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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

THOMAS STARKEY

Grievor

and

**DEPUTY HEAD
(Department of Fisheries and Oceans)**

Respondent

Indexed as
Starkey v. Deputy Head (Department of Fisheries and Oceans)

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: Kim Patenaude, counsel

For the Employer: Joel Stelpstra, counsel

Heard at Saint John, New Brunswick,
September 26 to 29, 2017. Written submissions October 31 and November 24, 2017

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Thomas Starkey (“the grievor”) was employed by the Treasury Board (TB or “the employer”) at the Department of Fisheries and Oceans (DFO) with the Canadian Coast Guard (CCG) as a seaman-deckhand classified at the SC-DED-02 group and level and based out of Dartmouth, Nova Scotia, in the DFO’s Atlantic region.

[2] By letter dated October 4, 2012, the grievor’s reliability status was revoked. By letter dated October 17, 2012, he was terminated from his employment. On October 29, 2012, he filed two grievances, one against the revocation, and the other against the termination.

[3] In his revocation grievance, the grievor alleged that the decision was unjust, discriminatory, and not done in good faith and that it constituted disguised discipline. As corrective action, he requested that his reliability be further reviewed and reinstated, that he be given a letter of apology, that he suffer no loss of pay and benefits, and that he be made whole.

[4] In his termination grievance, he alleged that the decision was unjust, discriminatory, and not done in good faith and that it constituted disguised discipline. As corrective action, he requested that he be reinstated to his position, that he be given a letter of apology, that he suffer no loss of pay and benefits, that he be made whole, and that all records pertaining to the termination be removed from his file.

[5] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365: *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former Public Service Labour Relations Board (PSLRB) as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[6] On May 28, 2015, both grievances were referred to the PSLREB for adjudication.

[7] 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 *PSLREBA* and the *PSLRA* 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

[8] As of the hearing, the grievor was 58 years old, a father of 4, and a grandfather of 5. His formal education ended in grade 9. He first started working for the CCG in August of 1977 as a steward, when he was 18 years old. After a little over a year, he left, returning in 1982. At a date not disclosed, he was made permanent. In 1989, he transferred from the steward to the deckhand position, in which he remained until the termination of his employment.

[9] As of the hearing, John Butler was retired. In 2012, he was the assistant commissioner for the CCG’s Atlantic region. He described the CCG’s mandate as being the civil marine arm of the Government of Canada and as supporting other organizations with respect to their operations. In short, the CCG supports the government with respect to operations done on water, including patrolling. It also includes assisting and supporting Royal Canadian Mounted Police (RCMP) and Department of National Defence (DND) operations. CCG vessels are equipped with fast response craft, search and rescue craft, and weapons. At times, RCMP and DND personnel may come on board and set up operations on CCG vessels. Those vessels are equipped with sophisticated communications equipment to facilitate their mandate and to support the operations of other government organizations.

[10] A copy of the deckhand work description was entered into evidence. Both the grievor and Mr. Butler described the duties as varied, depending on the ship. The duties included the following tasks:

- placing buoys;
- launching and recovering boats, including search and rescue boats;

- loading and unloading;
- assisting during operations conducted with other organizations;
- standing watch;
- assisting scientists; and
- acting as a quartermaster on the bridge (the quartermaster is at the helm and drives the ship).

[11] As of his termination, the grievor worked on a ship named the *Hudson*, to which he had been assigned since 2006. He testified that at times, he worked on other ships, but that for the most part, he remained on the *Hudson*. The *Hudson* is the CCG's largest and oldest scientific research vessel that has carried out oceanographic work along the north and eastern coasts of Canada from Greenland through the Arctic and down to Nova Scotia.

[12] By letter dated October 4, 2012, the grievor's reliability status was revoked by Joan Gibson, the DFO's director of safety, security, and emergency services and its departmental security officer (DSO). The letter stated that the assessment of the grievor's reliability status had been conducted in accordance with section 2.1 of the "Policy on Government Security's Standard on Personnel Security Screening". However, it did not set out the specific concern that led to the revocation, only that one was discovered. Ms. Gibson did not testify.

[13] By letter dated October 17, 2012, Mr. Butler terminated the grievor's employment. The relevant portions of the termination letter state as follows:

...

This is in response to the letter that the Departmental Security Officer of Fisheries and Oceans Canada issued to you today. This correspondence informed you of the Department's decision to revoke your reliability status, upon completion of a Departmental Security investigation.

As maintaining such status is a condition of employment, it is my duty to inform you that you can no longer be employed in the Public Service. Consequently, under the authority delegated to me by the Deputy Minister and pursuant to paragraph 12(1)(e) of the Financial Administration Act, I hereby inform you that your employment as an SC-DED-02 Deckhand with the Canadian Coast Guard is being terminated. This decision is effective as of today, October 17, 2012.

. . .

[14] The issue that led to the revocation of the grievor's reliability status was his involvement with the Bacchus Motorcycle (MC) Club ("Bacchus") in Atlantic Canada.

III. Outlaw motorcycle gangs or clubs

[15] As of the hearing, Leonard Isnor was a detective staff sergeant with the Ontario Provincial Police (OPP). He joined the OPP in 1984 and began working in the drug enforcement division, general policing, and traffic duties, which lasted about 11 years. In 1995, he began working and specializing in the investigation of outlaw motorcycle gangs or clubs ("OMCs"). Beginning in 1995, and as of the hearing, he has investigated and gathered intelligence on OMCs in several capacities, including as a lead investigator, an expert witness, an expert witness coordinator, an affiant, a court/agent handler, an instructor and lecturer, a case management assistant, a surveillance operator, an intelligence coordinator, an operation coordinator, and a supervisor.

[16] Det. Isnor was brought forward as an expert on OMCs in Canada. I properly qualified and determined him to be an expert on OMCs in Canada, including Bacchus.

[17] Det. Isnor testified that OMCs identify themselves as clubs and that the police and politicians identify them as gangs. Typically, they are structured with a hierarchy based on that of the Hells Angels. They gather information on other OMCs and criminal organizations as well as on law enforcement. Typically, they try to insulate or buffer themselves from criminal activity. They describe themselves as motorcycle enthusiasts. While that may be true, they abide by a set of both written and unwritten club rules that are upheld by violence, and they come into conflict with society and the law. They are in the business of making money by crimes. The number one business is drug manufacturing and distribution, which often leads to involvement in prostitution and to murder.

[18] The written rules include how the OMC is to be run and detail when meetings are to be held, how colours are to be worn, what runs (trips) members must participate in, and who can be affiliated. Examples of unwritten rules include that a member must have something to offer the OMC in order to join it, no cell phones in the clubhouse, and no police officers in the OMC.

[19] Secrecy is essential to an OMC's existence. Essential to secrecy is the quality of recruitment, of which loyalty is a key component. Initially, potential members are identified as "hang arounds". Later, they become what are called "prospects", or in Canada "strikers", and if all goes well, full members. A loyalty test is required to change levels. Some OMCs have support clubs that test loyalty. The time frame from being a hang around to becoming a full member can vary and depends in part on the recruit.

[20] Having something to offer the OMC is essential to becoming a full member. Examples include owning a business through which money can be laundered, being able to be an enforcer, having a drug distribution network, or being able to provide information or intelligence.

A. The meaning of "1%"

[21] Sgt. Isnor explained that before World War II, only people with money could afford motorcycles. After the war, there was a surplus of cheap motorcycles, and many ex-soldiers were offered them. In addition, many returning veterans encountered difficulties adjusting to civilian life; they rebelled, came together in groups (with motorcycles), and wore colours (which were identified as their uniforms). Society put up with it because they were war heroes.

[22] In 1947, the American Motorcyclist Association (AMA) held a get-together (called a "run") in Hollister, California. While the run was nothing new, a large number of clubs arrived. About 4000 people showed up on motorcycles; there were 7 police officers. There was not enough food, and there were not enough hotel rooms. One person was arrested, and a group of motorcyclists surrounded the police station. Trouble erupted, and the state police were called in. The AMA commented, stating that 99% of motorcycle riders are law-abiding and that only 1% are bad apples. The OMCs liked that identification and put a "1%" patch on their jackets. The OMCs are the 1%. They control who can be a 1% member.

[23] Det. Isnor stated that today, 7 OMCs in Canada are part of the 1%, including Bacchus. When it was suggested to him that the 1% is a social club, he stated that that is pure rhetoric and that it is untrue. They are criminal organizations. They are trying to project a clean image; it is a façade.

[24] Det. Isnor explained the territories of the OMCs in Canada. He stated that Bacchus is a small OMC, with 11 chapters in the Atlantic provinces and Ontario. He said that the difference between the Hells Angels and Bacchus would be akin to the difference between a large orange and a small one, inferring that Bacchus would be the small one. It has about 100 members under a vertical hierarchy with a president and vice president at the top.

[25] Det. Isnor testified that to become a full time member of Bacchus, a prospective member had to have been known by a member for four to five years. They start as hang arounds and eventually become strikers. Strikers have to visit all the chapters, which have to advise if there is a problem with a striker. To be made a full member, the vote has to be unanimous.

[26] According to Det. Isnor, Bacchus's criminal activities mostly involved drug trafficking in Atlantic Canada. He testified about investigations of Bacchus and its members along with their arrests.

[27] When he was asked about the potential nexus between the OMCs and the CCG, Det. Isnor stated that Atlantic Canada looms large in terms of the offloading of drugs into the country. Knowing where the CCG is located or will be located would be fabulous intelligence for an organization bringing illegal drugs into the country by sea. When the hypothetical was put to him of an OMC member having information valuable to his OMC, he stated that if that member knew where a CCG ship was or was to be located, he would be obligated to provide this information to the OMC. He stated that even if a member breaks ties with an OMC, the member must still assist if asked.

[28] Det. Isnor confirmed that he had never met the grievor; nor was he involved in the investigation that led to the grievor's loss of reliability status and termination of employment. He confirmed that he was contacted the week before the hearing to testify.

[29] Det. Isnor confirmed that in the past, some members had nothing to offer Bacchus. However, he said that presently (as of 2017), it would be very difficult to become a member without having something to offer.

[30] When in cross-examination, Det. Isnor was asked about the criminality of Bacchus, he stated that the main purpose of OMCs is criminal; like a franchise, they

form a big criminal network. The police have no presence in the drug community. The patch is a signal to the community not to tamper with the OMC. People will not rip off the drug business.

IV. Background to the revocation of the grievor's reliability status

[31] The grievor stated that he began to associate with Bacchus sometime in the mid- to late-1980s when the person he rented an apartment from became a member. He said that he started to hang around Bacchus in the early 2000s when friends of his started to do the same, but he said that he knew people in Bacchus before that. He said his participation amounted to going on motorcycle rides and attending corn roasts. He stated that during this period, he was not aware of any criminal activity.

[32] In 2010, the grievor became a full member of Bacchus.

[33] As of the hearing, Darren Costain was the CCG's deputy director of security operations. His initial involvement with the grievor's case was in December of 2008, when he reviewed the grievor's file and was briefed by his predecessor, Pierre Lyonnais. Mr. Costain did not testify as to what Mr. Lyonnais briefed him on. He said that in November of 2008, the RCMP informed the CCG that the grievor had an association with Bacchus. He said that Mr. Lyonnais then interviewed the grievor. Mr. Lyonnais' title at the time was National Coordinator, Security, Corporate Security, DFO.

[34] Entered into evidence was a two-page boilerplate-type document entitled, "Note to file - note au dossier Personnel Security - Sécurité du personnel", upon which were handwritten notes attributing it to two dates, December 24, 2008, and January 19, 2010, and referencing a meeting that Mr. Lyonnais had with the grievor in the presence of Scott White on December 18, 2008 ("the December 18 meeting"). Mr. Costain was shown the notes. He identified them as being from the security file and stated that Mr. Lyonnais made them ("the Lyonnais notes"). If Mr. White made any notes, they were not produced at the hearing; nor did Mr. White testify.

[35] The relevant portions of the Lyonnais notes are as follows:

24 Dec 08

...

-18 Dec 08 Scott and myself met with Mr. Sparkey to clarify and discuss his association.

- subject has no criminal records and has been with the CCG 17 years. He was concerned of his clearance and employment. He stated he had on joint the club as a hang around to join them on Road trips and social parties. Subject stated he did not own the Club's color and is know at the Club as the undercover Bacchus.

- Subject agreed to leave the Club and stop all associations.

- a brief was prepared by Pierre for ADM. Brief submitted to Jeannette on 22 Dec 08.

- based on the fact that subject was very cooperative, has no criminal records, management finds him a good employee, no adverse information is available that would support Reliability status Revocation.

- The brief recommends that the management pursues the current association so our Government Code of Ethics is met and that would mean to request that the employee seize all associations with the Club.

- Yet to brief the RCMP HQ on our findings and decision that subject presently poses no security risk.

19 Jan 10 Tina informed via e-mail and phone the [unintelligible] still need her to ask subject's manager/supervisor to confirm subject has seized all relationship with MC.

. . .

[Sic throughout]

[36] Entered into evidence was a copy of an email dated December 23, 2008, from Mr. Lyonnais to Corporal Katrina White of the RCMP ("the December 23 email to Cpl White"), which states as follows:

. . .

Subject was interviewed a day late due to weather.

He volunteered to leave the club if it was to affect his employment (Pension). He claims he had never been warned before, even though, his colleagues are aware of his association. He was very cooperative and informed us he did not own colours and that his explanation for his nick name. . .

Only enjoyed the group profile for road trips and social parties . . . Does not considers himself a full member, only a hang around . . .

I will be discussing the details with Sylvain. In the mean time, if you require to confirm some of the information, all I have is available to you.

I have nothing on the others except that our subject doubts that any would join the senior group. They apparently all have good jobs but not enough cash to join . . .

...

[Sic throughout]

[37] Entered into evidence was an email dated January 19, 2010, from Mr. Lyonnais to Tina Gore, the manager of maritime security, which states as follows:

...

The person we need to check to see if he stopped his association/relationship with his MC is Thomas Starkey.

As discussed, we need to have his respective manager/supervisor to confirm with him that he in fact stopped all associations as he had committed to do during my interview with him in 2006.

...

[Emphasis in the original]

[38] Ms. Gore's position relative to Messrs. Lyonnais and Costain was not made clear. Nor was it made clear if her position was within the CCG or DFO. She did not testify.

[39] Entered into evidence was an undated briefing note for the DFO's associate deputy minister (ADM) that Mr. Lyonnais prepared about the grievor and his relationship with Bacchus, which states as follows:

...

BRIEFING NOTE FOR THE ASSOCIATE DEPUTY MINISTER

ALLEGED ASSOCIATION TO AN OUTLAW MOTORCYCLE
GANG BY THOMAS PERCY STARKEY . . . AN EMPLOYEE OF THE
CANADIAN COAST GUARD, MARITIMES REGION

(Information Only)

SUMMARY

- *Information was received from the RCMP that Mr. Starkey, an employee of the Canadian Coast Guard, Maritimes Region was a member of a recognized Outlaw Motorcycle Club which was possibly affiliated with the Hells Angels, a recognized Outlaw Motorcycle Gang involved in international organized crime.*
- *DFO Corporate Security met with the RCMP Integrated Intelligence Unit (IIU) of Bay of Fundy who where the originator of the information and were able to confirm that Mr. Starkey was a known member of the Bacchus Motorcycle Club which is located in New Brunswick. . . It was further learned that the Bacchus Club had publically identified itself as an Outlaw Club by wearing the "1%" patch¹. Even though the Bacchus Club may have contacts in the Hells Angels, there is no evidence that would show involvement in criminal activities or with organized crimes.*

- *Based on the information received from the RCMP, an interview was conducted with the employee in which Corporate Security concluded that if the employee was to leave the club, it is unlikely that the employee would pose a security risk to the CCG joint operational ventures with other lead agencies.*

Background

- *The RCMP Integrated Intelligence Unit (IIU) of the Maritime Division who are responsible for monitoring Motorcycle Gang activities, reported to the CCG Maritimes Region management that one of their employee could be a security risk as he was a member of an "Outlaw Motorcycle Club"*
- *Further enquiries revealed that the subject, an indeterminate employee of the CCG fleet, was in fact an active social member of the "Bacchus Motorcycle Club". The club is suspected of having affiliations with the Hells Angels and may have been involved in criminal activities.*

Analysis/DFO Comment

...

- *Corporate Security learned that even though some members of the Bacchus Club have criminal records and the club has identified itself as a 1 % club, no evidence could be provided that would support criminal activities by the club or its members nor could the IIU substantiate possible affiliations with the Hells Angels.*
- *After obtaining all available relevant information from the IIU, Corporate Security met with the employee. The employee admitted being social with members of the Bacchus Motorcycle Club only to join them for road trips and parties. The employee knew that the club was patched as a 1% and was aware of its meaning. During the interview, the employee was very cooperative and stated that if his association with the Club could possibly affect his employment, he was prepared to immediately stop all associations with this club.*
- *Because it was learned from the IIU that the employee was known by the club members as the "Undercover Bacchus", the employee was questioned to that regard. It was learned that the reason of this nick name was due to the fact he did not own a vest with the club colours (Patch) nor was his motorcycle bearing any sign identifying him as a member of a club.*

Recommendations /Next Steps

...

- *That the CCG Fleet management pursue the initiative by the employee on leaving such a motorcycle club to meet the*

*Government Values and Ethics Code concerning the
conservation of the public confidence and trust.*

Officers Analyst/DSO/ DGs / ADMs

. . .

[Emphasis in the original]

[Sic throughout]

[40] Mr. Costain confirmed that that note was never sent to the ADM. The Lyonnais notes refer to it at the December 24 notation that mentions Mr. Lyonnais drafting it and providing it to someone named “Jeanette”.

[41] Entered into evidence was a document titled, “CISC National Priorities Outlaw Motorcycle Gangs (OMGs)”, which appeared to come from the 2003 Criminal Intelligence Service Canada’s (CISC) annual report. It states that it was modified on May 13, 2010. The modification or modifications to the document since 2003 were not identified. Mr. Costain identified that he obtained the document from the Internet. It consists of two and a half pages and gives an overview of OMCs in Canada, focusing largely on the Hells Angels, although it has some information on two other gangs. Only in the very last paragraph does it refer to Bacchus, as follows: *“In New Brunswick, the BACCHUS are criminally active and maintain a strong association with the HELLS ANGELS.”*

[42] Mr. Costain stated that in September of 2010, the RCMP informed him that the grievor was a full-patch member of Bacchus.

[43] Entered into evidence was an undated a document that Mr. Costain identified as a risk assessment, which he said he created a portion of in late December 2010 or early January 2011. It is entitled, “Personnel Security Screening Concern CCG Employee – Member of Outlaw Motor-cycle [sic] Gang” (“the December 2010 Risk Assessment”). Its relevant portion states as follows:

Summary

November 2008

Intelligence received from the RCMP Criminal division advised Mr. Thomas Percy Starkey, an employee of CCG Fleet Maritimes Region, was an active member of the New Brunswick Bacchus Motorcycle Club, known to be associated to the Hells Angel Motorcycle Gang.

National Security division conducted an investigation. The first step in the investigation was to meet with RCMP representatives. The following information was found:

- The subject has no criminal record
- Membership was confirmed by the RCMP Criminal Branch.
- Although some members of the Bacchus Club have criminal records and the club has identified itself as a 1% club, no evidence could be provided that would support criminal activities by the club or its members, nor could the Intelligence unit substantiate possible affiliations with Hells Angels.

An interview was held with the employee and National Security representatives and the following was determined:

- The employee admitted being social with members of the Club for road trips and parties.
- The employee knew that the club was patched as a 1% and was aware of its meaning.
- The employee was very cooperative and stated that if his association with the Club could possibly affect his employment, he was prepared to immediately stop all association with this club.
- The employee advised he did not own a vest with the club colours (patch), nor was his motorcycle bearing any sign identifying him as a member of the club.

September 2010

- RCMP confirmed that the employee has never stopped his association with the club and is very active with the gang.
- The employee does wear the club colours (patch) 1%, which identifies the members as criminal.

National Security group met with National Labour Relations and Legal to discuss the implications of this finding. Regional Security Officer was contacted.

Next Steps:

1. Establish roles and responsibilities (Duties) of the Employee
2. Establish risk to the department.
3. Determine if the Security group should revoke the employee's reliability status, meaning he would not meet the conditions of employment, therefore he would no longer be employed with the Canadian Coast Guard.

Roles and responsibilities:

1. What position does the employee hold in the Canadian Coast Guard?

The employee is a DED-02 – Deckhand aboard CCGS Hudson.

2. What are the roles and responsibilities of this position?

Please see attached job description.

3. Does the employee have the opportunity to act at a higher level?

The employee has not worked at a level above his substantive level since 2006.

4. If so, what are the roles and responsibilities of the acting position?

Not applicable.

Risk to the Department

1. What vessels does the employee have the opportunity to serve aboard?

The employee currently serves aboard the CCGS Hudson. However, the employee is part of the Crewing Pool, which means he could potentially work onboard any vessel in the CG Fleet. There is no restrictions placed on an employee, therefore, it would not be possible to limit his service to be only onboard the CCGS Hudson.

2. What vessel does the employee currently serve aboard?

The employee currently serves aboard CCGS Hudson.

3. What activity would the vessels is involved in?

The CCGS Hudson is a scientific research, oceanography and hydrograph vessel. The employee has been a member of this vessel since [blank], prior to this the employee served aboard the CCGS Provo Wallis, which is a buoy tender vessel.

4. Have you noticed any incidents onboard this vessel, involving this employee that would cause concern?

There are no disciplinary issues on the employee's file. The Captain has advised that they do not have any performance issues with this individual. The only issue they have is use of sick leave when the vessel is alongside, which is a common issue with the Fleet as a whole.

5. Would the employee have access to restricted information and/or assets that would cause concern?

There are no assets on this particular vessel that would be of concern to Management. Discussion took place whether there is a potential for any economic impact, it was not felt this would be a concern. The vessel is a single task vessel and would be the last vessel that may be involved in an enforcement activity.

Concern was raised with the implementation of the Coastal Watch system, that there would be access to information regarding vessel movement and surveillance.

6. What type of information or assets would this employee have possible access to?

If the employee was working as a Bridge Watchman, there would be access to the information from the Coastal Watch system; however, it would be limited.

If the employee was serving onboard other vessels in the Fleet, which is a possibility by being a member of the crewing pool, the employee may have access to RCMP and C&P mission information.

7. *Based on the type of information the employee would have access to, how often would the employee have access to this information?*

Interdiction - RCMP - crew are advised there is no shore leave when the vessel is tasked with RCMP work, however, there are personal cell phones onboard vessels and there is no way to control personal calls. In this type of operation, the crew are not briefed until the vessel leave port.

C&P work - Fisheries Patrol information.

The new RCMP vessels that will be arriving in the region would be of concern to Management as to the access of information, crewing requirements and Canadian Security policy role for Coast Guard.

8. *What is the probability of damage to the "Crown" if this information were to be used outside its intended purpose?*

- Substantive damage to the reputation of Coast Guard*
- Science vessels - commercial value (although this is very unlikely)*

9. *Is there any history of this type of information being released outside of its intended purposes?*

Not aware of any information being released, which would have potentially involved this employee.

10. *As the Manager of this employee, what concerns would you have regarding continued employment in the department?*

- Even though it is unlikely for the CCGS Hudson, all Coast Guard vessels can be called upon for any type of service, which would change the access to information that the employee would be privy to.*
- The employee sits in a pool position, which means the employee can be assigned to any vessel, there is no restriction and we would not be in a position to deny on the job training and experience.*
- There is no concern of any activity while onboard CCGS Hudson, as the ship is at sea for the majority of a voyage, there is very little time in extreme ports, however, as previously stated, it is not possible to restrict employees to a vessel that has no secondary interdiction, as this is career limiting.*

- *The CCGS Hudson is presently alongside conducting self-maintenance, which means the employee could be transferred to another vessel to fill vacancies.*
- *The Fleet Superintendent advised that he has personally sailed with this individual and was quite surprised when he heard about the association, but does not feel he brings the association to the work place.*
- *Concerned from a values and ethics point of view.*
- *It would be a great embarrassment to the department if it was known that the Coast Guard had employees with this association.*
- *There is concern, since this information comes from RCMP, the relationship with the RCMP could be affected.*
- *Concerned about the influence this employee may be under as being part of the “association”.*
- *Concerned about what the employee may have done to be able to be a “patch” and colour wearing member.*
- *Concerned that the employee committed, in his initial meeting with National security, to end his association, and he has not done so.*

A final meeting was held on December 14, 2010 with Regional Director, Real Property, Safety & Security (Robert MacDonald), Regional Director, Coast Guard Operations (Anne Miller), Regional Manager, Safety, Security & Emergency Services (Tina Gore), and Regional Fleet Superintendent (Rick Cotie). This meeting was established to discuss whether or not the Director CG Operations would or would not recommend an assessment regarding the removal of reliability.

The decision made by the Regional Director, Coast Guard Operation, is as follows:

As a corporate manager responsible to ensure adherence to security policies, ensuring a safe & secure work place for all employees; and taking into consideration the increasing role of Coast Guard in providing on water support services to other Government Departments & Agencies with a mandate in Maritime Security; the fact that the employee did not meet his obligations outlined in the original investigation; despite no issues with his work performance in his history of employment with the Canadian Coast Guard, I recommend a review by National Security, Legal and Labour Relations for the removal of reliability.

[Emphasis in the original]

[Sic throughout]

[44] Entered into evidence was a document dated June 19, 2011, and entitled, “Bacchus Outlaw Motorcycle Gang Security Concerns and Factors for Consideration”

(“the Costain Brief”). Mr. Costain said that he prepared it. Its relevant portions state as follows:

DFO History on File

17 November, 2008 – Tina Gore, Manager Safety and Security, Maritime Region reported she had learned from the Bay of Fundy RCMP Criminal division that Thomas Percy Starkey, an employee of CCG fleet in the maritime region, was an active member of the New Brunswick Bacchus Motorcycle Club confirmed by the RCMP to be an Outlaw Motorcycle Gang known to be associated to the Regional Hells Angel Motorcycle Gang.

26 November, 2008 – Pierre Lyonnais, National Coordinator – Security, met with Sergeant Lebel, A/Manager, RCMP internal and National Personnel Security Screening Branch to discuss the information brought forward.

24 November, 2008 – Pierre Lyonnais, National Coordinator – Security, was in contact with the RCMP Investigator who had initially reported the findings to the CCG authorities and agreed to meet Pierre to discuss further.

15 December, 2008 – Pierre Lyonnais, National Coordinator – Security and Scott White - National Coordinator – Security, met with Constable from the Fundy Integrated Intelligence Unit in preparation for the interview with Mr. Starkey.

18 December, 2008 – Pierre Lyonnais, National Coordinator – Security and Scott White - National Coordinator – Security, interviewed Mr. Starkey and provided him the opportunity to explain his association with the Bacchus Motorcycle Gang. Mr. Starkey admitted being social with Bacchus members merely to join them on road trips and social parties. He stated he did not own the clubs patches, insignia gang members wear on their jackets. He was concerned for his employment and agreed to stop all associations with the club.

9 September, 2010 – Pierre Lyonnais, National Coordinator – Security was advised by the Fundy Integrated Intelligence Unit that Mr. Starkey was an active (full patch) member of the Bacchus and provided a photograph of Mr. Starkey wearing the Bacchus patches which was taken by an RCMP St. John’s Drug Section member on July 19, 2010 at 1014 hrs., in Bay Roberts, NF.

17 January 2011 – A meeting was held with Nicole Brisson, A/Director, Safety and Security; Sonia Virc, Counsel; Kathy Lavoie, Labour Relations; Darren Costain, National Coordinator – Security and Louise Dubé, TBS Senior Policy Analyst. The meeting was to discuss next steps and approach to ensure the individual receives a fair and objective assessment that respects his rights. Unaware that a risk assessment was completed on December 14, 2010, it was determined one was required. ***Concerns were also raised that Mr. Starkey was never provided a cease and desist letter.***

8 Mach 2011 - Darren Costain, National Coordinator - Security received a copy of a risk assessment completed in December 2010 by Robert MacDonald . . . Anne Miller . . . Tina Gore . . . and Rick Cotie . . . The decision made by the Regional Director, Coast Guard Operations, was that National Security, Legal and Labour Relations conduct a review for the removal of Mr. Starkey's Reliability Status.

23 March, 2011 - Darren Costain, National Coordinator - Security received consent from Cst. David Emberley of the RCMP St. John's Drug Section to use and disseminate the photograph he took of Mr. Starkey on July 19, 2010 in Bay Roberts, NF.

6 April, 2011 - A meeting was held with Nicole Brisson . . . Sonia Virc . . . Cathryn Taubman . . . Darren Costain . . . to discuss the risk assessment completed in December 2010 by the Maritimes Region and the permission from Cst. David Emberley of the RCMP St. John's Drug Section to use a photograph of Mr. Starkey wearing the Bacchus patches. It was determined that there was still not enough information to revoke Mr. Starkey's Reliability Status and that a further review was required.

4 July, 2011 - A meeting was held with Nicole Brisson . . . Sonia Virc . . . Cathryn Taubman . . . Darren Costain . . . to discuss next steps. It was determined that we would discuss options with Centre of Values, Integrity and Conflict Resolution.

12 July, 2011 - A meeting was held with Kristina Purificati, Values and Ethics Advisor; Nicole Brisson . . . and Darren Costain . . . Kristina was briefed on the file and advised she would review the case and discuss with her director before determining if there was a breach of the Values and Ethics Code for the Public Service.

14 July, 2011 - Received an email from Kristina Purificati . . . advising that after a review of the case with her director, they determined that there is no breach of the Values and Ethics Code for the Public Service. She did suggest, in-light of the picture of the subject wearing the club patches, that the subject's manager discuss this with him, specifically the fact that on December 18th, 2008 he denied being part of the gang, other than riding with them socially.

19 July, 2011 - Tele-conference between Tina Gore . . . Sherry L Hannah, Health and Safety Advisor; Jody Lohnes, Security Officer; Nicole Brisson . . . and Darren Costain . . . An update on the case was provided. Tina advised that the subject could be moved to any vessel or position on the bridge at any time, with little notice. Tina had concerns with requesting that the manager meet with the employee if there was no further action that could be taken in relation to the subjects association with the gang. Tina advised she would speak with the Fleet Superintendent and request a written statement of risks, specifically the possibility of the subject moving to a higher risk position on short notice or being privy to sensitive information.

Treasury Board Secretariat Requirements

The Treasury Board Secretariat standard on personnel security screening requires departments to assess an individual's reliability to determine if there is reasonable cause to believe that the subject is not honest and trustworthy and may steal valuables, exploit assets and information for personal gain, is indiscreet, and would fail to safeguard information and assets entrusted to them, or exhibit behaviour that would reflect negatively on their reliability. Departments may initiate a reliability check on an employee for cause.

In order to evaluate an individual can be relied upon not to abuse the trust that is or might be accorded to the subject, we must conduct an assessment of any risks attached to their position, and nature of the duties performed.

In arriving at a reliability screening decision, officials are expected to provide a fair and objective assessment that respects the rights of the individual. Individuals must be given an opportunity to explain adverse information before a decision is reached. Unless the information is exemptible under the Privacy Act, individuals must be given the reasons why they have been denied reliability status.

Assessing the Information

Departments should establish an internal screening review process to review all relevant information and negative recommendations before reliability status or a security clearance is denied or revoked.

The department must conduct a reasonable assessment of the individual and the information gathered in relation to the position of the individual. Appreciating that assessments have the potential for being subjective in nature, consideration is to be given to the nature of the concern and its impact on the position and the individual's suitability to hold reliability status. To minimize the potential for inaccurate or inappropriate assessments being made, consideration should be given to any of the following factors:

- The nature, extent, and seriousness of the conduct.*
- The circumstances surrounding the conduct, including knowledgeable participation.*
- The frequency and currency of the conduct.*
- The presence or absence of rehabilitation and other permanent behavioural changes.*
- The motivation for the conduct and willingness to participate.*
- The potential for pressure, coercion, exploitation, or duress. and*
- The likelihood of continuation or recurrence.*

Although adverse information concerning a single criterion may by itself not be sufficient to warrant a negative decision, an

individual may have their Reliability Status either denied or revoked if adverse information reflects a recent or recurring pattern of questionable judgment. When information of a security screening concern becomes known, departments should consider whether:

- *The individual voluntarily reported the information:*
- *The individual was truthful and forthright in responding to questions;*
- *The individual sought assistance where appropriate, followed professional guidance; and/or*
- *The individual has resolved or appears likely to have favourably resolved the security concern.*

Security Concerns and Mitigating Conditions

To assist in rendering a decision, in this particular case, the table below provides a list of concerns and mitigating conditions that should be considered.

...

Deliberately provided false or misleading information concerning relevant matters to security officials, or other official representatives in connection with a personnel security screening determination.

Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail.

A pattern of dishonesty, including violation of any written or recorded agreement made between the individual and the department or agency.

Association with persons involved in criminal activity, such as trans-national crime.

...

[Emphasis added]

[Sic throughout]

[45] The January 17, 2011, reference in the Costain brief states that concerns were raised that the grievor was never provided a cease-and-desist letter.

In cross-examination, Mr. Costain said that the employer's legal and labour relations branches had raised those concerns. He then said that "we", without identifying who that was, determined that the grievor had been informed verbally. However, he did not identify who exactly did so.

[46] Section 7 of the December 2010 Risk Assessment refers to the type of information that the grievor could access in his job and how often. In cross-examination, Mr. Costain said that if the RCMP were to hold a joint operation with the CCG, CCG crews would not be given any advance notice. When he was asked about crew members and personal cell phones on board a vessel during such joint operations and the cell phone reception when a ship is at sea, Mr. Costain said that he did not make any such assessment. When it was put to him that the RCMP had ways of shutting down communications from a vessel it was on, he admitted that the RCMP did have that technology but that he was not aware of its use.

[47] Section 7 also refers to concerns about the grievor's continued employment. When Mr. Costain was asked who answered those concerns, he said that he believed it was the fleet superintendent, Rick Cotie. When he was asked if Mr. Cotie had expressed any concerns about the grievor, Mr. Costain said that he had expressed nothing except what was set out in section 7. Mr. Cotie did not testify.

[48] In cross-examination, Mr. Costain confirmed that in March of 2011, the CCG received permission from the RCMP to use the photo of the grievor it had provided. He also said that as of April of 2011, he felt that there was not enough information to make a decision about the grievor.

[49] Entered into evidence was a seven-page PowerPoint presentation dated February 17, 2012, and entitled, "BACCHUS MOTORCYCLE GANG Briefing to ADM HRCS/CCG", which Mr. Costain identified as having been authored by a senior investigator, Ovila Robichaud. Mr. Robichaud's position in the CCG relative to Messrs. Costain and Lyonnais and Ms. Gore was not made clear. The fifth page of the presentation states as follows:

...

Risk

- *Starkey presently assigned to CCGS Cornwallis since January 25, 2012 and will remain until Feb. 22, 2012. Vessel used for Marine Aids and Rescue, and not used at any time for C&P or RCMP-run operations. He is replacing a person on annual leave.*
- *Starkey is scheduled to be assigned to CCGS Hudson which is presently through a steelwork assessment. Could be leaving in 1-2 months. Also possibility of being assigned on another operational vessel at a moment's notice.*

- *Supervisor Rick Cotie, Marine Superintendent has no intention of keeping Starkey off operational vessel unless he receives a formal request from Security.*
- *The issue of RCMP evidence regarding Starkey's affiliations with Bacchus has not been addressed with him since Dec. 2008.*
- *Risk of compromise of intelligence/sensitive information on RCMP/DND/CCG integrated enforcement activities.*

...

[Emphasis in the original]

[50] Mr. Costain was unable to tell the hearing what type of ship was the *Cornwallis*. He confirmed that he never spoke with Mr. Cotie. When he was asked how often the CCG worked with DND, he stated that it shares information with DND. He then stated that the CCG did not carry out enforcement activities with DND.

[51] None of Messrs. Lyonnais, Robichaud, or Cotie testified.

[52] Entered into evidence was a copy of the *Policy on Government Security* ("the Security Policy") that states that it took effect on July 1, 2009. The copy incorporates updates effective April 1, 2012. Its relevant portions state as follows:

...

3. Context

3.1 Government security is the assurance that information, assets and services are protected against compromise and individuals are protected against workplace violence. The extent to which government can ensure its own security directly affects its ability to ensure the continued delivery of services that contribute to the health, safety, economic well-being and security of Canadians.

3.2 Security begins by establishing trust in interactions between government and Canadians and within government. In its interactions with the public when required, the government has a need to determine the identity of individuals or institutions. Within government, there is a need to ensure that those having access to government information, assets and services are trustworthy, reliable and loyal. Consequently, a broad scope of government activities, ranging from safeguarding information and assets to delivering services, benefits and entitlements to responding to incidents and emergencies, rely upon this trust.

3.3 In a department, the management of security requires the continuous assessment of risks and the implementation, monitoring and maintenance of appropriate internal management controls involving prevention (mitigation), detection, response and recovery. The management of security intersects with other

management functions including access to information, privacy, risk management, emergency and business continuity management, human resources, occupational health and safety, real property, materiel management, information management, information technology (IT) and finance. Security is achieved when it is supported by senior management – an integral component of strategic and operational planning – and embedded into departmental frameworks, culture, day-to-day operational and employee behaviours.

3.4 At a government-wide level, security threats, risks and incidents must be proactively managed to help protect the government's critical assets, information and services, as well as national security. Advice, guidance and services provided by lead security agencies support departments and government in maintaining acceptable levels of security while achieving strategic goals and service delivery imperatives.

3.5 The management of security is most effective when it is systematically woven into the business, programs and culture of a department and the public service as a whole.

...

3.10 This policy is to be read in conjunction with the Foundation Framework for Treasury Board Policies, the Directive on Departmental Security Management and the Directive on Identity Management.

4. Definitions

4.0 For definitions of terms used in this policy, refer to Appendix A – Definitions.

...

Appendix A – Definitions

...

risk (risque)

The uncertainty that can create exposure to undesired future events and outcomes. It is the expression of the likelihood and impact of an event with the potential to impede the achievement of an organization's objectives.

security clearance (cote de sécurité)

indicates successful completion of a security assessment; with a need to know, allows access to classified information. There are three Security Clearance levels: Confidential, Secret and Top Secret.

...

security incident (incident de sécurité)

Any workplace violence toward an employee or any act, event or omission that could result in the compromise of information, assets or services.

...

Threat (menace)

An event or act, deliberate or accidental, that could cause injury to people, information, assets or services.

...

[Emphasis in the original]

[53] Appendix B of the Security Policy is entitled, “Responsibilities of Lead Security Agencies”. The following are the lead security agencies listed: the Treasury Board Secretariat, the Privy Council Office, Public Safety Canada, the Communications Security Establishment Canada, Public Works and Government Services Canada, the Canadian Security Intelligence Service, the RCMP, the Library and Archives of Canada, the Department of Foreign Affairs and International Trade, the Department of National Defence/Canadian Forces, and the Canada School of Public Service. Neither the DFO nor the CCG is listed.

[54] Entered into evidence was a copy of the *Personnel Security Standard* (PSS) that states that it was modified on October 17, 2002, and rescinded on October 20, 2014. Its relevant portions state as follows:

...

2. Personnel screening process

2.1 Introduction

Good personnel management requires the examination of the trustworthiness and suitability of all employees to protect the employer's interests. This process usually involves reference enquiries, verification of qualifications and, often, credit and criminal history checks. A national government, in addition, must have regard for the employee's loyalty and associated reliability as those relate to national security concerns. Security assessment and reliability checks are conditions of employment under the Public Service Employment Act (PSEA).

...

2.2 Screening requirements

...

There are two types of personnel screening: an assessment of reliability; and an assessment of loyalty and reliability related to loyalty. The types and levels of personnel screening, as well as the levels of access they permit, are as follows:

Basic reliability status is the minimum type of screening required for individual's appointed or assigned to a position for six months or more. This status is also required for individuals who are under

contract for more than six months and who will have regular access to government premises. It is optional for periods of less than six months. An individual granted basic reliability status may access only information and assets that are neither classified nor designated.

Enhanced reliability status is the type of screening required when the duties or tasks of a position or contract necessitate access to designated information and assets, regardless of the duration of an assignment, appointment or contract. An individual granted enhanced reliability status may access, on a need-to-know basis, designated information and assets.

...

Types of personnel screening

SCREENING TYPE	SCREENING LEVEL	SENSITIVITY LEVEL
RELIABILITY STATUS	Basic	Non-sensitive
	Enhanced	Designated

...

2.3 Checks to be conducted

...

2.3.1 Basic reliability check

A basic reliability check involves the following:

- Verification of personal data, educational, professional and qualifications, employment data and references.
- A declaration concerning any conviction for a criminal offence for which a pardon has not been granted, except when replaced by a CRC (see article 2.5.1).
- An optional criminal records name check (CRNC), except mandatory as a prerequisite for a security balance.

All checks are to be conducted before the appointment and the results are to be received before the status is authorized that precedes appointment.

2.3.2 Enhanced reliability check

An enhanced reliability check involves the following:

- Verification of personal data, educational or professional qualifications, and employment data and references.
- An optional declaration concerning any conviction for a criminal offence for which a pardon has not been granted.
- A check of criminal records, except for current federal government employees as defined in article 3.1.

- *credit check, when the duties or tasks to be performed require it or in the event of a criminal record based on the type of offence.*
- *Other checks, according to the duties or tasks to be performed, and with the prior consent of the Treasury Board.*

Either a CRNC or a fingerprint check must be conducted for the enhanced reliability check. If the manager decides that a fingerprint check is required, it may be performed before or after appointment. In the latter case, the CRNC must be completed and the status authorized before the effective date of appointment or contract.

...

2.7 Evaluating results of reliability checks

In arriving at a reliability screening decision, officials are expected to provide a fair and objective assessment that respects the rights of the individual. Individuals must be given the opportunity to explain adverse information before a decision is reached. Unless the information is exemptible under the Privacy Act, individuals must be given the reasons why they have been denied reliability status.

The authorizing manager will need to determine whether a person can be considered trustworthy, taking into account the assessments in articles 2.7.1 to 2.7.5 below.

2.7.1 Verification of personal, educational and employment data and reference checks

On the basis of the information collected, the manager determines whether the person has been reliable in previous employment and is honest and trustworthy.

2.7.2 Results of the criminal records check

The existence of a criminal record can be but need not be sufficient grounds to deny reliability status. A criminal record should be considered in light of such matters as the duties and tasks to be performed, the nature and frequency of the offence, and the passage of time. Where the individual has been convicted of a criminal offence, an official of the security office may brief the manager regarding the nature and severity of the offence.

Departmental officials must not enquire about a criminal offence for which a pardon has been granted.

The authorizing manager will need to determine:

- *The person's attitude towards the unpardoned offence(s) and the extent to which he or she has changed behaviour in this regard.*
- *The likely recurrence of similar offenses and their potential effect upon job reliability.*

2.7.3 Discrepancies between criminal record check and declaration

...

2.7.4 Credit check

The existence of negative information in a credit report can be but need not be sufficient grounds to deny enhanced reliability status.

Where adverse credit information exists, the authorizing manager must evaluate:

- To what extent the individual has changed habits with respect to financial reliability.
- The likely recurrence of financial difficulties and their potential effect on job reliability.

2.7.5 Special provisions of the Criminal Code

Section 748(3) of the Criminal Code states that no person convicted of an offence under Section 121 (frauds on the Government), Section 124 (selling or purchasing office) or Section 418 (selling defective stores to Her Majesty) has, after that conviction, the capacity to contract with Her Majesty or to receive any benefits under a contract between Her Majesty and any other person or to hold office under Her Majesty unless a pardon has been granted.

...

2.9 Granting or denying reliability status

Departments must ensure that authority is assigned to grant or deny reliability status.

In granting reliability status, the authorized official signs the document entitled Personnel Screening Request and Authorization Form, certifying that the checks have been carried out and whether, in his or her judgment, the risks attached to employing or contracting with the individual are acceptable.

All records pertaining to reliability checks are to be retained, normally as part of standard information bank PSE 921, except where an alternate bank is identified in Info Source.

If the requested reliability status is denied, the individual must be briefed and given the reasons for the denial, unless the information is exemptible under the Privacy Act. The individual is also to be advised of the right to redress. *See Section 6 for further information on redress.*

...

3. Special circumstances

...

3.4 Screening for access to sensitive sites or facilities

Situations may occur when a person's duties require access to sensitive government-related sites or facilities, usually for a short

time, and not to information. In limited and specific circumstances security assessments for site access security clearances may be conducted. These circumstance include the following programs:

- Programs involving work sites or facilities that are designated, on the recommendation of the Director, Canadian Security Intelligence Service, as ones which could reasonably be expected to be targeted by those who engage in activities constituting threats to the security of Canada as defined in the Canadian Security Intelligence Act.

...

5. Revocation

As a result of an update or a review based on new adverse information concerning an individual, his or her enhanced reliability status or security clearance may be revoked. The authority of the deputy head to revoke a security clearance may not be delegated.

In the event of a revocation, individuals must be informed of their rights of review or redress and prohibited from access to sensitive information and assets.

If as the result of a denial or revocation of a security clearance or reliability status, the individual no longer meets the condition of employment, departmental Labour Relations must be consulted.

...

Appendix B – Guidance on Use of Information for Reliability Checks

...

3. In checking reliability, the question to be answered is whether the individual can be relied upon not to abuse the trust that might be accorded. In other words, is there reasonable cause to believe that the individual may steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to him or her, or exhibit behaviour that would reflect negatively on their reliability. Such decisions are to involve an assessment of any risks attached to making the appointment or assignment, and, based on the level of reliability required and the nature of the duties to be performed, a judgment of whether such risks are acceptable or not.

...

[Emphasis in the original]

[Sic throughout]

[55] The evidence disclosed that the DFO put out a request for proposal (RFP) with respect to the grievor that was not entered into evidence. But entered was a copy of a letter dated February 22, 2012, from AGL Investigation Consulting Inc. (AGL) responding to the RFP and providing its proposal. Attached was a copy of

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

André Lefebvre's résumé. He appears to be the principal of AGL. Mr. Costain stated that he knew of Mr. Lefebvre's background and stated that he had been an RCMP officer for 20 years.

[56] The CCG retained AGL to carry out some form of investigation. The investigation's terms of reference were not entered into evidence. AGL produced a nine-page report dated March 2012 ("the AGL report") that was signed by Mr. Lefebvre, who did not testify. The relevant portions of it state as follows:

EXECUTIVE SUMMARY

This report presents the salient findings of a security interview conducted for the purpose of a reliability status review of a Department of Fisheries and Oceans employee assigned as a Deckhand on the Canadian Coast Guard Ship Hudson.

. . .

During the security interview, Mr. Thomas Starkey was given an opportunity to explain his association with the Bacchus Motorcycle Club. After providing a fair and objective assessment of all the facts gathered during the security interview, taking into account the operating context of the Canadian Coast Guard and the DFO, it is my professional opinion that Mr. Starkey's behaviour reflects negatively on his reliability as a Canadian Coast Guard employee and represents a high risk that he could abuse the trust accorded to him by the Departmental Security Officer.

1.0 INTRODUCTION

1.1 Background

On November 17, 2008, the Royal Canadian Mounted Police (RCMP) informed the Manager, Safety and Security Maritime Region that Thomas Percy Starkey, a Canadian Coast Guard employee working as a Deckhand on the Canadian Coast Guard Ship Hudson was an active member of the Bacchus Motorcycle Club . . . Mr. Starkey was subsequently interviewed by the Department of Fisheries and Oceans (DFO) National Coordinator, Security and explained that although he was not a full member of the Bacchus motorcycle gang, he socialized with them attending club parties and participating on road trips. Because of the reliability concerns raised by the DFO, Mr. Starkey had indicated he would cease his association with the Bacchus Motorcycle Club.

On September 9, 2010, the RCMP informed the DFO National Coordinator, Security that the Mr. Starkey was now a full and active member of the Bacchus Motorcycle Club. The RCMP provided photographs of Mr. Starkey in Cape Spear NL wearing the Club's insignia (patches) openly revealing his membership to the outlaw motorcycle gang.

On March 7, 2012, the Director, Safety and Security approved the terms of reference for the conduct of a security interview with the employee.

...

2.0 SUMMARY OF THE SECURITY INTERVIEW

On March 19, 2012, Mr. Thomas Starkey was interviewed at the Bedford Institute of Oceanography in Dartmouth, NS. Mr. Starkey was not accompanied by an observer and was found to be evasive and not forthright in his answers.

...

2.1 December 18, 2008 Security Interview and the July 19, 2010 Incident

Mr. Starkey was questioned on the interview he had with Mr. Pierre Lyonnais . . . Mr. Starkey indicated that he faintly recalled the interview but could not remember the purpose of the interview. When informed that the December 2008 interview was to discuss the DFO concerns about his association to the Bacchus Motorcycle Club which is considered by the law enforcement community as an outlaw motorcycle gang, Mr. Starkey indicated that he did not remember ever discussing his association to the Bacchus Motorcycle Club with the National Coordinator, Security. It was suggested to Mr. Starkey that on December 18, 2008, he had indicated to the DFO's (former) National Coordinator that he would cease his association to the Bacchus Motorcycle Club if it meant saving his employment with the Canadian Coast Guard, Mr. Starkey responded that although he did not remember much about that interview, it sounded like a statement he would make in such circumstance.

...

2.2 Bacchus Motorcycle Club

. . . When further questioned why he did not follow through on his December 2008 commitment to cease his association with the outlawed motorcycle gang but instead became a full patched member, Mr. Starkey indicated that he decided not to follow through with his commitment because he could not see how his membership with the club could affect his work performance as an employee of the Canadian Coast Guard.

Mr. Starkey was questioned on the meaning of the "1%" patch that he was wearing in the photograph. Mr. Starkey stated that it meant that the club represented 1% of society that did its "own thing". Asked to explain what he meant by the club doing "its own thing", Mr. Starkey became very evasive in his answer and could not provide a further explanation other than stating that the 1% patch came with the rest of the club's patch kit he received when he became a full member. When asked if he agreed with the notion that the 1% patch meant that the club considered itself 1% of society that considered itself outlaw, Mr.

Starkey indicated that he did not know but did not consider himself an outlaw.

Mr. Starkey described the Bacchus Motorcycle Club as a respectable club, one that offers bike trips, summer corn roasts to its members and makes contributions to charitable organizations although he could not name the beneficiaries of the charitable donations. When challenged on the club's known criminal activities in the area of drug trafficking, weapons and use of violence, Mr. Starkey stated he had never engaged in a criminal activity or witnessed criminal activity by members of the club.

... When asked to describe the club's association with the Hell's Angels, also a known outlawed motorcycle gang, Mr. Starkey explained that some past members of the Bacchus Motorcycle Club were now members of the Hell's Angels, thus when the Bacchus Motorcycle Club hosted parties, they sometime invited member of the Hells Angels to promote camaraderie between the two organizations. When further questioned, Mr. Starkey indicated that he was unaware of any (criminal) activities between the two clubs.

When asked what he could say to his employer that would ensure a continued level of trust in him, Mr. Starkey stated:

- He has an excellent work record;
- That his activities with the Bacchus Motorcycle club has not impeded on his work performance; and,
- That he has never discussed Canadian Coast Guard operational matters with members of the Bacchus Motorcycle Club and vice versa.

When asked if he thought that his membership with an outlawed motorcycle gang would affect the operational relationship between the Canadian Coast Guard and the RCMP, Mr. Starkey stated that if the RCMP has issues working with him, he would gladly remove himself and enjoy shore leave.

2.3 Financial Background and Criminal Conviction

Mr. Starkey indicated that his personal finances were in good order and that he planned on retiring in February 2014. When asked on whether he had ever been convicted of a criminal offence, Mr. Starkey indicated that in the early 1980's, he was convicted of possession of a drug substance (marihuana) at the US / Canada border.

3.0 SECURITY INTERVIEW ANALYSIS

...

3.2 Presence or absence of Mitigating Factors

Mr. Starkey was provided an opportunity in December 2008 to address the concerns of the DFO by ceasing his association

with the Bacchus Motorcycle club. Instead of taking advantage of this opportunity, Mr. Starkey acted in deceit by not only refusing to cease his association with the Bacchus Motorcycle Club but by accepting a full membership with the outlaw organization.

3.2 Employee's Motivation for Building Trustworthiness and Reliability

During his interview, Mr. Starkey showed no motivation of wanting to restore the trust accorded to him by the DSO. Mr. Starkey was found not credible during the interview, choosing to be evasive in his answers and not forthright with the interviewer.

Mr. Starkey indicated that he enjoyed his employment with the Canadian Coast Guard and his relationship with his peers and supervisors. Mr. Starkey stated that if necessary, he would be willing to suspend his membership with the Bacchus Motorcycle Club until his retirement from the Canadian Coast Guard in 2014. It should be noted that Mr. Starkey had offered a similar solution in December 2008 but choose not to follow through on such a proposal.

...

4.0 CONCLUSION

... Ultimately, the question that must be answered during the security interview is whether the individual can be relied upon not to abuse the trust that was accorded by the employer.

The security interview provided information that leads to the following conclusion:

Can the individual steal valuables:

Although the interview revealed no evidence that Mr. Starkey stole valuables for the Canadian Coast Guard, his membership in an outlaw motorcycle gang raises questions about his integrity and therefore represents a higher risk that he could engage in such an activity.

Can the employee exploit assets and information for personal gain:

Although the interview revealed no evidence that Mr. Starkey exploited Canadian Coast Guard assets and /or information for personal gain, his membership in an outlaw motorcycle gang raises questions about his integrity and therefore represents a higher risk that he could engage in such activity.

Would the employee fail to safeguard information and assets entrusted to him:

Although the interview revealed no evidence that Mr. Starkey failed to safeguard his employer's assets and information entrusted to him, his membership in an outlaw motorcycle gang raises questions about his integrity and therefore represents a higher risk that he could engage in such activity.

Can the employee exhibit a behaviour that would reflect negatively on his reliability:

The security interview revealed documentary and testimonial evidence that the employee disregarded the DFO's concerns about his association with the Bacchus Motorcycle Club and opted to pursue a full membership with this criminal organization.

During the security interview, Mr. Starkey showed no concern that his behaviour reflected negatively as an employee of the Canadian Coast Guard and on its operational stakeholders such as the RCMP.

In summary, it is my professional opinion that the employee exhibits a behaviour that reflects negatively on his reliability as a Canadian Coast Guard employee and represents a high risk that he may abuse the trust that was accorded to him by the DSO.

...

[Emphasis in the original]

[Sic throughout]

[57] Mr. Costain testified that he attended the interview with Mr. Lefebvre. However, he did not participate in writing the AGL report. In cross-examination, he said that he took notes of the interview but that he did not review them before testifying or retain them.

[58] He was also asked who in addition to the grievor Mr. Lefebvre interviewed. He responded that it was Mr. Robichaud. He said that he did not know if Mr. Lefebvre spoke to anyone else and specifically that he did not know about whether he spoke to Mr. Lyonnais and the *Hudson's* captain. He said that to the best of his knowledge, Mr. Lefebvre did not speak to the RCMP, the Saint John Police, or the Integrated Intelligence Unit.

[59] Mr. Costain stated he had no information that would indicate that the grievor had been involved in illegal activities or that Bacchus had been involved in any such activities that impacted CCG activities.

[60] The grievor testified that he did not recall much of the meeting in December of 2008 with Mr. Lyonnais. He said that he was not asked to end his association with Bacchus and that afterwards, he told them (Mr. Lyonnais and White) that if it came down to him associating with Bacchus or losing his job, he would choose his job because he had no education. When he was asked if he was told that he could lose his job, he replied, "No." When he was asked if he was ever told to stop associating with Bacchus, he replied, "No." He confirmed that as of the 2008 interview, he was not a full

member of Bacchus and confirmed that he became one in 2010. When he was asked why he did so, he indicated that no one told him that it could cost him his job. He said that for most of those in Bacchus whom he had been acquainted with, he had known them for between 20 and 40 years.

[61] When the grievor was asked about the benefit he received from Bacchus, he said that there was none. He stated as follows:

- his interest was in the functions;
- he was not aware of criminal activity when he first started hanging around with Bacchus in the early 2000s;
- he was not required to visit any other motorcycle clubs before he was admitted as a member;
- he was not aware of criminal activity in Bacchus when he was made a member;
- he did not carry out criminal activities;
- he did not own a business;
- between the December 2008 and March 2012 interviews, no one from the employer discussed his association with Bacchus;
- he never shared any CCG information with Bacchus members;
- he never had any information to share with Bacchus; and
- he was never asked by anyone in Bacchus to share information from his job.

[62] With respect to the March 2012 interview and the questions about the 1% and the patch, he said that he did not know what it meant and that he received it as part of a package with the colours. He said that they all stick together and ride together. When he was asked about the association with the Hells Angels, he stated that some of the older Bacchus members were friends with some Hells Angels. When he was asked if any Hells Angels had attended the Saint John clubhouse, he said that they had at least once, for an anniversary party.

[63] The grievor stated that he left Bacchus in the summer of 2012. When he was asked for a reason, he said that he had gone west and had thought that when he retired, it would be in the west. He said that he was there when a shooting occurred, which he said made him decide to leave Bacchus.

[64] Entered into evidence was a copy of a CBC news report posted July 26, 2012, the relevant portions of which state as follows:

Biker club president pleads guilty to manslaughter

Matthew Thomas Foley, 50, pleaded guilty to manslaughter on Thursday in connection with the shooting death of a Saint John man outside of the Bacchus Motorcycle Club's headquarters earlier in July.

Foley, who was the president of the local motorcycle club was originally charged with the second-degree murder of Michael Thomas Schimpf, 31.

...

Evidence introduced

...

The crown also showed video seized from the clubhouse, which was taken by cameras attached to the building.

...

The legs of the victim walk into view on the street, then the video shows Foley turn, hand his drink to another person, pull a gun from his vest and follow Schimpf off screen . . .

The others then jump up and look down the street. Foley then returns, reloads the gun and leaves again.

The Crown then read from a written statement Foley gave police after turning himself in. The letter says the victim threw bricks through the window of Foley's tattoo shop earlier in July.

...

Police do not believe Schimpf's death was connected to organized crime. But police do believe Schimpf and Foley knew one another.

While the Bacchus have long maintained they are simply a riding club with no connection to organized crime,¹ Criminal Intelligence Service Canada considers Bacchus an outlaw motorcycle gang.

Last year, police raided the Bacchus clubhouse, based on allegations it housed an illegal bar.

...

[Emphasis in the original]

[65] With respect to the *Hudson*, the grievor confirmed that at times, he had a cell phone while on board and that at times, they were in range of cell phone towers. He also confirmed that computers were on board, two for the crew, which they could use for email.

[66] I was not provided with any evidence of the grievor's cell phone records. There is no evidence that anyone asked for them, let alone looked at them.

[67] I was not provided with any evidence of the grievor's email correspondence, if any existed, when he was on CCG vessels. There is no evidence that anyone asked for it or obtained it, let alone looked at it.

[68] In his evidence, the grievor confirmed that he had intended to retire in February of 2014.

[69] Entered into evidence was an undated and unsigned document created sometime in 2012 and titled, "Memorandum for the Deputy Minister Revocation of Reliability Status" ("2012 memo to the DM"). Mr. Costain identified it. He stated that he had prepared some information in it but that he could not identify who had authored it. Its relevant portions state as follows:

SUMMARY

...

- *Mr. Starkey is a member of the Bacchus Motorcycle Club, an outlaw motorcycle gang involved in drug trafficking, use of weapons and violent activities. This club is known to be associated with the Hells Angels Motorcycle Club, a recognized outlaw motorcycle gang involve in international organized crime.*
- *Through our assessment and consultations with the Director, Fleet Operational Support of the Canadian Coast Guard, Legal Services, Labour Relations and Treasury Board Secretariat, we have concluded that Mr. Starkey's association with the Bacchus Motorcycle Club presents a security threat to the department and other federal government departments and agencies.*
- *As Deputy Head, in accordance with the Policy on Government Security, you have delegated authority to revoke Reliability Status to me, as the Departmental Security Officer.*

Background

...

- *In December 2008, Corporate Security at National Headquarters interviewed Mr. Starkey and provided him with the opportunity to explain his association with the Bacchus Motorcycle Club. Mr. Starkey admitted that he was involved with Bacchus members on a social basis so that he could join them on road trips and participate in social activities. He stated he was not an active member of the*

club and because of the Reliability Status concerns raised by Corporate Security, he agreed to cease all association with the Bacchus Motorcycle Club.

- In September 2010, Corporate Security was advised by the Fundy Integrated Intelligence Unit that Mr. Starkey had become an active member of the Bacchus Motorcycle Club. This was supported by a photograph of Mr. Starkey wearing the Bacchus patches, a form of insignia that gang members wear on their jackets. The photo was taken in July 2010 by the Royal Canadian Mounted Police St. John's Drug Section in Bay Roberts, Newfoundland.
- After obtaining the Royal Canadian Mounted Police [sic] permission to use the photo of Mr. Starkey as evidence of his involvement with the Bacchus, Mr. Starkey was interviewed on March 19, 2012 by André Lefebvre, a consultant from AGL Investigation Consulting Inc., and Darren Costain, National Coordinator, Security, Corporate Security. During the interview, Mr. Starkey was found to be evasive and not forthright in his answers. Mr. Starkey showed no concerns that his behaviour reflected negatively as an employee of the Canadian Coast Guard, and on its stakeholders, such as the Royal Canadian Mounted Police.
- On May 18, 2012, a Security Assessment was completed by the Director, Fleet Operational Support of the Canadian Coast Guard which addressed issues related to whether Mr. Starkey would be considered trustworthy, taking into account the March 19, 2012 interview results.

Analysis/DFO Comment

...

- Even though Mr. Starkey was provided with an opportunity to address security concerns related to his association with the Bacchus Motorcycle Club by ceasing his association with the Club in December 2008, he acted in a deceitful manner by not ceasing his association and eventually accepting a full membership with the Bacchus Motorcycle Club.
- According to a recent media report, the President of the Saint John chapter of the Bacchus Motorcycle Club has been charged with second-degree murder after a man was gunned down near the Bacchus clubhouse in Saint John. The Saint John police are investigating a potential link between the murder and the Bacchus clubhouse being a front for the Hells Angels in Atlantic Canada. This further corroborates the fact that the Mr. Starkey's association with Bacchus poses security concerns.
- A Security Assessment, completed by the Canadian Coast Guard, identified that there is reasonable cause to believe that Mr. Starkey's association with the Bacchus Motorcycle Club presents a security threat to the operations of the

Canadian Coast Guard and joint operations with other federal, provincial and municipal lead agencies. Therefore, his Reliability Status should be revoked.

...

- *On August 31, 2012, the Royal Canadian Mounted Police, J Division Criminal Analysis Section in Moncton, New Brunswick, informed the Department that there are no reports of threats made by the Bacchus Motorcycle Club to the Department or employees, and that they have no information that indicates that Mr. Starkey is a violent individual. They elaborated that when alone, and without club contemporaries, a club member is not likely to display a confrontational attitude.*

...

[Emphasis in the original]

[70] Mr. Butler testified that reliability status was a basic requirement of employment. Since the grievor's had been revoked, he no longer met that basic requirement, so his employment was terminated.

V. Summary of the arguments

A. For the employer

[71] The employer referred me to *Heyser v. Deputy Head (Department of Employment and Social Development)*, 2015 PSLREB 70 ("*Heyser PSLREB*") (upheld in 2017 FCA 113 ("*Heyser FCA*")), *Féthière v. Deputy Head (Royal Canadian Mounted Police)*, 2016 PSLREB 16 ("*Féthière PSLREB*", upheld in 2017 FCA 66 ("*Féthière FCA*")), and *Grant v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 37. Those cases marked a departure from the previous jurisprudence with respect to revocation-of-reliability-status termination cases.

[72] In both *Heyser FCA* and *Féthière FCA*, the Federal Court of Appeal stated that if management wishes to terminate an employee, the termination must be based on proper and legitimate grounds. If it is done under a relevant policy, it is legitimate. The decision maker must determine if the reliability status revocation was based on legitimate grounds. If so, it is valid; otherwise, it is not.

[73] The Security Policy sets the framework for such a decision. Section 3.1 states that government security is the assurance that information, assets, and services are protected against compromise and that individuals are protected against workplace violence. Section 3.3 states that a department must continually assess risks. Section 2.1

of the former PSS, which was in place at the relevant time, provides that good personnel management requires examining the trustworthiness and suitability of all employees, to protect the employer's interests. Reliability status is the basic requirement for all federal public service jobs.

[74] Section 2.7 of the former PSS states that if adverse information arises, it has to be put to the employee. Section 5 discusses revoking reliability status or a security clearance. Employees who no longer meet the minimum qualifications will lose their jobs.

[75] The grievor had an association with Bacchus that was identified in 2008. He was not a member then. The employer was not aware of any criminal activities, and there was no clear indication of any at the OMC. The grievor offered to leave Bacchus if staying meant that his job would be on the line. In 2010, the RCMP received further information, including that the grievor was a member of Bacchus, which he then offered to leave.

[76] The employer analyzed the risk. The grievor could have been pressed into service on any CCG ship, all of which had information that he could have accessed. All CCG employees have a duty to watch, report, and carry out tasks, and they have a role in operations. At times, both on vessels and on land, they are exposed to the operations and capabilities of law enforcement agencies.

[77] The CCG has responsibilities with partner agencies. There are sensitive assets around bases and ships. Someone with OMC affiliations could compromise the CCG's relationships with partner agencies. The 1% patch means power. Prospects to an OMC are controlled by intimidation. After joining, there is no going back. If the OMC wants information, a member or former member is obligated to assist.

[78] Sgt. Isnor was a court-certified OMC expert. He has had experience dealing with them since 1995. He described the risk to people intimately involved with them. OMCs have rules that are enforced by violence. They are involved in drug trafficking, promulgating violence, and information gathering. Members have to follow the rules. The Bacchus the grievor belonged to was the second largest in Canada after the Hells Angels, after which it modelled its organization.

[79] The control of Canadian ports is essential to the drug trade. Saint John and Halifax have ports, and it is important to control them. It is important for an OMC to know the runs of CCG ships.

[80] The employer referred me to *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2009 PSLRB 19, for the premise that the government is mandated to protect Canadian citizens' confidential and personal information and to ensure the integrity of employees who have access to it. This case discloses the risks involved with respect to links between employees of government departments who have connections to organized crime.

[81] *Stokaluk v. Deputy Head (Canada Border Services Agency)*, 2015 PSLREB 24, involved a border services officer (BSO) who had relationships with people involved in smuggling. The decision holds that associating with known criminals is sufficient and that the employer does not need a conviction to justify imposing discipline. The associations were incompatible with the BSO position of the grievor in that case. The failure of the employer in that case to warn him of the risks involved in continuing his associations was not a condonation of his behaviour. The fact that there was a delay in acting on the information and that the grievor might have had a legitimate lack of understanding did not overcome the risk.

[82] *Lapostolle v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 138, involved a correctional officer ("CX") who had associated with a person identified by police with ties to the Hells Angels MC. He accepted a sponsorship from that person to participate in a poker tournament. He was terminated for accepting the sponsorship from and for meeting with that person. At paragraph 87, the adjudicator sets out the test for the principle to use to penalize an employee for his or her associations or relationships outside work, which is as follows:

...

1. *the nature of the duties performed by the employee;*
2. *the type of relationship with the associated individuals; and*
3. *other circumstances.*

[83] At paragraph 91 of *Lapostolle*, the adjudicator speaks of image, stating that it was not normal for an employee of the Correctional Service of Canada (CSC) to flaunt his association with individuals openly associated with OMCs and to visit locations

that members of those OMCs knowingly frequented. The conduct was deemed incompatible with the duties of a peace officer who regularly deals with people from that environment as part of his job. At paragraph 93, the adjudicator stated that by publicly associating with individuals involved in organized crime, Mr. Lapostolle had tarnished the CSC's image.

[84] The employer also referred me to *Sorel-Tracy (Ville) v. Syndicat des pompiers du Québec, section local Sorel*, 2002 LNSARTQ 53 ("Sorel"), *Canadian Imperial Bank of Commerce v. Boisvert*, [1986] 2 F.C. 431 (C.A.), *Granby (Ville) v. Fraternite des policiers de Granby Inc.* (1981), 3 L.A.C. (3d) 443, *AUPE v. Alberta (Letha Thompson grievance)*, (unreported, October 3, 1988; file no. 88-113 (Grievance Arb.)), *Rudd v. Attorney General of Canada*, 2016 FC 686, *Sattar v. Canada (Minister of Transport)*, 2016 FC 469, *R. v. Bachensky*, 2014 ONCJ 785, *Canada (Minister of Public Safety and Emergency Preparedness) v. Stables*, [2010] I.D.D. No. 25 (QL), and *Waite v. OFF574LTD.*, [2014] ONSC 32.

[85] The employer submitted that the following question must be asked to determine if there is reasonable cause: Can the individual be relied upon not to abuse the trust that might be accorded to him or her? In other words, is there reasonable cause to believe that the individual may steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to him or her, or exhibit behaviour that would reflect negatively on his or her reliability?

B. For the grievor

[86] The grievor also referred me to *Heyser* (both PSLREB and FCA), *Féthière* (both PSLREB and FCA), *Grant*, and *Sorel*.

[87] The grievor has little formal education. In 1977, at the age of 18, he started to work for the CCG as a steward. Over the years, he worked his way up to deckhand, which was his final position. He was an ideal employee. He had no issues and had never been disciplined.

[88] In 2008, RCMP approached the CCG with respect to the grievor's association with Bacchus . He told the employer at that time that he would sever his association with Bacchus if staying in it would affect his job. No one told him to. No one pressed

upon him the specific nature of the concerns they had with respect to his association with Bacchus. He was not told that he had to leave it or else lose his job.

[89] Entered into evidence was an undated briefing note that stated that the issue of the grievor's offer to leave Bacchus in 2008 should have been followed up on, yet it never was.

[90] The grievor admitted that he became a Bacchus member. He stated that he was not involved in criminal activity. He said that he was not aware of any criminal element. He never disclosed any information about the CCG or his job to those in Bacchus; nor did anyone ask him to provide any. He left Bacchus in 2012, after spending the summer out west and contemplating leaving it.

[91] The grievor submitted that the decision to revoke his reliability status was not made on proper and legitimate grounds.

[92] The grievor submitted that the AGL report should not be relied upon. The employer must have reasonable cause to believe that he would abuse trust. Its only concern was that he had an association with Bacchus. However, the December 2008 Risk Assessment stated that the risk that he would provide support to Bacchus was minimal and that there were no concerns.

[93] While a suggestion was made that it was not possible to restrict the grievor to the vessel he was working on, the *Hudson*, which was identified as the last vessel in the CCG fleet that would be involved in enforcement activities, the CCG knew that he had planned to retire in 2014. He had worked on the *Hudson* almost exclusively since 2006. He had also been in the same position for 22 years, and it was highly unlikely that he would move to a higher position.

[94] The evidence also disclosed that save for one practice run, between 1977 and 2012, the grievor was never involved in any operations with the RCMP on board a CCG vessel.

[95] The evidence disclosed that CCG joint operations with other organizations were never shared with the crew of the vessel until they were at sea and that cell phone reception once at sea was minimal.

[96] The grievor's history should have been considered; his record should have been weighed (see *Grant*). He was an ideal employee with no issues from 1977. Neither the fleet superintendent nor the captain of his vessel had any issues with him. There was no evidence of misconduct. And between 2008 and 2012, when he was a Bacchus member, there is no suggestion that he did anything that could be seen as compromising information or assets.

[97] The employer also knew about the grievor's membership in Bacchus for well over a year and did nothing about it. This speaks volumes; if he was such a risk, why was he allowed to continue to work? There was no evidence of the employer having a strained relationship with any law enforcement agency.

[98] In the end, the only information that the employer shared with the grievor was the photo of him wearing his Bacchus jacket. If the risk was so high, the employer would have moved more expeditiously.

[99] With respect to much of the jurisprudence submitted by the employer, the grievor submitted that it should be viewed with caution. He was neither a CX nor a BSO; he was a deckhand on a ship. While the employer suggested that information was available that could have been shared, there was none for him to share.

[100] The grievor does not seek reinstatement but damages in lieu of it.

C. The employer's reply

[101] The employer cannot be faulted for not telling the grievor to cease and desist. He should have inferred from the fact that investigators spoke to him that his association with Bacchus was a problem.

[102] The situation in *Heyser* PSLREB with respect to the fraudulent activity is fundamentally different from the one in this case.

[103] The grievor attempted to minimize the employer's position and the risk once at sea because of minimal cell phone reception. That was not the only risk. There was also knowing the locations of CCG and partner organization ships, where they were going, where they had been, and how often they sailed to certain locations.

VI. Reasons

[104] The grievor has grieved the revocation of his security status and his termination, which was based on this revocation. As set out at paragraph 75 of *Heyser FCA*, the Board has jurisdiction to deal with non-disciplinary terminations under s. 209(1)(c) of the *Act*. At paragraphs 76 and 77, the Court stated as follows:

[76] . . . it is up to the Board to determine whether the non-disciplinary termination is for cause . . . the Board must, on the basis of the relevant facts surrounding the revocation and in the light of the relevant policies enacted by Treasury Board as the employer, determine whether the termination is for cause, which means inquiring into whether the revocation is based on proper and legitimate grounds.

[77] It is my view that if the revocation is justified on the basis of the relevant policies then the resulting termination was for cause. In other words, as is the situation here, when the employer terminates an employee on non-disciplinary grounds, i.e. because the employee has lost his or her reliability status, the Board must determine whether the revocation leading to the termination is justified. If so, the employer has shown that the termination was made for cause. If the employer is unsuccessful in demonstrating that the revocation was based on legitimate grounds, then there is no cause for the termination and the employee, as the adjudicator so ordered in this matter, must be reinstated.

[105] Thus, as set out above, my examination of whether there was cause to terminate the grievor necessarily entails an examination into whether the revocation is based on proper and legitimate grounds. Two policies were in effect at the relevant time, the Security Policy and the PSS (which is no longer in effect). The Security Policy sets out in general terms the reasoning behind government security, largely defining what it is and, in general, the organizations and positions responsible for given tasks. It defines a security clearance as an indication of a successful completion of a security assessment and sets out three levels: confidential, secret, and top secret. The evidence did not disclose that the grievor was ever subject to a security assessment; nor did he ever hold any level of security clearance. In addition, the Security Policy does not refer to the PSS or to reliability status.

[106] Appendix B of the Security Policy lists the government departments and organizations that are the leading security agencies. Neither the DFO nor the CCG is listed.

[107] It is clear from the evidence that the PSS governs reliability status. It has two levels of reliability screening, basic and enhanced. Section 2.2 states that enhanced reliability is the type of screening required when the duties or tasks of a position or contract necessitate access to designated information and assets, regardless of the duration of an assignment, appointment, or contract. An individual granted enhanced reliability status may access, on a need-to-know basis, designated information and assets. The grievor held reliability status.

[108] Section 2.3.2 of the PSS sets out what is involved in an enhanced reliability check, as follows:

- the verification of personal data, educational or professional qualifications, and employment data and references;
- an optional declaration concerning any conviction for a criminal offence for which a pardon has not been granted;
- a check of criminal records, except for current federal government employees as defined in section 3.1;
- a credit check, when the duties or tasks to be performed require it or in the event of a criminal record, based on the type of offence;
- other checks, according to the duties or tasks to be performed, and with the prior consent of the Treasury Board; and
- a criminal records name check (CRNC) or a fingerprint check. If the manager decides that a fingerprint check is required, it may be performed before or after appointment. A CRNC must be completed and the status authorized before the effective date of appointment or contract.

[109] Section 2.7 of the PSS discusses the evaluation of reliability checks. It states that when they arrive at a reliability screening decision, officials are expected to provide a fair and objective assessment that respects the person's rights and that the person must be given the opportunity to explain adverse information before a decision is made. Unless the information is exemptible under the *Privacy Act* (R.S.C., 1985, c. P-21), the person must be told why he or she has been denied reliability status. It states that the authorizing manager will need to determine whether a person can be considered trustworthy, taking into account the assessments in sections 2.7.1 to 2.7.5.

[110] Sections 2.7.1 through 2.7.5 of the PSS deal with the results of the following checks:

- personal, educational, and employment data and reference checks (section 2.7.1);
- a criminal records check (sections 2.7.2, 2.7.3, and 2.7.5); and
- a credit check (section 2.7.4).

[111] Sections 2.7.2 and 2.7.3 address discrepancies between a criminal records check and information provided by the individual. There was no evidence of a criminal records check being done or that information from one was relevant to revoking the grievor's reliability status, let alone evidence of any discrepancy between the information he provided and such a check.

[112] Section 2.7.4 addresses the existence of negative information in a credit report with respect to a credit check. There is no evidence of any negative information in a credit report, that a credit report had any role in the revocation of the grievor's reliability status, or that a credit check had been requested or carried out.

[113] Section 2.7.5 addresses information with respect to a particular section of the *Criminal Code* (R.S.C., 1985, c. C-46). There is no evidence that that section was relevant to the decision to revoke the grievor's reliability status.

[114] This leaves section 2.7.1, which addresses information with respect to the verification of personal, educational, and employment data, and reference checks. It states that based on the information collected, the manager determines whether the person has been reliable in previous employment and is honest and trustworthy. There is no evidence that the grievor was not reliable in his previous employment. In fact, there was no evidence that he was not reliable, honest, or trustworthy during his 30 years of CCG employment.

[115] The only evidence adduced at the hearing about the grievor's employment before the CCG was that he started with the CCG in 1977 and that he left but returned in 1982. From the evidence, it appears that until his reliability status was revoked and his employment terminated in the fall of 2012, he was employed with the CCG from 1982, or 30 years, for 23 of which he was a deckhand. There was no evidence that during any of his time with the CCG, he was anything other than a model employee.

[116] The PSS states as follows at Section 3 of Appendix B:

3. In checking reliability, the question to be answered is whether the individual can be relied upon not to abuse the trust that might be accorded. In other words, is there reasonable cause to believe that the individual may steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to him or her, or exhibit behaviour that would reflect negatively on their reliability. Such decisions are to involve an assessment of any risks attached to making the appointment or assignment, and, based on the level of reliability required and the nature of the duties to be performed, a judgement of whether such risks are acceptable or not.

[117] The difficulties with the employer's case come from its reliance solely on the fact that the grievor became a full member of Bacchus in 2010. However, the evidence disclosed that he had some form of an association or relationship with it as far back as the early 2000s. At least from November 17, 2008, the CCG, the DFO, and in particular, their security operations, were aware of that association as the RCMP had advised them of it. It led Mr. Lyonnais, then National Coordinator, Security, Corporate Security, DFO, to interview the grievor on December 18, 2008.

[118] Mr. Lyonnais did not testify. The only evidence from his interview are the documents that he created in the course of his duties and the grievor's testimony. The grievor confirmed that the topic of ending his association with Bacchus was discussed in December of 2008 and that he offered to end it if continuing it would affect his job.

[119] Mr. Lyonnais' three documents largely say the same thing. The first written record of the December 18 meeting was the December 23 email to Cpl. White, in which Mr. Lyonnais states that the grievor volunteered to leave Bacchus if staying would affect his employment. Two important facts can be taken from the email. The first is that the grievor had an involvement, relationship, or membership of some type in Bacchus because Mr. Lyonnais wrote as follows: "[The grievor] volunteered to leave the club . . .". It is trite to say that if someone is volunteering to leave that he or she has something to leave (a membership, an association, a relationship, etc.). In the next sentence, Mr. Lyonnais refers to it as an association. Second, he also states that the grievor referred to his relationship with the OMC as a hang around. As Det. Isnor testified, this term is specific to OMCs. According to his evidence, it indicates some form of lower-level membership, relationship, or association with an OMC.

[120] Chronologically the next document, the Lyonnais notes, records the discussion about the grievor leaving Bacchus slightly differently in two places on the same date (December 24, 2008). In one place, it states that the grievor had agreed to leave. However, later on, it states that management would “... *request that the [grievor] [cease] all associations . . .*”. Those statements are not incongruent with the statement in the December 23 email to Cpl. White indicating that “He volunteered to leave the club if it was to affect his employment (Pension).” These statements are in line with what appears to have been said at the December 18 meeting as referenced in the first written documentation, the December 23 email to Cpl. White; namely, the grievor offered to voluntarily end his association if asked because he was concerned about losing his job. This is buttressed by Mr. Lyonnais’ second statement at the December 24 notation of the Lyonnais notes, where he states that management should ask the grievor to cease his association.

[121] The other relevant document that existed at that time is the undated briefing note for the ADM that Mr. Lyonnais prepared but never sent. At the third bullet point of the summary, it states that “. . . *Corporate Security concluded that if the employee was to leave the club, it is unlikely that the employee would pose a security risk to the CCG joint operational venture with other lead agencies.*” The fact that Mr. Lyonnais uses the phrase “*leave the club*” again infers that the grievor had a membership, association, or relationship with it that he could leave. Again, it is trite to say that a person cannot leave something if he or she does not belong to it.

[122] Later, the briefing note refers to the December 18 meeting and states as follows:

- . . .
- . . . *During the interview, the employee was very cooperative and stated that if his association with the Club could possibly affect his employment, he was prepared to immediately stop all associations with this club.*

. . .

Recommendations/Next Steps

- . . .
- *That the CCG Fleet management pursue the initiative by the employee on leaving such a motorcycle club to meet the Government Values and Ethics Code concerning the conservation of the public confidence and trust.*
- . . .

[123] The grievor's testimony on the subject of leaving Bacchus is in line with what is set out in Mr. Lyonnais' documentation, which is that he volunteered to leave if it would affect his employment. All the documents produced about the December 18 meeting, namely, the December 23 email to Cpl. White, the Lyonnais notes, and the undated briefing note, together with the grievor's evidence (he attended the December 18 meeting), lead me to believe that at the meeting, he merely offered to leave Bacchus if staying would affect his employment.

[124] I have no doubt that the grievor offered to stop associating if otherwise, his job would be affected. What I doubt, based on the evidence in the documents just mentioned, is that CCG management took him up on the offer and told him to stop associating with Bacchus, or he would lose his job.

[125] Mr. Lyonnais was not the grievor's supervisor or manager; nor did the grievor report to him in any fashion. The evidence also did not disclose that Mr. Lyonnais ever told the grievor that if he did not cease his association with Bacchus, he would or could lose his job.

[126] There is no documentary evidence that anyone in authority ever told the grievor that if he did not cease his association with Bacchus, he would or could lose his job. While in his evidence, Mr. Costain said that the grievor was told just that, he could not identify anyone who had told him as much. No witness was brought forward who could testify that he or she told as much to the grievor. The grievor's evidence was that no one ever so told him as much. The documentation indicates that the security unit made that suggestion to management and followed up internally, but there is no documentation of management following up either with the security unit or more importantly, with the grievor. In fact the evidence in the Costain brief, at the January 17, 2011 reference states that concerns were raised that the grievor was never provided a cease-and-desist letter. While both the grievor and Mr. Lyonnais had good intentions, no one, so to speak, closed the loop. The grievor made an offer that appears to have been left on the table. However, it is clear that the employer should have expressed its expectation to him. I strongly suspect that had management told him that if he did not cease his association with Bacchus, he would or could lose his job, he would have done so. I so find because in the summer of 2012, while still working and before his reliability status was revoked, he quit Bacchus of his own accord.

[127] In short, other than Mr. Lyonnais interviewing the grievor on December 18, 2008 (and making the Lyonnais notes), drafting an undated (and unsent) briefing note, and sending the December 23 email to Cpl. White, the employer did nothing about the grievor and his association, relationship, or membership with or in Bacchus. In fact, the only action that seemed to occur and that was related to the grievor's association with Bacchus between December 18 to 24, 2008, and September 2010 (a period of 21 months) is that Mr. Lyonnais followed up with Ms. Gore on January 19, 2010 (some 13 months after the December 18 meeting), and asked if management had in fact followed up with the grievor.

[128] The evidence disclosed that the grievor became a full member of Bacchus in or around the summer of 2010 and that on September 9, 2010, the CCG was made aware of it. It further disclosed that he continued work as a deckhand throughout the period between November 17, 2008, and September 9, 2010 (roughly 22 months), without incident. No evidence was brought forward that at any time during this period did he do any of the following:

- anything criminal;
- act in any manner whatsoever to compromise the assets of the DFO, the CCG, the employer, or the government; or
- act in any manner to compromise any joint operation involving the CCG and RCMP, CCG and DND, or CCG and any other law enforcement agency.

[129] In addition, there was no evidence whatsoever that from November 17, 2008, to September 9, 2010, there were any joint operations involving the CCG and RCMP, CCG and DND, or CCG and other law enforcement agencies that involved the vessel the grievor was working on. Nor was there any evidence that he was involved in any type of work at any CCG or DFO workplace that would have provided him with access to any information with respect to any such joint operation.

[130] Between September 9, 2010, and early 2012, the only thing that the DFO and CCG (specifically its security operations) did was create memos and briefing materials about information largely based on what was known in late 2008, with the exception of adding the only new information, which was the change in the grievor's relationship with Bacchus. The only significant step that the DFO or CCG took was to issue an RFP. Its terms were unclear, but it appeared to be for some type of an inquiry with respect

to the grievor and his association with Bacchus. The RFP's date is unknown, as it was not produced into evidence. However, AGL was the successful bidder. Its proposal was dated February 22, 2012. The evidence disclosed that on March 19, 2012, Mr. Lefebvre of AGL interviewed the grievor.

[131] As far as I am aware, the grievor continued to work as a deckhand throughout the next period, from September 9, 2010, to March 19, 2012 (a little more than 18 months), without incident. No evidence was brought forward that at any time during this period did he do any of the following:

- anything criminal;
- act in any manner whatsoever to compromise the assets of the DFO, the CCG, the employer, or the government; or
- act in any manner to compromise any joint operation involving the CCG and RCMP, CCG and DND, or CCG and any other law enforcement agency.

[132] In addition, there was no evidence whatsoever that between September 9, 2010, and March 19, 2012, there were any joint operations involving the CCG and RCMP, CCG and DND, or CCG and any other law enforcement agency that involved the vessel the grievor was working on. There was no evidence that he was involved in any type of work or was at any CCG or DFO workplace that would have provided him with access to any information with respect to any such joint operation.

[133] The AGL report was dated simply March of 2012. Since the grievor was not interviewed until March 19, 2012, the report had to have been finalized near the end of March.

[134] I shall address the AGL report later in these reasons.

[135] Between March 19 and October 4, 2012 (the date on which the grievor's reliability status was revoked), one significant thing occurred with respect to him and his association with Bacchus — he quit. The date he did so is not clear; however, he said that he quit sometime after the shooting incident of July 2012. But clear is that the CCG either did not know that he had quit or did not consider it when it decided to revoke his reliability status as there is no evidence that anyone at the CCG or DFO knew or considered it. It was not reflected in any evidence.

[136] There was no evidence whatsoever that during the period from March 19, 2012, to October 4, 2012 (close to 7 months), the grievor did any of the following:

- anything criminal;
- act in any manner whatsoever to compromise the assets of the employer or the government; or
- act in any manner to compromise any joint operation involving the CCG and RCMP, CCG and DND, or CCG and any other law enforcement agency.

[137] In addition, there was no evidence whatsoever that between March 19 and October 4, 2012, there were any joint operations involving the CCG and RCMP, CCG and DND, or CCG and other law enforcement agencies involving the vessel on which the grievor was working. Nor was there any evidence that he was involved in any type of work at any CCG or DFO workplace that would have provided him with access to any information with respect to any such joint operation.

[138] The evidence does disclose that from the moment the DFO and CCG became aware of the grievor's association with Bacchus (November 17, 2008) until they revoked his reliability status (October 4, 2012), which was a period of almost 47 months (almost 4 years), the following is true:

- there was no evidence that the grievor did anything criminal or inappropriate;
- there was no evidence that he acted in any manner whatsoever to compromise the assets of the CCG, the DFO, the employer, or the government;
- there was no evidence whatsoever that he ever acted in any manner to compromise any joint operation involving the CCG and RCMP, CCG and DND, or CCG and any other law enforcement agency;
- there was no evidence whatsoever that during this period there were any joint operations involving the CCG and RCMP, CCG and DND, or CCG and any other law agency in which the vessel he worked on was involved; and
- there was no evidence that he was involved in any type of work at any CCG or DFO workplace that provided him with access to any information with respect to any joint operation involving the CCG and RCMP, CCG and DND, or CCG and any other law enforcement agency.

[139] The evidence also discloses that the grievor appeared to continue to work as a deckhand throughout this almost four-year period and that there did not appear to be any concerns about his work or his association with Bacchus, as the employer took no steps to either limit his duties or assignments or monitor him in any manner whatsoever.

VII. The AGL Report

[140] The AGL report was not helpful to the employer's case. Its terms of reference were not disclosed. It ignores relevant facts. It contains incorrect information, because of which it reaches erroneous conclusions.

[141] Its most glaring shortfall is in the assessment, analysis, and conclusion with respect to the grievor's character, trustworthiness, and honesty, which it bases on a finding from the December 18 meeting and the discussion surrounding his offer to end his association with Bacchus. At section 3.1, it states that rather than ceasing his association with Bacchus, he "*acted in deceit*".

[142] There was no indication that Mr. Lefebvre saw any of the documents provided to me at the hearing, namely, the December 23 email to Cpl. White, the Lyonnais notes, and the undated briefing note. They clearly indicate that the grievor was prepared to act on his offer to cease his association with Bacchus if continuing it would jeopardize his employment. As set out earlier in these reasons, there was no evidence that anyone in authority with respect to the grievor told him to stop his association or that continuing it would jeopardize his employment. If that information was readily available to Mr. Lefebvre in his investigation, it certainly was not set out in the AGL report. In this vein, the report leaps to the conclusion that the grievor was dishonest and untrustworthy.

[143] In his conclusion, Mr. Lefebvre posed the following four questions:

Can the individual steal valuables[?]

Can the employee exploit assets and information for personal gain[?]

Would the employee fail to safeguard information and assets entrusted to him[?]

Can the employee exhibit a behaviour that would reflect negatively on his reliability[?]

[144] Mr. Lefebvre's analysis is strikingly similar in his answers for the first three questions. He notes that although the interview disclosed that there was no evidence that the grievor did any of those things, his membership in Bacchus "*. . . raises questions about his integrity and therefore represents a higher risk that he could engage in such activity.*" With respect to the fourth question, Mr. Lefebvre premises his negative assessment on incomplete facts and a flawed assessment based solely on the grievor's failure to dissociate with Bacchus.

[145] The test for reliability has a large element of subjectivity; it is not an exact science. When one views the information set out in the PSS for review, it is clear that it is limited in scope and that at its very best, it is a snapshot of very specific information: criminal records, credit checks, and employment checks. A person's reliability is based on that person's historical behaviour, which could lie anywhere on a hypothetical line between almost no information and extensive information.

[146] For example, a new, young employee who has never held a job or had any credit and who has no criminal record has almost no information upon which to be assessed. Unlike that employee, an older person may have a clean criminal record and an extensive employment and credit history, which provides significantly more information to assess reliability. Indeed, if an older person has no criminal record, it discloses only that the person has gone a longer time without getting into trouble with the law, assuming that he or she has no juvenile record or has received a records suspension (formerly called a pardon), which has erased that negative information. In short, at best, the checks are an educated guess, the accuracy of which depends on the amount and accuracy of the information being assessed.

[147] The folly of the AGL report is that valid and important information was available that a reasonable and informed person would and should have considered when assessing the grievor's reliability. When Mr. Lefebvre interviewed him, the grievor was not young and just out of school; he had been in the workforce for 35 years, of which it would appear that about 30 had been with the CCG. Indeed, there is not a shred of negative information about his performance or behaviour in any employment setting, let alone his 30 years with the DFO and CCG. And no issues were raised with respect to his credit or a criminal record. His sole transgression was his association with Bacchus. This is not to suggest that being a member of an OMC such as Bacchus is

appropriate for a federal public servant. It means that the purpose of the checks is to assess the person's reliability and not to rely solely on his or her associations.

[148] The evidence with respect to Bacchus was largely hearsay and provided by Det. Isnor. While he was brought forward as an expert witness with respect to OMCs in Canada, the employer contacted him the week before the hearing, in mid-September 2017, some five years after the grievor had been terminated from his job. The information he possessed about Bacchus was certainly not in the employer's possession when it revoked the grievor's reliability status in 2012.

[149] Ms. Gibson, who was the DFO's director of safety, security, and emergency services and its DSO, revoked the grievor's reliability status by letter dated October 4, 2012. The letter provided no reasons for the revocation.

[150] Also entered into evidence was the 2012 memo to the DM. It was ostensibly drafted either by or for Ms. Gibson as the last page had a place for her signature. However, she did not testify. Its relevant portions state as follows:

...

- *Even though Mr. Starkey was provided with an opportunity to address security concerns related to his association with the Bacchus Motorcycle Club by ceasing his association with the Club in December 2008, he acted in a deceitful manner by not ceasing his association and eventually accepting a full membership with the Bacchus Motorcycle Club.*
- *According to a recent media report, the President of the Saint John chapter of the Bacchus Motorcycle Club has been charged with second-degree murder after a man was gunned down near the Bacchus clubhouse in Saint John. The Saint John police are investigating a potential link between the murder and the Bacchus clubhouse being a front for the Hells Angels in Atlantic Canada. This further corroborates the fact that the Mr. Starkey's association with Bacchus poses security concerns.*
- *A Security Assessment, completed by the Canadian Coast Guard, identified that there is reasonable cause to believe that Mr. Starkey's association with the Bacchus Motorcycle Club presents a security threat to the operations of the Canadian Coast Guard and joint operations with other federal, provincial and municipal lead agencies. Therefore, his Reliability Status should be revoked.*

...

[151] The 2012 memo to the DM goes on to recommend revoking the grievor's reliability status based on the suggestion that he had been deceitful with respect to the December 2008 interview with Mr. Lyonnais and the offer to cease his association with Bacchus. It also refers to the murder that took place in July of 2012 and to a security assessment.

[152] The 2012 memo to the DM is problematic because neither its author nor its recipient testified. Needless to say, it would appear that the reference to the security assessment, as best as can be determined, meant the AGL report. As I have set out earlier in these reasons, the AGL report is flawed.

[153] The letter dated October 17, 2012, terminating the grievor's employment merely advised that it was due to the revocation of his enhanced reliability status. It did not provide any details. It is clear and obvious based on the evidence before me that it was solely based on his relationship with Bacchus.

[154] The grievor testified as follows:

- he was not aware of criminal activity when he first started hanging around with Bacchus in the early 2000s;
- he was not required to visit any other motorcycle clubs before he was admitted as a Bacchus member;
- he was not aware of criminal activity in Bacchus when he was made a member;
- he did not carry out criminal activities;
- he did not own a business;
- between the December 2008 and March 2012 interviews, no one from the employer discussed his association with Bacchus;
- he never shared any CCG information from a ship with Bacchus members;
- he never had any information to share with Bacchus; and
- he was never asked by anyone in Bacchus to share information from his job.

[155] The AGL report contains **no evidence** of the following:

- Bacchus carrying out criminal activity;

- the grievor having any knowledge of Bacchus carrying out criminal activity;
- the grievor having to visit any other motorcycle clubs or gangs before being admitted as a full member of Bacchus;
- the grievor carrying out any criminal activity;
- the grievor owning a business;
- the grievor sharing any CCG, DFO, Government of Canada, or employer information with anyone, let alone from Bacchus;
- anyone, let alone a Bacchus member or one of any other OMC, asking the grievor to obtain or share any information he obtained from or in the course of his CCG employment; and
- the grievor having any CCG, DFO, Government of Canada, or employer information that was of any value to share with anyone, let alone with Bacchus or any other OMCs or their members.

[156] The hearing was provided with absolutely **no evidence** that any of the following applied to the grievor:

- he had any knowledge of Bacchus carrying out criminal activity;
- he had to visit any other motorcycle clubs or gangs before being admitted as a full member of Bacchus;
- he was involved in any criminal activity;
- he owned a business;
- he shared any CCG, DFO, Government of Canada, or employer information with anyone, let alone from Bacchus or any other OMC;
- he was asked by anyone, let alone a Bacchus member or any member of any other OMC, to obtain or share any information he obtained from or in the course of his CCG employment;
- he had any CCG, DFO, Government of Canada, or employer information that was of any value to share with anyone, let alone with Bacchus or any other OMC or their members; and
- he was untrustworthy or unreliable.

[157] At paragraphs 34 and 35 of *Heyser* FCA, the Court, in upholding *Heyser* PSLREB, referred to paragraphs 155 and 156, which stated as follows:

[155] While the employer had a legitimate reason to initiate an investigation into the grievor's conduct, it knowingly allowed her back into the workplace without restriction for close to six months while being aware that she had falsified the 2011 certificate. The reason for revoking the grievor's reliability status set out in Mr. Boyd's letter to Mr. Netzel was that her conduct posed "... a serious risk to the Department." That statement is negated by and inconsistent with the evidence, given the grievor's presence in the workplace and Mr. Boyd's testimony that no incidents of her untrustworthiness since her return to work had been brought to his attention. Furthermore, there was no evidence of the level of reliability required and the nature of the duties to be performed, especially with respect to access to confidential or sensitive information. I was presented with no evidence whatsoever that during that period, the employer considered that there was an unacceptable risk that the grievor might steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to her, or otherwise exhibit behaviour that would injure the employer' [sic] operations. All that remains is the finding in the administrative investigation report that the grievor did not "... act at all times in a manner that [would] bear the closest public scrutiny; an obligation that is not fully discharged by simply acting with the law."

[156] Therefore, I find that the grievor has demonstrated on a balance of probabilities that the employer did not have a legitimate concern that she "... pose[d] a serious risk to the Department ... " or that, in the words of its own Personnel Security Standard, there was "reasonable cause to believe" that she represented an unacceptable security risk when it decided to revoke her reliability status. The evidence has shown that the conditions required to revoke her reliability status were absent at the time of Mr. Boyd's decision, and therefore, I find that the consequential termination of her employment, not being for cause, constituted a contrived reliance on the FAA, a sham or camouflage. Further Mr. Netzel testified that the fact that the grievor had returned to the workplace had no impact on his decision to terminate her employment because he was unaware of that fact. Although that fact was highly relevant in the circumstances and was known to the employer, it did not inform the decision to terminate the grievor's employment. Failure to consider a highly relevant fact in making a decision is sufficient to render that decision arbitrary.

...

[158] In *Heyser* PSLREB, it is clear that the adjudicator found that despite the employer's statements on the alleged "risk" caused by keeping Ms. Heyser in the

workplace, by knowingly allowing her to return to the workplace and to stay there doing her work “. . . without restriction for close to six months while being aware that she had falsified the 2011 certificate”, there in fact was no unacceptable risk, which did not meet the test to substantiate revoking her reliability status.

[159] In this case, the risk alleged by the employer was the grievor’s Bacchus membership. However, as in *Heyser* PSLREB, the grievor remained in his position for a lengthy period (almost four years) without any monitoring by the employer or change of duties, despite what the employer alleged was a serious risk that in essence required terminating his employment.

[160] Therefore, as did the adjudicator in *Heyser* PSLREB, I find that the grievor demonstrated on a balance of probabilities that the employer did not have a legitimate concern that he “pose[d] a serious risk to the Department” or that in the words of its PSS, there was “reasonable cause to believe” that he represented an unacceptable security risk when it decided to revoke his reliability status. The evidence has shown that the conditions required to revoke his reliability status were absent at the time the decision was made to revoke it. Therefore, I find that the consequential termination of his employment, not being for cause, must be set aside.

[161] The evidence disclosed that the grievor had intended to retire in February of 2014 and that he is not seeking reinstatement. He also submitted as much. I am prepared to accept his request and not reinstate him into his position. Instead, he should be paid the equivalent of his salary and benefits for the period from October 17, 2012, to February 28, 2014, at the rate of pay he would have been entitled to, less any statutory deductions and the deduction of the appropriate union dues.

[162] As the grievor was a long-service employee, this additional period of a little more than 16 months (October 17, 2012, until February 28, 2014) may affect the value of his pension benefits. I declare that the date of the severing of the employment relationship shall be February 28, 2014, and that the grievor is entitled to payment for the value of his pension entitlement for the period from the date of termination until February 28, 2014.

[163] In his grievance, the grievor requested an apology. I decline to grant this request.

[164] In his grievance the grievor requested that all records pertaining to this be removed from his file. In light of the findings I have made, all material related to the revocation of his reliability status and termination of employment shall be removed from his personnel files.

A. Written submissions

[165] At the end of the hearing, I posed a question to the parties with respect to a scenario where I might consider or determine that evidence before the delegated decision maker in 2012 did not justify the revocation of the grievor's reliability status but that evidence after the fact did. Given my findings, that question is moot and I need not address the parties submissions in my decision. The parties also addressed the question of whether I could reinstate the grievor's reliability status. Given the grievor does not seek reinstatement, I will make no order with respect to the return of his reliability status.

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

(The Order appears on the next page)

VIII. Order

[167] I have jurisdiction to hear the grievances.

[168] The grievances are allowed.

[169] The grievor shall not be reinstated into his position.

[170] The Treasury Board shall pay the grievor an amount equivalent to his salary and benefits at the rate of pay he would have been entitled to from the date of his termination until February 28, 2014, less all the usual statutory deductions (including taxes and employment insurance) as well as union dues, all of which would otherwise have been deducted from his pay in the normal course of him receiving it.

[171] The Treasury Board shall pay the grievor interest on the net amount after the deductions mentioned earlier in this decision and at the appropriate rate of interest in accordance with the laws of the province of New Brunswick as provided for in s. 36(1) of the *Federal Courts Act* (R.S.C., 1985, c. F-7), to be calculated from February 28, 2014. I declare that the date of the severing of the employment relationship shall be February 28, 2014, and that the grievor is to have his pension adjusted to recognize this period.

[172] I retain jurisdiction for 120 days to address any issues relating to the calculation of amounts owed under paragraphs 170 or 171.

February 7, 2020

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