violent. That is why Mr. Carignan thought it would be better to completely change inmate D's situation by taking him to the central post, to meet with a senior manager. To move him, he had to be handcuffed (recall that using restraints is commonplace, according to the SMM). Mr. Carignan first tried to negotiate, without success. Verbal orders were also in vain.

[49] As confirmed by the copy of the exam and the SMM, Mr. Carignan learned from his training that one way to contain a situation in which an inmate refuses to obey a verbal order is to use an inflammatory agent, such as OC.

[50] The CSC called Mr. Lévesque to testify. He was a manager of the CSC's instructors. He was also an instructor in the use of inflammatory agents.

[51] Mr. Lévesque was asked why the inflammatory agent training manual gave different distances for the ranges of the MK4 (three-foot minimum) and MK9 (six-foot minimum) sprayers. He replied that if the eye is contacted at a shorter distance, it can be permanently damaged, which he calls the hydraulic needle effect. The same manual states that MK9 is provided for use "[translation] against one or more persons in a restricted space".

[52] OC is effective if it contacts mucous membranes — its paralyzing effect is immediate. If it contacts only skin, there is a burning sensation, but it does not prevent the person in question from continuing to act.

[53] Mr. Lévesque indicated that there is no specific duration for the spray. Usually, it should last 1 to 2 seconds. Continuous re-evaluation is required, and the spray must be stopped once it contacts mucous membranes.

[54] Mr. Carignan and Mr. Grimard testified that they chose to use MK9 because MK4 simply would not have had the required range in the room containing inmate D. It is difficult to exactly assess the distance between Mr. Grimard and inmate D when he was doused, but it seemed to have been four to five feet. His face was never contacted.

[55] As soon as inmate D gestured his surrender, the spraying stopped, and he was handcuffed. He stiffened his arms, which made the task more difficult; it took the three correctional officers to handcuff him. As the floor was slippery and inmate D resistant, Mr. Grimard slipped, and his face hit inmate D's back, which was covered with OC. The effect was immediate for Mr. Grimard — he had OC in his eyes and nose.

[56] Other correctional officers arrived, some of whom helped Mr. Carignan take inmate D to the decontamination shower. Once he was in the shower — the situation had been pacified, without injuries or consequences — everything was resolved, in Mr. Carignan's mind. In under 10 minutes (from 09:15, when inmate D left his cell, to 09:24, when he entered the shower), a situation had been defused. Mr. Carignan testified at the hearing that he thought he had done a good job.

[57] According to Mr. Juneau, the investigators interpreted the SMM differently, including the passage that stated that if possible, the inmate must be isolated, the incident must be contained, and the officers must step back and reassess the situation “[translation] ... so that the most appropriate steps are taken.”

[58] Mr. Grimard testified that he had often intervened using OC when he was at Port-Cartier Institution. He was very surprised that a disciplinary investigation was conducted. He had never been accused of an excessive use of force.

B. Observation reports

[59] Correctional officers who use force complete a report for that reason. They also complete an Observation Report as soon as possible after the incident. Mr. Carignan completed the observation report at 12:50 on September 6. He described as follows what happened in the kitchen:

[Translation]

... After conducting my pat-down search, I asked him to go to the kitchen so that he could calm down and so that I could search his cell. The inmate refused again [he had first refused the search], and I then ordered him to the kitchen immediately. He finally cooperated but remained aggressive and insulting. Once in the kitchen, I asked him again to calm down, and that we were going to search his cell. The inmate began banging on the kitchen door and was even more aggressive. He was physically uncooperative and verbally aggressive. I then asked him to put his hands behind his back, and we would handcuff him and then bring him to Keeper Hall so that he could be met and calm down. The inmate refused. I then told him that I would order him at most three times and that the third time, inflammatory agents would be used. The inmate then told me to spray him!!! I gave him my first two orders, and I told him again that we would use inflammatory agents on the third order. Once again, he refused the order and turned his back to us, to protect himself. We used the inflammatory agents, and the inmate resisted being handcuffed. Finally, we were able to handcuff him and escort him to detention for his decontamination shower.

[60] Mr. Grimard, whose report was completed at 10:26 on September 6, described what he witnessed and did as follows:

[Translation]

On a shift while waiting for an external escort, I went to support the officers at unit 10 at verification time. The officers in charge in the unit had to escort an aggressive inmate to the kitchen. He started banging all over the kitchen; he was very violent. So, I collected MK9 as a preventative measure. Unfortunately, after refusing three orders, he was still physically and verbally uncooperative and had his fists clenched; he was a danger to himself and to my colleagues. So, I was forced to use inflammatory agents three times before the inmate agreed to surrender. Unfortunately, I was quite seriously contaminated.

[61] At the hearing, Mr. Grimard explained that the OC spray in the kitchen had affected him significantly because, in handcuffing inmate D, he had slipped, and his face had touched inmate D's back. Thus, OC entered his eyes and nose. He wanted to complete his observation report quickly, mainly so that he could seek care.

[62] The two grievors were accused of exaggerating inmate D's behaviour to justify their use of OC. Mr. Carignan wrote, "[translation] The inmate began banging on the kitchen door and was even more aggressive." Mr. Grimard wrote that the inmate was

banging all over the kitchen and was very violent, while the videotape shows him almost motionless in front of the window, after the kick and shaking the door handle.

[63] Mr. Carignan explained that he sought to describe the violent kick and the shaking of the door handle using the word “[translation] banging”. For his part, Mr. Grimard explained that at first, he had his back turned to the kitchen, so he heard inmate D’s agitation in the kitchen before seeing him. On seeing him, inmate D very aggressively insulted Mr. Carignan (which Ms. Laurendeau confirmed), such that according to Mr. Grimard, his behaviour as a whole was violent and aggressive.

[64] In her observation report, which she completed at 11:32 on September 6, Ms. Laurendeau described as follows the kitchen incident:

[Translation]

... When he was placed in the kitchen, the officer asked him to calm down while the cell was being searched. He continued shouting after that. The officer closed the door, and the inmate began continuously banging on the door. The officer reopened the door to explain to him that he needed to calm down and that he would be handcuffed and taken to Keeper Hall to be met with. He told the officer to spray him and that he did not care ... the officer explained to him that he would order him three times and that he needed to comply, or he would be sprayed. He again said to spray him and that he did not care, and he turned to protect himself. The officer repeatedly gave several orders, but the inmate was already protecting himself, even though the officer tried to tell him that he would spray him because he had exceeded the three orders. The two officers sprayed him, and then, I handcuffed him. Even during handcuffing, he resisted....

[65] Mr. Grimard completed the use-of-force report at 09:25, immediately after the incident. He wrote the following:

[Translation]

I had to spray the inmate [D] because he was verbally and physically uncooperative. He was a danger to himself and my work colleagues. I had to spray him three times before he agreed to cooperate.

C. The investigation

1. Decision to conduct the investigation

[66] The use-of-force and the observation reports led the institution's authorities to watch the videotapes. The tape from the kitchen, as well as the fact that the MK9 canister had been completely emptied, led to a local and regional review that recommended a thorough investigation.

[67] The Assistant Deputy Commissioner, Correctional Operations, for the Quebec Region wrote to the CSC's director general, security, to report on the use of force, which was deemed at Level 3 (the highest) due to the noted deficiencies and the large amount of OC used. The memo includes the following two comments:

[Translation]

...

In this matter, we share local management's assessment and find that staff did not properly apply the Situational Management Model (SMM) during this incident and that the use of irritants was not necessary in the circumstances.

...

We must also mention that the option of keeping the kitchen door closed should have been included as part of the Situation Management Model and that negotiation should have been considered...

[68] The warden, Alessandria Page, ordered an investigation launched. She issued the mandate to establish the circumstances of the use-of-force incident involving inmate D. The mandate was specifically directed at Mr. Grimard and Mr. Carignan; a decision was made to not include Ms. Laurendeau as a subject of the investigation.

[69] The investigation's purpose and mandate were set out in the investigation report as follows:

[Translation]

The purpose of this investigation is to shed light on the incident of September 6, 2016, and to determine whether the allegations of misconduct that occurred during the use of force on the inmate [D] are founded.

*The investigation committee's mandate is to establish the circumstances of the above-mentioned incident involving **Philippe***

Carignan and Jonathan Grimard, both correctional officers I, and to provide a full account of the circumstances of the incident and any other misconduct.

[Emphasis in the original]

2. The conduct of the investigation

[70] Stenographic notes from the interviews of Mr. Carignan, Mr. Grimard, and Ms. Laurendeau demonstrated that the two investigators, Benoît Juneau and Jacques Gauvreau, have significant experience as correctional officers and correctional managers but little experience as investigators.

[71] That inexperience was evident in the fact that they did not really allow the grievors to explain their actions. The investigators, especially Mr. Gauvreau, sought to demonstrate the errors in the grievors' intervention: they should have waited for a negotiator or a correctional manager, they should not have opened the kitchen door, and they were wrong to use OC. The investigators persisted with the idea that inmate D posed no danger in the kitchen, despite the unanimous testimony from both grievors and Ms. Laurendeau that he was aggressive and threatening.

[72] In each interview, the investigators alluded to an inmate who had died at Dorchester, Matthew Ryan Hines. The Correctional Investigator of Canada investigated the death. The report, dated February 15, 2017, was included in the grievors' documents.

[73] Mr. Hines died of acute asphyxiation from a serious pulmonary edema, directly caused by the use of OC. In his case, he was sprayed several times in the face with OC while his hands were cuffed behind him. When his reaction was to cough and spit in an attempt to clear his airways, the correctional officers rolled up his sweater to block his mouth.

[74] At the hearing, when he was asked about his perception of that case, Mr. Carignan simply stated, "[translation] It was not an intervention; it was torture."

[75] Nevertheless, Investigator Gauvreau attempted to draw a parallel between the two situations. I quote as follows from pages 111 and 112 of the stenographic notes of Mr. Carignan's interview (the spoken language is reproduced verbatim):

[Translation]

[Mr. Gauvreau]: ... *“and” “all” correctional officers have to be taught, it's the SMM, as I explained to “them”, to your colleagues, it's the following ... “and” we're at “this” point after several incidents ... uh ... in which there was a use of force, “and” we're still talking about the inmate who died at Dorchester ...*

...

[Mr. Filion]: *He “was” sprayed eight (8), nine (9) times ...*

[Mr. Gauvreau]: *He “was” ...*

[Mr. Filion]: *... in the face, it's ...*

[Mr. Gauvreau]: *... sprayed about ... uh ... a little bit more than that, but he died.*

[Mr. Carignan]: *Okay.*

[Mr. Gauvreau]: *“And”... uh ... the big thing at the CSC, right now, is the use of force, we ... they... the media will get hold of it for sure, it's ... it's like ... uh ... after “the” death of Ashley Smith, which was the big battlefield, it'll be the use of force, “and” “all” use of force will be scrutinized, to the “letter” ...*

[Mr. Carignan]: *Okay.*

[Mr. Gauvreau]: *... “and” they'll be looked at, “and” if our policies aren't applied “and” our... uh ... we'll be at the same spot tomorrow, there, I mean, we don't want ... we want to avoid that....*

[76] Mr. Carignan did not disagree with the idea of improving. He replied as follows to Mr. Gauvreau:

[Translation]

[Mr. Carignan]: *Okay. Listen: it's ... like I said, I said, “for me”, my goal, too, is to improve myself, if ... if you have suggestions, anything that can avoid this kind of problem or new training [inaudible], would be happy to ... to hear it.*

Because, “me”, it's certain, you know, I'm in my sixth year, so I ... I can develop, so, uh

[77] In each interview, Mr. Filion mentioned the fact that the training that correctional officers undergo no longer corresponds to what is expected of them. In the interview with Mr. Carignan, he stated the following (page 97 of the stenographic notes):

[Translation]

[Mr. Filion]: *Well ... Ah! Ah! ... I want to point out that it's too bad that this is something that's known, at Cowansville Institution, which is that there's a difference of opinion or misunderstanding among several officers, about the use of force, that local*

management is aware, and that we had a multidisciplinary committee on this topic.

After that committee ... uh ... they all went back to their positions.

Uh ... afterward, I ... we had a union meeting with ... uh ... the AWO and then ... uh ... we agreed together to develop an action plan, “and” it was important to inform the CXs and the correctional officers of their ... well, their duties, responsibilities, “and” what the administration expects of them.

“And”, as a result, there was no ... there was never a communication plan drawn up.

“And”... uh ... today... uh ... people, they learn ... uh ... they learn how ... you know ... what ... you know, they learn the Situation Management Model in an exam ... uh ... disciplinary, when they ... you know, when they first had to learn ... uh ... when the employer... realized there was a problem in that area....

[78] At the hearing, Mr. Carignan testified that as he understood it, in a situation in which an inmate does not want to cooperate, using OC is permitted, even recommended. He filed as evidence an exam from his training (March 2010) on chemical agents and inflammatory sprays. Question 4 reads as follows:

[Translation]

The CSC’s Situational Management Model states that chemical agents and oleoresin capsicum are the most appropriate means to use when an offender refuses to cooperate and is aggressive or when verbal orders have proven ineffective.

[79] It was a “true” or “false” question. The correct answer was “true”.

[80] In the interview, Mr. Gauvreau reproached Mr. Carignan for believing that OC could be used after three orders. However, at the hearing, the grievors also filed as evidence an exam completed online, in which question 20 reads as follows:

[Translation]

Select the statement that best completes the following:

Under the Situational Management Model (SMM), the combined use of physical control and inflammatory agents may be an appropriate intervention in a security incident if the offender:

- a. Enters into a long debate with an officer to determine whether he must leave his cell or room;*
- b. Refuses to leave his cell or room after receiving three direct orders from an officer.*

[81] The correct answer is the second statement.

[82] In his investigation interview, Mr. Carignan did not have the opportunity to explain himself as to either his reasoning or the training he had received.

[83] For his part, Mr. Grimard responded in the interview that he simply followed his colleague's instructions. Mr. Grimard had come from a maximum-security institution, Port-Cartier, and the use of OC, for him, was neither unusual nor exaggerated.

[84] In the interview, the investigators referred to an "[translation] planned non intervention", which was the first time he had heard of such a concept. As he understood it, it meant that the incident had to be contained and that a negotiator or manager had to be brought in.

[85] In the interviews, the investigators considerably emphasized the concept of a "[translation] planned" versus a "[translation] spontaneous" intervention. According to them, the intervention had been planned because, before opening the kitchen door, Mr. Carignan made a point of asking Mr. Grimard to bring the MK9 canister "[translation] as a preventative measure", according to the two grievors.

[86] Mr. Carignan had a different perception of a planned intervention, which a correctional manager must necessarily approve. According to him, they tried to manage the situation to the best of their knowledge. As the mode was essentially reactive, it was a spontaneous intervention. Mr. Grimard agreed.

[87] Mr. Grimard explained that they were in a reactive mode in which the aim was to have the inmate cooperate immediately. Had he said, "[translation] That's enough", right away, they would have stopped. Indeed, as soon as he said, "[translation] That's good", they stopped and did not use any additional force, despite inmate D's resistance to being handcuffed.

[88] According to Mr. Grimard, the investigators seemed to want to put words in his mouth. According to them, the kick was not aggressive, while it was for Mr. Grimard, in the context, especially as inmate D was screaming. The correctional officers were concerned by the fact they did not know what inmate D would do. Like Ms. Laurendeau, Mr. Grimard was struck by the difference between viewing the video

without sound and the verbal aggressiveness of inmate D, which caused in him an adrenaline rush.

[89] At the hearing, Mr. Juneau explained that the amount of OC used was not proportional to the situation. At six seconds, the first spray was too long. There was no need to engage in an exchange with inmate D if he was not cooperative. Once brought under control in the kitchen, it would have been best to wait for a correctional manager to arrive.

3. The investigation report

[90] The investigation report is dated November 30, 2016.

[91] The report summarized the interviews, described the videos, and presented findings of fact, the most important being that inmate D did not show any aggressiveness while in the kitchen. The report did not compare that conclusion to the three correctional officers' perceptions. They saw inmate D as aggressive, especially in his comments, which, again, were inaudible. The report found that the grievors breached the applicable rules.

[92] The report referred to Mr. Filion's comments on the lack of a training plan on the use of force but did not draw any conclusions as to the relevance of those comments to assessing the grievors' actions.

[93] The report contained some curious factual errors; it attributed intentions to Mr. Carignan that did not correspond to reality.

[94] Mr. Carignan testified at the hearing and told the investigators that he returned to inmate D's cell at about 09:15 after the first round, to inquire about what had caused inmate D to be in a bad mood. On entering the cell, Ms. Laurendeau and Mr. Carignan smelled brew. They thought that the inmate should leave his cell so that it could be searched. However, the investigators wrote the following about this (page 23 of the investigation report):

[Translation]

When they entered cell 11, certain common procedures should have been carried out, such as wearing search gloves, because, based on what was obtained, they returned to the cell to conduct a search based on reasonable grounds of belief.

This leads us to believe that the reasons that officer Carignan advanced for entering inmate D's cell were not those cited.

The officer stated that the return to the cell to conduct the search had been for a reason, while in his testimony, he said that the odour had been detected only when they arrived at cell 11.

However, the officer had remained in front of that cell for several seconds during his round, and the return to range 1B was only to speak with the inmate.

[95] Mr. Carignan never said that he had returned to the cell with the intention of conducting a search. The intention was to speak with the inmate, which the investigators seem to doubt.

[96] The report did not consider in any way the explanations of the grievors and Ms. Laurendeau or the fact that inmate D's tone was rising and that the situation seemed volatile. Nor did the report mention that Mr. Carignan was willing to improve, provided he was given clear instructions.

D. The disciplinary action

[97] Mr. Anctil was the deputy warden of Cowansville Institution. He signed the disciplinary letter to the two grievors. He was not there in September and October 2016 when the incident and investigation interviews took place. He returned (he had worked there in 2014) in November 2016. He read the investigation report and met with the grievors at a disciplinary hearing on March 6, 2017. At that meeting, the grievors complained about the investigators' attitudes. They felt that the investigators had not listened to them. They asked Mr. Anctil to listen to the recordings of the interviews, but he refused to. According to him, the videotapes were clear, and the investigation report was complete and reasonable.

[98] The discipline letter to Mr. Grimard indicated the following breaches:

[Translation]

...

Paragraph 6g - Failure to respect or to apply any Act, regulation, Commissioner's Directive, standing order, or other directive as it relates to duty

CD [Commissioner's Directive] 567 - Management of Security Incidents, at the following paragraphs: 7; 12; 13; 14 and 17

CD 567-1 - Use of Force, paragraph 15

CD 567-4 - Use of Chemical and Inflammatory Agents, paragraph 14

Paragraph 6j - Wilfully or through negligence, make or sign a false statement related to the performance of duty

Paragraph 6n - Use excessive force (that is, more force than is reasonable and necessary) to carry out legal duties.

[99] The letter to Mr. Carignan reiterates the same breaches and adds the following: “[Translation] Protocol for stab-resistant vests”, referring to the fact that Mr. Carignan did not wear his safety vest that day. He testified that he had simply forgotten it. That oversight seems to have been uncommon, as his performance evaluations note that he “[translation] appropriately [wears] his safety equipment”.

[100] Mr. Carignan was also criticized for not following the instructions at paragraph 11 of Commissioner’s Directive (CD) 567.

[101] Mr. Anctil considered many mitigating factors when determining the sanctions to impose. The grievors had cooperated with the investigation, and they both had clean disciplinary records.

[102] Mr. Anctil imposed on Mr. Grimard a financial penalty of \$1000 (equal to 4 days of pay). For Mr. Carignan, Mr. Anctil imposed a more severe penalty, a 5-day suspension without pay, because of his leadership role in the matter and because he did not seem to understand the seriousness of his actions.

[103] To fully understand the allegations against the grievors, it is appropriate to quote the Commissioner’s Directives (CD) cited in support of the sanctions.

[104] The relevant paragraphs of CD 567 - Management of Security Incidents read as follows:

...

7. All interventions used to manage or control incidents that jeopardize the security of an institution will be consistent with the Situation Management Model and will:

a. promote the peaceful resolution of the incident using verbal intervention and negotiation

b. be based on the safest and most reasonable measures to prevent, respond, and resolve the situation

c. be limited to only what is necessary and proportionate to the objectives of the CCRA [Corrections and Conditional Release Act]

d. respond to changes in the situation through continuous assessment

...

11. The inmate's current behaviour, situational factors (e.g. location, presence of weapons, other inmates, social history, etc.), tactical considerations (past behaviour, size of inmate, skills of the officer, availability of backup, etc.) and the risk relating to the incident will be assessed on an ongoing basis.

12. When necessary and possible, staff members will consider withdrawing, reassessing and re-planning [sic] their response option so that the most appropriate response is implemented. The effectiveness of previous interventions will be part of this ongoing assessment.

Inmate Behaviour

13. Staff will consider the inmate's current behaviour and assess it as:

- cooperative*
- verbally resistive*
- physically uncooperative*
- assaultive*
- shows potential to cause grievous bodily harm or death, or*
- escape*

Selection of Appropriate Management Strategies

14. Every incident will be managed using the safest and most reasonable response, and be limited to only what is necessary and proportionate to attain the purposes of the CCRA and to respond to the situation.

...

17. Whenever appropriate, staff will manage situations using dynamic security, staff presence, verbal intervention, conflict resolution, negotiations, or verbal orders.

...

[Emphasis in the original]

[105] Paragraph 15 of CD 567-1 - Use of Force reads as follows:

15. When a staff member is directly involved in a spontaneous use of force, attempts will be made, when practical, to limit his/her involvement beyond what is necessary to control the situation.

[106] I note that CD 567-1 provides that a planned use of force must be the subject of an intervention plan and be authorized by a correctional manager.

[107] Paragraph 14 of CD 567-4 - Use of Chemical and Inflammatory Agents reads as follows:

14. The amount of chemical or inflammatory agents used will be limited to what is necessary and proportionate to bring situations under control.

[108] I note that there is no provision stating that the use of MK9 must be authorized by a correctional manager. The only relevant provision about MK9 reads as follows:

3. The Institutional Head will:

...

d. ensure the MK9 inflammatory agents are only authorized for:

...

ii. placement on control posts to be available for issue for responding to incidents

[109] I note that Ms. Laurendeau received no discipline despite being of a higher rank than Mr. Carignan (she is a CX-02) and despite the fact that she never questioned the grievors' actions during the incident of September 6, 2016. In addition, she also did not wear her security vest that day.

[110] I also note that at the hearing, both grievors acknowledged that the instructions are now clear. In similar circumstances, it would be necessary to wait for a correctional manager before attempting to move the inmate from the kitchen so that the manager could determine the required intervention.

[111] Finally, I reviewed the charge against inmate D for refusing to obey an order on September 6, 2016, which resulted in disciplinary segregation on October 19, 2016. I also reviewed his profile, which explains the reasons for his incarceration and his general attitude. The information in the profile did not play a role in the grievors' decisions. They responded to inmate D's attitude and behaviour on that day.

III. Sealing order

[112] The CSC asked that the video sequences be sealed, as they show the partial configuration of Cowansville Institution. Similarly, it asked that the detailed plan of unit 10 be sealed. It submitted that publicly disclosing the institution's layout could pose security risks. The grievors did not object to that request. Finally, inmate D's profile, filed as evidence, was also included in the sealing request, for privacy reasons.

[113] The principle of the public nature of evidence and hearings before the Board is well established. A confidentiality order must meet the criteria that the Supreme Court of Canada established in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835; *R. v. Mentuck*, 2001 SCC 76; and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. In *N.J. v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 129 at para. 48, the criteria was summarized as follows for the Board's purposes:

48 As noted earlier, it is recognized that the open court principle applies to courts and quasi-judicial tribunals. It is also recognized that, in some instances, limits could be imposed on the accessibility to proceedings. The Supreme Court of Canada developed the Dagenais/Mentuck test, which helps when deciding whether restrictions should be imposed on the open court principle. The Dagenais/Mentuck test was reformulated in Sierra Club of Canada as follows:

...

a. [the restriction] ... is necessary in order to prevent a serious risk to an important interest ... in the context of litigation because reasonable alternative measures will not prevent the risk; and

b. the salutary effects of the ... 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.

...

[114] In the present circumstances, I find it appropriate to seal the exhibits per the respondent's request. It is in the public interest to maintain the confidentiality of the layout of the premises at a penitentiary. As for the videos showing inmate D, and for his profile, I acknowledge that they should also be sealed to respect his privacy. Sealing these documents does not in any way affect the transparency of this decision

or the quasi-judicial process. Therefore, the following exhibits are sealed: E-2, E-3, E-4, E-5, E-6, E-7, E-8, E-9 (videos on the CD), E-11, and F-3.

IV. Summary of the arguments

A. For the respondent

[115] The questions that arise in the case of a grievance against a disciplinary measure are as follows (*Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1): Was there misconduct that justified imposing disciplinary measures? If so, were the measures excessive? If the adjudicator finds that the measures were excessive, what alternative measures should be substituted as fair and equitable?

[116] According to the CSC, there is no doubt that there was misconduct. The information provided by the videotape was objective. The intervention was not justified, it was not minimal, and it was not necessary. Therefore, the grievors did not follow CSC instructions.

[117] In their arguments, the grievors relied on *King v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 84, in which the adjudicator wrote that the lack of sound in a videotape could present a problem when interpreting the facts in it. However, according to the respondent, the videotapes in this case are useful; they are objective, and as the adjudicator emphasized in *Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services) (Zolnierczyk Grievance)*, [2011] O.G.S.B.A. No. 18 (QL), although the witnesses' versions of the facts change over time, videos do not change. In *Hicks v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 99, the Board found that the lack of sound was not a problem when interpreting the video.

[118] The videotapes were not the only evidence of the use of force; there were also the observation reports, testimonies, and investigation report.

[119] The grievors' misconduct was in not correctly applying the CSC's use-of-force directives. Interventions must always be attempted with the least possible force. The grievors justified using OC by the fact that the inmate was physically uncooperative; in reality, he became so when they opened the kitchen door. It would have been preferable to leave him in the kitchen and to call another intervenor, correctional

manager, or negotiator to resolve the situation. As in *Seamark v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 56, the inmate was secured and showed no signs of distress. Other, more peaceful, interventions were possible.

[120] The grievors should have obtained authorization, as their intervention was planned. In effect, since there was no immediate threat, preparing MK9 before opening the door demonstrated some planning. That planning should have been approved. The grievors could not argue that it was a spontaneous act, as it required some reflection.

[121] The situation was not reassessed during the intervention with MK9, contrary to what is set out in the SMM. The grievors sprayed OC three times over a short period. There was no need to spray such a quantity.

[122] Additionally, the observation reports were deficient, which was another part of the grievors' misconduct.

[123] Given the seriousness of the unjustified use of force, the penalties imposed were just and proportional.

[124] The respondent also cited several decisions that have in common excessive use of force and subsequent denial by the correctional officers involved. I will return to them in my analysis.

B. For the grievors

[125] The grievors relied heavily on *King* to challenge the disciplinary measures imposed on them. They made two main arguments: the videotapes are not enough to present the facts as a whole, as they lack sound, and the grievors complied with all directives and the SMM.

[126] *King* was about a use of force that the CSC deemed abusive and unnecessary. Correctional Officer King ordered an inmate who had just hit another inmate to return to his cell. According to all the testimonies, the inmate verbally refused and had an aggressive tone. The investigator found that neither his refusal nor his aggressiveness could be seen in the video. Correctional Officer King's action, i.e., grabbing the inmate by his sweater to lead him to his cell, was deemed excessive and premature. He received a financial penalty equal to four days' pay.

[127] In *King*, the adjudicator found that although the absence of sound on a videotape is not necessarily a determining factor, it might be when it deprives the viewer of the context of an intervention. In *King*, as in this case, the verbal refusal and the rising tone justified the correctional officers' intervention.

[128] In *King*, the adjudicator also found that the correctional officer had applied the SMM's principles to manage the situation. He had several options, and he chose one. She allowed the grievance.

[129] Additionally, if the allegations against the grievors are reviewed, it can be seen that while the CSC seemed to see a single incorrect intervention, the grievors saw several stages and several things.

[130] In their arguments, the grievors reiterated the directives that they are accused of having incorrectly applied.

[131] Paragraph 7 of CD 567 states that interventions must respect the SMM. Mr. Carignan testified that he had that precisely in mind throughout the incident. Paragraph 7(a) (and 17) promotes a peaceful resolution using verbal intervention, which Mr. Carignan tried.

[132] Paragraphs 7(b) and (c) (and 14) of CD 567 provide for using the safest and most reasonable measures and for interventions that are necessary and proportional. In the kitchen area, to calm an inmate whose tone was rising, the grievors felt that OC was the best means of having him agree to be handcuffed.

[133] Paragraph 7(d) (and 12) provides for continually assessing. Mr. Carignan testified that he monitored and reassessed the situation, taking into account not only the inmate but also the overall context, in a cell block in which other inmates can move freely. Paragraph 11 refers explicitly to the importance of context when assessing a situation. The grievors took into account not only that the inmate was secured but also that he was in a kitchen that was not safe. The glass could have been broken, the pots and pans could have been thrown, and other inmates could have arrived and encouraged an escalation.

[134] Paragraph 13 states that the inmate's behaviour must be considered. All three testimonies aligned on the inmate's aggression and rising tone. Mr. Carignan tried to

negotiate but to no avail. He explained to the inmate that he would give three orders. The inmate was already expecting OC; he said as much and turned his back.

[135] The SMM states that inflammatory agents can be used in cases of physical resistance.

[136] As soon as inmate D said, "That's good", the use of force stopped. No recourse apart from OC was used, and it never contacted inmate D's mucous membranes. Therefore, the use of force and OC were proportional to the situation. The inmate was immediately taken to the decontamination shower. There was no sign of aggression when he was escorted from the kitchen to the shower.

[137] The grievors were also accused of making false statements. However, the employer acknowledged in the disciplinary letter that they had fully cooperated with the investigation. They hid nothing about their actions. The reports were completed as soon as possible after the incident.

[138] Mr. Carignan used the word "[translation] banging" to describe the kick and the handle shaking. Mr. Grimard, who had his back to the kitchen, heard noises and interpreted them as the inmate banging everywhere in the kitchen. He added in his report that the inmate was very violent. At the hearing, he explained that inmate D's tone and attitude gave him the impression of violence.

[139] The investigators strongly emphasized that it was a planned use of force and thus that authorization had been required to use MK9. No directive provides authorization for using it. Additionally, CD 567-1, on the use of force, defines the following two types of use of force:

...

Planned use of force: the authorized deployment of line staff through an Intervention Plan or deployment of the Emergency Response Team through a SMEAC (Situation, Mission, Execution, Administration and Communication).

...

Spontaneous use of force: an immediate intervention by staff to an incident in which at least one use of force measure, consistent with the Situation Management Model, is required to bring a safe resolution to the situation.

...

[140] The grievors argued that they faced a situation in which they felt a need to act immediately to prevent it from deteriorating, i.e., a spontaneous use of force with MK9.

[141] In conclusion, the decision to impose a penalty was not based on CSC guidelines, which the grievors claim to have followed.

[142] Mr. Carignan acknowledged that he did not wear his vest that day. Ms. Laurendeau did not wear one either, according to the videotapes. She was not disciplined.

V. Analysis

[143] An adjudicator's assessment of the merits of a disciplinary action as part of a grievance is well known and stems from the decision in *Wm. Scott*, which the Federal Court of Appeal upheld in *Basra v. Canada (Attorney General)*, 2010 FCA 24. The questions are: Was there misconduct? If so, was the disciplinary measure imposed excessive? If the Board's view is that it was excessive, what alternative measure should be substituted as fair and equitable?

[144] It is a well-established principle in labour law that as confirmed in *King*, at para. 106, the adjudicator's investigation at the hearing is *de novo*. In other words, the adjudicator is not bound by the investigation's findings that led to the disciplinary action.

[145] In this case, the investigation had two serious breaches of procedural fairness in that it was instead an inquisition, and the decision maker refused to hear the recordings that would have shown it.

[146] From the start, the investigators decided that the grievors had acted incorrectly. Their questions were not aimed at shedding light on the grievors' decisions but rather at highlighting the errors they made. There was no question of listening to the grievors' explanations about the lack of sound on the videotapes. The intervention in the kitchen is incomprehensible in the absence of the consistent testimonies of the grievors and Ms. Laurendeau that inmate D's tone was rising, along with raised fears that the situation would deteriorate. As in *King*, the lack of a soundtrack hindered interpreting the facts.

[147] On reading the memo that the Regional Deputy Commissioner sent to the Director of Security well before the investigation, it can be seen that it was already determined that there had been no reason to use OC or to open the kitchen door. The investigators began with the same premise and did not deviate from it.

[148] In their disciplinary interview, the grievors asked Mr. Anctil to listen to the recording of their interviews. Mr. Anctil refused because he trusted the investigators, had seen the videos, and felt that the report was objective.

[149] The decision not to include Ms. Laurendeau as a subject of the investigation demonstrates that the issue truly was the MK9 canister being emptied. She was present throughout the incident, she let Mr. Carignan make the decisions, she handcuffed the inmate, and she prepared a report making the same observations (“[translation] banging continuously on the door”) for which the grievors were blamed.

[150] The penalties were based on the grievors’ alleged misconduct. But I cannot conclude that misconduct occurred. The CSC did not present me with any evidence that the grievors breached the directives.

[151] On the contrary, I find that to the best of their abilities, the grievors applied the directives and the SMM, which allows in particular the use of inflammatory agents when an inmate is physically uncooperative.

[152] The investigators’ assessment was based solely on what is seen in the kitchen. The videotape did not have sound, and the investigators did not seek any explanations from the grievors. On the contrary, they refused to understand the perspectives of the grievors and Ms. Laurendeau as to inmate D’s perceived aggressiveness; he refused to submit to direct orders.

[153] The grievors were accused of not assessing and reassessing the situation. I find otherwise — the assessment was ongoing. Their key concern was security.

[154] The SMM is based on a central core, the CAPRA (recall its meaning: Client, Acquiring and Analyzing, Partnership, Response, and Assessment). Therefore, the client is at the heart of the CSC’s concern. Still, the SMM provides for the deployment of a range of measures, including the use of a firearm in the event of escape, to control inmates’ behaviour.

[155] In other words, which the SMM confirms, the CSC's main mission is security. What is striking about the difference of opinion between the investigators and the grievors is that the investigators looked at inmate D only in the kitchen. They did not hear him; they also did not hear what Mr. Carignan said. Throughout the incident, he attempted to reason with and to calm inmate D. In particular, the investigators did not seem to account for the reality of life in a prison unit and the effect on other inmates when an inmate is so disorganized that he loses his grip. That is clearly what led the grievors to act as they did, to defuse as quickly as possible a situation they felt was dangerous.

[156] From their side of the glass, the grievors saw not only an inmate who was becoming angry and who could act out but also the situation as a whole, including the movements of other inmates, the possibility of the situation deteriorating and becoming more violent, the difficulty of restoring order, and the possibility of serious injury. Investigator Gauvreau told Mr. Carignan said that had the inmate indeed become violent, he could have intervened with a "[translation] time out", a physical intervention involving several correctional officers. Mr. Carignan replied that he was in fact trying to avoid a situation that might have required more draconian and violent steps.

[157] Mr. Carignan testified that he would have immediately consulted with the correctional manager, but she was not there. He assumed (correctly) that Mr. Janicek had made a radio call from the control post; managers are supposed to monitor the radio and react when it is their sector. The videotapes show other correctional officers immediately running but no correctional manager.

[158] In that context, Mr. Carignan felt that he needed to defuse as quickly as possible a situation that he considered dangerous. Based on his performance evaluations, he had a good relationship with inmates. Although he was accused of not reassessing the situation, the evidence showed otherwise. He continually assessed the situation and made decisions based on his assessment.

[159] After an initial assessment, he took inmate D out of his cell due to a smell of brew, which could explain inmate D's unusually bad mood. After his second assessment, in view of inmate D's obvious bad mood, he considered that the search

should be conducted without him present. As a result, inmate D was taken to the kitchen; he was not happy; he kicked the door and shook the handle, trying to get out.

[160] According to the investigators, the reassessment should have led to a time out until a correctional manager or negotiator was called, except that their assessment did not consider inmate D's aggressiveness. After two violent behaviours, he began to stare at and insult Mr. Carignan.

[161] Mr. Carignan considered contacting the unit correctional manager, but as she was absent, he concluded that it would be more effective to simply take the inmate to Keeper Hall. To do that, given the inmate's agitation, he had to be handcuffed, which he outright refused. After three orders, the inmate was sprayed with MK9. According to the training that Mr. Carignan had received, and in the context of the reassessments, it was the appropriate response.

[162] The investigators strongly insisted on the fact that there was no urgency to remove the inmate from the kitchen, since he was confined. The grievors' assessment was different, as they could see and hear the inmate. He was immobile (practically), but aggressive — he shouted and stuck his chest out. They did not know if he would suddenly take a pot and throw it through the glass. The movements of other inmates could have been contained by closing the gates, which would have risked creating a fair amount of discontent, as the risk could not be taken of inmates being present and encouraging inmate D to become more violent.

[163] It was not that Mr. Carignan did not constantly assess the situation; it is that his assessment was not consistent with that of the investigators, who lacked several parts of the assessment, such as directly seeing the inmate or hearing his insults or Mr. Carignan's tone in trying to calm him. As the grievors argued, this situation was very similar to that of *King*.

[164] Mr. Carignan gave orders; inmate D refused to comply. Therefore, he was sprayed with MK9 for control purposes. As soon as inmate D signaled his surrender, the use of force stopped (the MK9 canister was empty, but the agents still had their MK4). Although the inmate was still reluctant, he was handcuffed without a violent incident and was led to the decontamination shower. Mr. Carignan accompanied

inmate D to the shower with other correctional officers. The inmate was calm, as were the correctional officers.

[165] There were no pans through the glass and no broomsticks used as weapons, and inmate D was uninjured. In reality, worst off was Mr. Grimard, who received OC in the face. Things returned to normal in unit 10 once inmate D left for the decontamination shower. The grievors did their best to restore order.

[166] Would it have been better had the manager been there to speak with inmate D immediately and perhaps defuse the situation? Undoubtedly. She was not there. The three correctional officers directly involved viewed a situation that was deteriorating, based on things not available to the investigators, such as directly seeing inmate D and hearing his and Mr. Carignan's statements. Ms. Laurendeau said she was struck by Mr. Carignan's calmness. The two CX-02s present (Ms. Laurendeau and Mr. Janicek, who were not penalized) collaborated in the effort, her by letting Mr. Carignan take responsibility for the intervention and handcuffing inmate D after he was sprayed, and Mr. Janicek by unlocking the trunk containing MK9. In other words, the intervention was also not out of the ordinary for them.

[167] It would be today, as the guidelines for correctional officers have changed. It is no longer a matter of resolving a situation but of identifying and containing and then waiting for a decision from a correctional manager. I certainly do not wish to impede progress in how the CSC treats its clients. However, it cannot accuse its correctional officers of not following new instructions that have not yet been communicated. At the hearing, Mr. Fillion testified about the lack of communication, which he raised at the three interviews. He made a point of indicating to the investigators that the CSC had not implemented the communication plan. His interventions are referred to in the investigation report, but they are given no weight. As a result, they were not considered when the discipline was imposed on the grievors.

[168] Mr. Carignan acknowledged that he did not wear his vest that day. Nor did Ms. Laurendeau, according to her interview. She was not disciplined. For an employee with a clean disciplinary record and with performance appraisals that indicate that he takes care to wear the uniform properly, forgetting his vest would warrant at most an observation from his manager.

[169] In its arguments, the CSC presented several decisions in which correctional officers used excessive force and then tried to downplay or deny their actions: *Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services) (Gillis Grievance)*, [2008] O.G.S.B.A. No. 84 (QL), *Zolnierczyk Grievance*, and *Ontario Public Service Employees Union v. Ontario (Ministry of Public Safety and Security) (Horan Grievance)*, [2002] O.G.S.B.A. No. 58 (QL).

[170] In those cases, the use of force was not justifiable, and it is clear that the correctional officers sought to hide their actions. That was not so in this case. Both grievors said that had the OC contacted inmate D's face, they would have stopped immediately. They stopped as soon as inmate D said, "That's good", to surrender. There were no blows or other brutality after that. Additionally, their full cooperation in the investigation was noted in the disciplinary letters. In their reports, they did not downplay their intervention. At the hearing, they explained their observation reports, which referred to the inmate's aggressiveness. Having heard their testimonies and reviewed Ms. Laurendeau's interview, I understand their reports, even though they might not have been written very well.

[171] In the justification for taking disciplinary action, the CSC cited the fact that they had signed false statements. I am not prepared to recognize that the grievors made false statements, in the sense that it was determined in the decisions cited earlier. They explained the meanings of their statements, and given all the circumstances, those statements, although imperfect, are not dishonest or misleading.

[172] The CSC presented decisions in which the use of force had been clearly abusive, in that inmates had been struck when not dangerous because they were already under control and even handcuffed (*Roberts v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 28, and *Hicks*).

[173] Once again, I must make a distinction. It was clear from the grievors' testimonies and confirmed by the videotapes that their use of force was limited to what was needed. As soon as inmate D complied, all use of force ceased. I would add that their performance assessments confirm their professionalism and their restraint.

[174] The CSC has an obligation to protect inmates in its custody, and it is right to crack down when its employees do not respect the limits of reasonableness. That said,

correctional officers must deal with a difficult population that is in a penitentiary for reasons of criminality. That is why the use of force is sometimes needed and thus permitted.

[175] I find that the grievors committed no misconduct on September 6, 2016. They acted to the best of their abilities and tried to resolve a situation that they feared would degenerate. Neither the training they received nor the Commissioner's Directives contradict their actions and decisions. No one was injured, and order was quickly restored, including for inmate D. Consequently, disciplinary action was not warranted.

[176] The grievors claimed \$5000 in damages in their grievances because the investigation and discipline tarnished their images as correctional officers.

[177] I find that this decision restores their images as correctional officers who carry out their work conscientiously. I did not receive any evidence of any further action by the CSC. The fair remedy usually involves restoring the person to the state he or she would have been in had there been no penalty. I see no reason to grant additional damages.

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

(The Order appears on the next page)

VI. Order

[179] According to the confidentiality order, the following exhibits are sealed: E-2, E-3, E-4, E-5, E-6, E-7, E-8, E-9 (videos on the CD), E-11, and F-3.

[180] The grievances are allowed.

[181] The disciplinary measures and any reference to the disciplinary investigation shall be completely removed from the grievors' files.

[182] Mr. Carignan's suspension and Mr. Grimard's financial penalty are set aside.

[183] The grievors are entitled to the reimbursement of their salaries with interest at the applicable legal rate in the Province of Quebec.

September 6, 2019.

FPSLREB Translation

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board