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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

ROOP AUJLA

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Aujla v. Deputy Head (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

Before: Margaret T. A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Corinne Blanchette, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Respondent: Marc Seguin, counsel

Heard at Abbotsford, British Columbia,
March 19 to 21 and October 15 to 17, 2019, and January 14 to 16, 2020.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] The grievor, Roop Aujla, grieved the termination of his employment, which he alleged was done without cause, was excessive, and was discrimination on the basis of a prohibited ground under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). He alleged that his employer, the Correctional Service of Canada (CSC or "the employer"), did not accommodate his substance-abuse disorder. In addition, he grieved the employer's revocation of his reliability status because it used the same grounds it relied on to establish cause to terminate his employment. He alleged that the revocation was a sham, camouflage, and disguised discipline. The employer's decision to make the revocation was alleged to be unfair and to have violated the principles of natural justice. The grievor also alleged that the revocation was another act of discrimination on the basis of his disability.

II. Summary of the evidence

[2] The grievor was a correctional officer (CX) employed by the CSC at its Pacific Institution facility ("the institution") in Abbotsford, British Columbia. As a CX-01, he was primarily involved in the custody, control, and correctional influence of inmates in the institution. He was obligated to comply with the employer's "Commissioner's Directive 060 - Code of Discipline" ("CD-060"), "Mission, Vision and Values Framework", and "Standards of Professional Conduct", along with the "Values and Ethics Code for the Public Sector". Also during the course of his employment, when cause arose, his reliability status was subject to review under the Treasury Board's "Standard on Security Screening".

[3] On March 24, 2017, the employer advised the grievor that his employment was terminated because it had concluded that based on a disciplinary report, and following a disciplinary meeting, he did not display the values and ethics required of a CSC employee and that he had violated CD-060 and the Standards of Professional Conduct. As a result, he could no longer be trusted to perform his CX-01 duties.

[4] That same day, he was informed that the CSC's Security and Information Division had reviewed his reliability status after receiving reports that he had attempted to purchase and import cocaine into Canada from the United States and that he had lied to the Royal Canadian Mounted Police (RCMP). In addition, he had been

seen in the Abbotsford area purchasing cocaine from known drug traffickers, described as “dial-a-dopers”, who respond to phone calls and then deliver their product to those wishing to purchase it.

[5] According to the employer, its Security and Information Division reviewed the grievor’s reliability status for cause based on a review of his job description and on information it received in an adverse-information report. After he was interviewed, it was decided to revoke his reliability status, which was consistent with government standards.

[6] The information that the warden and the security review committee considered was that in September 2015, the grievor and another CX (“the other CX”) entered the United States, intending to purchase drugs. While there, they were seen in the company of a known drug trafficker and gang member “Mr. J” (some names are anonymized in this decision). Still in that month, the grievor was seen purchasing cocaine twice while under RCMP surveillance. The grievor and the other CX, who later committed suicide, were under that surveillance between September 2015 and May 2016. It then ceased, and the RCMP commenced interviewing its suspects. The other CX committed suicide before the RCMP could interview him.

[7] The RCMP interviewed the grievor on May 20, 2016, the day of the other CX’s suicide. Based on the contents of the report of that interview, which was shared with the employer, a disciplinary investigation was launched on June 22, 2016. The investigation concluded that the grievor associated with known drug dealers and criminals who used drugs, that he gave false information to the RCMP in the course of its investigation, and that he entered the United States with the intention to acquire narcotics.

[8] A disciplinary hearing was held on December 22, 2016. In January 2017, the grievor was interviewed by the departmental Security and Information Division and was determined to have admitted to lying to the RCMP and to the disciplinary investigator. The disciplinary termination letter and the letter revoking his reliability status were given to him and made effective on the same day.

[9] Constable Paul Spencer produced a written report on “Op Peacetime”, which was the result of the investigation into two Canadians who were suspected of entering the United States to attempt to purchase cocaine from Mr. J, a known drug trafficker and

gang member. The RCMP received an intelligence report from the United States Department of Homeland Security ("Homeland Security") advising it of that suspected activity. Based on that intelligence, the Op Peacetime task force was set up to determine whether the grievor and the other CX planned to purchase and import what was believed to be 30 kg of cocaine, with a value of CDN$35 000 to $45 000 per kg.

[10] The grievor and the other CX went to Seattle, Washington, on July 21, 2015, where they met with Mr. J. Cst. Spencer and the task force secured production orders for the phone calls and texts of the other CX and the grievor and determined whom they called and the police interactions of those people. The task force surveilled the other CX and the grievor. Since they had crossed the border in the grievor's vehicle, he was the primary target of the surveillance. When Cst. Spencer noted that the other CX and the grievor worked for the CSC, he advised it of the ongoing investigation into two of its employees.

[11] According to Cst. Spencer, noted during the surveillance was that the grievor associated with different members of society, including known criminal elements. He went to establishments known to police, according to Cst. Spencer, at which drugs are readily available for purchase. The grievor was seen outside one of these establishments with "RF", who was a known drug dealer. Thus, Cst. Spencer concluded that the grievor's interaction with RF, which he observed, was a drug deal being transacted.

[12] RF was a known dial-a-doper, as was "JN". The grievor's phone records showed that he contacted RF 70 times between May 1 and November 17, 2015, and that he contacted JN 41 times during that time. In addition, he was associated with other known traffickers, including "AS", according to Cst. Spencer. He also had connections with members of a criminal organization involved in importing drugs, and in particular with a former CSC employee, a Mr. B, whom the CSC fired once he was convicted of drug trafficking. The grievor also denied knowing "RR", who was known to the police and was the grievor's business partner. Cst. Spencer found this particularly significant, since RR's wife worked with the grievor. In cross-examination, Cst. Spencer admitted that RR and his wife had separated.

[13] When the other CX committed suicide on May 20, 2016, shortly after finding out that he was under investigation by the RCMP, Cst. Spencer feared that the grievor

would have the same reaction to finding out that he was under investigation, so he took steps to apprehend the grievor at work. He detained the grievor under the provincial *Mental Health Act*, thinking that he might be a threat to himself. He was disarmed and taken into custody.

[14] Once he had the grievor in his custody, he asked the grievor why he had entered the United States on July 21, 2015. The grievor told him that he went with the other CX to purchase a boat he found on the classified ads website Craigslist from someone there. The grievor said that he went along because he feared that if the other CX went alone, he would be ripped off. The grievor could provide no information about or any description of the boat that the other CX had intended to purchase.

[15] When Cst. Spencer asked the grievor about purchasing drugs from RF, JN, and AS, he denied doing so and having any involvement whatsoever with drugs. He told Cst. Spencer that doing so would have detrimental consequences on his employment. Cst. Spencer testified that the grievor did not believe that the other CX was involved in importing or exporting drugs but that he might have been an occasional recreational drug user. The grievor told Cst. Spencer that he had heard that the other CX was a partier.

[16] Cst. Spencer testified that he did not believe the grievor's version of events. It did not fit the timelines the investigation had developed or the facts of the case, including that the other CX had several open drug trafficking and other related files in the United States. Given that, it was highly unlikely that the other CX went to the United States to buy a boat from a known drug trafficker who was the subject of Homeland Security surveillance. Cst. Spencer believed that it was possible that the grievor volunteered to drive the other CX to the meeting with Mr. J because he feared that the other CX might be ripped off, but Cst. Spencer did not believe that the meeting was about buying a boat.

[17] Given the inherent danger of this type of situation, in which deals are made for the purchase and sale of large quantities of illegal drugs, those participating are highly wary of who attends meetings, according to Cst. Spencer. The other CX would have had to bring someone he knew and trusted. It was highly unlikely that he would have brought another peace officer unless that peace officer was involved, again according to Cst. Spencer. The other CX would not have brought someone who was unaware and

who would have put the meeting at risk. Even so, it was clear to Cst. Spencer that the grievor was not the driving force in the deal.

[18] Op Peacetime ended with the death of the other CX and the grievor's interview. There was no outcome. It is not routine for the RCMP to inform an employer when its employees are under investigation. But in this case of two peace officers being the subjects of the investigation, the RCMP thought that the CSC should be informed because of the special natures of the investigation and of their employment. Cst. Spencer met with Terry Hackett and Corinne Justason, the deputy warden and assistant warden operations at the time of the institution regularly to update them on the progress of the investigation.

[19] Between May 1 and November 17, 2015, nothing arose that was worthy of reporting to the employer. Nothing in the RCMP investigation of the grievor indicated that he had sufficient financial resources to pay for the amount of cocaine it was suspected that he and the other CX were attempting to import. To facilitate the purchase, more people were required, which was why the connection to the criminal organization was of interest to the RCMP. In the end, there was no evidence that the grievor planned to import cocaine or that he was trafficking in drugs. There was evidence that he was purchasing and using drugs thought to be cocaine, that he was associating with drug dealers and criminals, and that he had lied about not knowing that he had been under investigation by the RCMP.

[20] William Thompson was Assistant Deputy Commissioner, Operations, Pacific Region, CSC, during the investigation period. He received a phone call from Deputy Commissioner Peter German in May 2015, whom the RCMP had contacted, to advise him of the investigation into the other CX and the grievor. Mr. Thompson notified the warden of the institution where the officers worked. Mr. Hackett and Ms. Justason were assigned to monitor the situation and to provide Mr. Thompson with follow-up briefings after they met with Cst. Spencer for updates. The number of people aware of the investigation and its process was limited, as Mr. Thompson did not want to compromise the RCMP investigation. The other CX and the grievor were kept employed for the same reason.

[21] Once he received the RCMP report in May 2016, he discussed it with Mr. German, Mr. Hackett, and Ms. Justason. They and four others at the CSC's national

headquarters were the only ones aware of the investigation. Based on his discussions, he decided to convene a disciplinary investigation into the behaviours and actions that the RCMP had reported to the CSC. He developed four allegations to be investigated, in consultation with Mr. German, Mr. Hackett, Ms. Justason, and the local labour relations advisor. It was decided that Bill Ard, a former lawyer and retired RCMP officer who had carried out investigations for the CSC's Pacific Region in the past would be contracted to conduct the disciplinary investigation. He was selected because of his experience with the RCMP and, according to Mr. Thompson, because of "his ability to knock down obstacles with the RCMP".

[22] From the time the RCMP initially contacted the institution, the presence of the other CX and the grievor in the institution was risk-managed, according to Mr. Thompson. He knew the other CX from working with him at the CSC's Kent Institution. He did not know the grievor and was not aware that he had any disability. He was not aware of any attempts by inmates to target or compromise the grievor during the course of the RCMP investigation. Had such a thing happened, Mr. Thompson was certain that he would have been made aware of it, given the circumstances.

[23] Between April 2015 and May 2016, there was no evidence that either the other CX or the grievor brought drugs into the institution or that the grievor prevented drugs from entering it. Mr. Thompson never personally met the grievor, but from all reports, he was an unremarkable employee. There was no evidence that the grievor did not do his job during this period. Mr. Thompson was aware that the grievor took leave after the other CX committed suicide.

[24] In February 2016, Mr. Thompson met with the CSC's commissioner; Fraser MacAulay, Assistant Commissioner, Correctional Operations and Programs; and Nick Fabiano, Director General, Security and Intelligence, and the CSC's head of departmental security. They met to discuss the way ahead, the disciplinary process and the security review process. Mr. Thompson shared the grievor's phone records and charts of those calls and explained what he knew at the time. He told Mr. MacAulay and Mr. Fabiano that he was aware that the RCMP was investigating the grievor for attempting to import narcotics into Canada. Mr. Thompson believed that knowing this information was essential for a thorough review of the grievor's reliability status.

[25] Mr. Ard was tasked with investigating four allegations, which were that the grievor associated with gang members, drug dealers, and criminals; that he purchased and used narcotics; that he provided false testimony to the RCMP, which Mr. Ard changed to false statements; and that he attempted to acquire narcotics in the United States. Mr. Ard launched his investigation on June 22, 2016, and submitted his report on October 24, 2016. In the interview process, he spoke to the grievor, Mr. Hackett, "ML" (another CX investigated by the RCMP), Cst. Spencer, and an investigator with Homeland Security.

[26] Mr. Ard asked the grievor to recount his version of his trip with the other CX. According to the grievor, he and the other CX went to Seattle because the other CX was purchasing a 10- to 12-foot aluminum fishing boat from someone. The other CX needed a truck with a hitch to tow the boat back. Since the grievor had such a truck and was not working that day, he agreed to go with the other CX.

[27] According to Mr. Ard, the grievor's story made no sense to him. He asked the grievor why the other CX would allow him to come on such a trip without knowing the true purpose. It also did not make any sense to Mr. Ard since the other CX's phone records showed that 14 phone calls had been placed between the other CX's phone and Mr. J's phone during the drive from Surrey to Seattle and back.

[28] The grievor explained the calls as the other CX seeking directions to the meeting location. Yet, it made no sense to Mr. Ard that the other CX continued to seek directions to that location after the meeting had occurred. Furthermore, driving to Seattle to buy a boat that was not unique, inexpensive, and readily available in the B.C. lower mainland did not make sense to Mr. Ard.

[29] Based on all these inconsistencies, which the grievor could not adequately explain, Mr. Ard concluded that the grievor knew that the purpose of the other CX's trip was to purchase cocaine. According to Mr. Ard, the grievor acknowledged that the other CX went to Seattle to buy drugs when he was confronted with all the facts, including the phone records and the RCMP report. The grievor acknowledged as much, even though he was steadfast that he did not know during the trip that that was its purpose.

[30] Therefore, Mr. Ard concluded that the allegation that the grievor attempted to acquire narcotics in the United States had been proven, as had the allegation that he

had associated with known criminals. He had admitted that he might have purchased and used cocaine on the one occasion noted in the RCMP report. According to Mr. Ard, the grievor candidly admitted that he purchased and used cocaine in the summer of 2015 over the space of what he described as "quite a few months". He also told Mr. Ard that he had drank heavily but that he had stopped drinking and using drugs some 8 to 10 months earlier. He never mentioned to Mr. Ard that he had a disability. He characterized his cocaine use as recreational and stated that neither his drinking nor his cocaine use had ever interfered with his job.

[31] The grievor allegedly lied to the RCMP about being told about the investigation. ML, another CX named in the convening order and investigated, told the grievor that the RCMP was investigating him and the other CX. When Mr. Ard confronted the grievor with that statement, the grievor denied it. However, the RCMP report clearly states that ML reported to the RCMP that he had told the grievor and the other CX about the investigation. Since ML admitted doing it, and, in Mr. Ard's opinion, the RCMP would not make up something like that, Mr. Ard concluded that the grievor lied to the RCMP when he denied that ML had notified him of the investigation. Even though he concluded that the grievor lied to the RCMP, Mr. Ard did not find that the grievor had given false testimony as he had not been under oath. As a result, he substituted making a false statement and providing false information for providing false testimony as set out in the convening order.

[32] The grievor admitted to having contact with only one drug dealer, RF. When Mr. Ard asked him to describe the person he met, the grievor's description did not match that of RF, so Mr. Ard concluded that he had met with someone other than RF. When the grievor was asked if he knew that people with whom he had associated had been identified as known criminals, he denied knowing them when in fact, he and RR were directors in the same business and were business partners.

[33] While the grievor told the RCMP that he never used drugs, he told Mr. Ard that he used them for a period in the summer of 2015. He denied calling drug dealer JN, but his phone records showed that the grievor had called him 41 times. Likewise, he denied calling RF, but his phone records showed that he had called him 70 times. According to Mr. Ard, the grievor was evasive during the interview. For instance, when he was asked about the type of boat to be purchased, the grievor responded that since

there was no boat, he had no idea of its type. Based on all this, Mr. Ard determined that the grievor was not credible and that all the allegations were founded.

[34] During the course of the interview, the grievor never mentioned to Mr. Ard being addicted to drugs or alcohol. He did mention drinking heavily after the other CX's death. Nor did he mention to Mr. Ard being stressed or depressed. However, he mentioned seeing things when he worked at Kent Institution. He mentioned being stressed after the RCMP talked to him in May 2016 after the other CX's suicide, following which he spoke to the deputy warden, Claude Demers. Mr. Ard did not talk to Mr. Demers because the grievor's stress was not the subject of the investigation, which was about misconduct; his stress was not relevant.

[35] The grievor claimed that he drank a bottle of alcohol every day during the summer of 2015. He never defined the bottle size. In Mr. Ard's opinion, it was a ruse. The grievor claimed to have experienced blackouts due to alcohol to justify his inability to remember things that Mr. Ard was certain he did remember, such as ML informing him of the investigation.

[36] Shawn Huish testified that he was the warden at the institution in October 2016. In that role, he was responsible for among other things labour relations issues, including disciplining employees. He described his expectations of a CX-01, such as the grievor, as providing static security in the institution, controlling doors, and monitoring the institution's posts. As a CX, the grievor held peace officer status and had authority over the offenders incarcerated in the institution, including search-and-seizure and detention powers under the *Criminal Code* (R.S.C., 1985, c. C-46). A CX is expected to be a good role model to inmates.

[37] When joining the CSC, each CX, including the grievor, signs an undertaking to be bound by the Standards of Professional Conduct in the Correctional Service of Canada. Standard 2 sets out what the employer expects of its employees with respect to their conduct both on and off duty. A CX who commits criminal acts or other violations of the law, particularly repeatedly, does not demonstrate the type of personal or ethical behaviour considered necessary by the employer. If an employee experiences personal problems that may affect the performance of his or her duties, the employer has a responsibility to offer assistance to that employee, but it does not mean that the employer will ignore poor performance or behaviour. An employee experiencing such

problems is expected to advise the employer or consult its Employee Assistance Program for help.

[38] Mr. Huish knew nothing of the grievor until the disciplinary investigation report was finalized. At that point, he called the grievor, introduced himself, and advised the grievor that the report was finished and that he would soon receive a vetted copy of it. A disciplinary hearing was scheduled for December 22, 2016, which was attended by Mr. Huish, Sue Langer from the regional labour relations office, the grievor, and two union representatives. The purpose was to allow the grievor the opportunity to share information with Mr. Huish that he thought was necessary to help Mr. Huish make a fair decision.

[39] The grievor was given the opportunity to address the issues raised in the disciplinary investigation report. According to Mr. Huish, the grievor talked about his trip to the United States but denied all the allegations in the report. He talked about his drug use and how hard the discipline process had been on him.

[40] The grievor never raised or used the word “disability” with Mr. Huish. During a telephone conversation related to scheduling the disciplinary hearing, he did mention that he was undergoing counselling and that he had been diagnosed with PTSD. Mr. Huish passed this information to the labour relations advisor but did not seek a further medical assessment, such as a fitness-to-work evaluation, which would have been moot since the grievor was not then at work. Every letter sent to him offered him the assistance of the Employee Assistance Program. The onus was on him to take the offer.

[41] According to Mr. Huish, the grievor admitted to purchasing and using cocaine for a brief period in 2015 but denied the much wider allegation of intending to import it. At no time did he mention drug abuse during his meetings with Mr. Huish, and he denied that his use of drugs and alcohol ever affected his work. Mr. Huish’s assessment was that the grievor was not remorseful; at no time did he express remorse or say that he was sorry for his actions. He was upset and regretful for being in the situation but was not remorseful for his actions. At no time was any mention made that the grievor had a disability, although Mr. Huish was provided with a medical note indicating that the grievor had been diagnosed with post-traumatic stress disorder and was in treatment from May 2015 to December 2016. According to the grievor he

addressed his substance abuse issue and informed the warden that he had been in counselling since August 2016. The grievor's psychologist wrote in December 2016 that the grievor no longer had any substance abuse issues.

[42] The fact that the grievor disclosed his alcohol abuse to Mr. Demers in 2016 (he said that it had been for a period in 2015), which Mr. Ard acknowledged in his report, was not discussed at the disciplinary hearing. The meeting was not held to discuss the grievor's alcohol use but to deal with disciplinary allegations, according to Mr. Huish. He took no steps to corroborate the discussions between the grievor and Mr. Demers as they were not relevant to the topic of the meeting. Also not relevant was the grievor's then-current anxiety and depression medication, prescribed by his doctor.

[43] When determining the appropriate penalty, Mr. Huish considered the findings in the disciplinary investigation report, the grievor's statements at the disciplinary hearing, the timing of the disclosure of his substance abuse, the conflicting statements he made about purchasing the drugs versus purchasing the boat, his years of service, his disciplinary record, his truthfulness with the RCMP, and whether he could be trusted to be a public servant. The mitigating factor was his clean 18-year disciplinary record, while the aggravating factor was that given his 18 years of service, he knew better. He admitted in his interview with the RCMP that he was aware of the implications that the allegations would have on his job.

[44] The grievor apologized and expressed remorse for how his actions affected his reputation, not how they affected the reputations of his colleagues, his peers, the CSC, and peace officers in general. Even with two union representatives with him to help him answer questions, the best he could do was gloss over his expression of remorse. According to Mr. Huish, it was not a genuine expression of remorse or regret and did not express true understanding of the harm he had caused.

[45] One of Mr. Huish's biggest concerns was maintaining the reputation of a CX as a peace officer, even though Cst. Spencer had testified that he saw no impact on the CSC's reputation within the RCMP. When a CX lies to a partner peace-keeping agency, it creates a very significant risk to the CSC's reputation. Furthermore, what type of role model could the grievor be given that the inmates he was to guard were incarcerated for similar poor decisions. As a CX, he was expected to act as a role model, not as an inmate. Part of the CSC's mission is to respect the law, which the grievor showed he

could not do. By then, he had proven himself more akin to the inmates than to the other CXs.

[46] When he was asked two years later if he stood by his decision, Mr. Huish said that he did. The grievor's rationale for being in Seattle that day did not make sense. He wilfully communicated with drug dealers and violated the law. Since it was unknown whether he had been compromised, his return to the institution posed an unacceptable risk. The employer would never know when one of his dealers would become an inmate or when he might encounter one of them while on duty, if he was returned to the institution. It was impossible to know when an inmate who knew about the grievor's drug use might try to compromise him within the institution.

[47] Mr. Huish collaborated with his labour relations consultants at the regional and national levels. The decision to terminate the grievor was held off pending the completion of the review for cause of his reliability status, but Mr. Huish had no involvement in that process. Ultimately, Mr. Huish gave the grievor his termination letter on March 24, 2017, at the same time as the letter revoking his reliability status.

[48] Dorothy Sicard is responsible for the security screening of CXs within the CSC. The CSC's screening program is government-wide and in certain circumstances provides for a review for cause. A review for cause is a reassessment of a granted security clearance due to adverse information coming to light. It is a formal process that is undertaken when such adverse information calls into question someone's ability to protect sensitive information. It may include a security investigation and an interview, which were both done in this case.

[49] Adverse information is any information that calls into question someone's ability to protect government information. It may include allegations of theft, fraud, alcohol or drug use, criminal activity, or dishonesty. The process for a review for cause is set out in Appendix D of the Treasury Board's Standard on Security Screening. Adverse information is assessed against the criteria set out in section 2 of Appendix D, including the severity of the information, the currency of it, the circumstances, and the likelihood that it will affect the individual's reliability. Depending on the outcome of the assessment, the individual may be called to an interview.

[50] During the interview, the person's openness and honesty is assessed. According to Ms. Sicard, honesty is the foundation of reliability status, which was the level of

clearance that the grievor held, as it measures honesty, integrity, and trustworthiness. The interview is conducted to allow the individual to rebut or clarify the adverse information and to fill in any gaps. It is done by videoconference and is recorded. The individual may be accompanied by a union representative and is told to be honest and truthful with the interviewers.

[51] The grievor's review for cause ran parallel to the disciplinary investigation. He held enhanced reliability status, which assessed his honesty and trustworthiness. His interview was prompted when the departmental Security and Intelligence Division received a copy of the disciplinary investigation report from the regional labour relations office, at Mr. Thompson's direction. Ms. Sicard read the report. She identified security concerns related to the fact that the grievor had not been honest with the RCMP, had withheld information during the disciplinary and RCMP investigations, had purchased drugs, and had been dishonest about his associations with criminals. She passed this information on to Mr. Fabiano, her director general, who requested that she conduct a review for cause.

[52] Ms. Sicard then gathered all the information in the grievor's file, plus the RCMP and disciplinary reports. The review-for-cause interview was held on January 17, 2017. The purpose was to discuss the information she had collected and to allow him to discuss her findings. He was not forthcoming with answers, according to her, and he provided only limited responses. The results were that he admitted that he had been untruthful to the RCMP and in the investigations when he said he was not aware of the RCMP investigation even though he was aware of it, when he told the RCMP that he had never used or purchased drugs, and when he denied knowing RR, even though they were business partners.

[53] Ms. Sicard's overall assessment of the grievor was that he was not honest, that he lied to law enforcement, and that he was found not trustworthy. The interview committee put this in its report and recommended that his reliability status be revoked. The recommendation was sent to the Resolution of Doubt Committee. She attended its meeting. The committee accepted the recommendation and sent it to Mr. MacAulay. The grievor was given 10 days to refute the committee's recommendation, but none was received.

[54] On cross-examination, Ms. Sicard could not point out any particular question that the interview committee asked and that the grievor did not answer truthfully. She admitted that she did not know if his answers were truthful as the committee made no efforts to verify their truthfulness after the fact. He answered all the questions about his marriage, his drug and alcohol use, and his finances. Ms. Sicard testified that she took his answers at face value and that she could not point out any dishonesty in his interview. His admissions that he had been dishonest with the RCMP and Mr. Ard were of concern to the committee members.

[55] Ms. Sicard could not specify why the other employees implicated in Op Peacetime (ML and a Correctional Manager (CM)), who were also disciplined but not discharged, were not subject to a review for cause. It was pointed out to her that as of the review for cause, the grievor had not been disciplined, let alone discharged. She commented that the employer cannot revoke the reliability status of someone who is no longer employed, according to the Treasury Board guideline, so the Security and Intelligence Department and Mr. Langer from Labour Relations decided to effect the termination and the revocation at the same time. The disciplinary investigation report was used as the adverse information required to initiate the review for cause.

[56] In 2017, Mr. MacAulay was the delegated deputy head responsible for the CSC under the Treasury Board's Standard on Security Screening. According to him, the Resolution of Doubt Committee, from which he received the recommendation to revoke the grievor's reliability status, was part of due process and procedural fairness and independent of any disciplinary process. He was advised of the outcome of the committee's deliberations, which were sent to Mr. Fabiano. In this case, the adverse information initially came from Homeland Security, which the RCMP relayed to the employer.

[57] According to Mr. MacAulay, at the security interview, the grievor was well aware that everything was at risk, including his job, but he still did not admit to things that had been proven. The employer cannot operate with people who are not open and forthright. His explanation of his trip to Seattle to buy a boat that never showed up, and his statement that he never got out of the vehicle made no sense, according to Mr. MacAulay. The grievor's behaviours during that trip were inconsistent with his story. He said that he had not felt well, but he stopped for lunch and had a beer. He made 70 contacts with a self-professed drug dealer but could not identify him. Alcohol

and drug use is a huge problem for the CSC, since 70% of the inmate population is addicted to one or both. The grievor's lifestyle made him a prime target for blackmail or flipping; this was too much risk for the employer, the institution, the inmates, and the staff. With that degree of risk, the grievor did not meet the test under the Standard on Security Screening to be granted or to maintain his reliability status.

[58] Every time the grievor was questioned about his cocaine use, he spoke about his alcohol use and denied using drugs. None of it added up, according to Mr. MacAulay.

[59] Mr. Langer was the acting manager of labour relations for the CSC's Pacific Region as of the grievor's termination. He advised senior management on the disciplinary and security processes. He kept Mr. Huish up to date on the progress of the parallel security process while management held the completion of the disciplinary process in abeyance pending the completion of the security process. He shared all the disciplinary information with the security group, including the disciplinary investigation report used to terminate the grievor. He advised management of the effect of an early termination on the employer's ability to review and revoke the grievor's reliability status under the Treasury Board's standard. Based on his recommendation and advice, the disciplinary process was put on hold pending the completion of the security review process. He then coordinated the delivery of the two letters together. He attended meetings with Ms. Sicard present at which the intended outcome of the disciplinary process was discussed. At no time did the employer consider alternatives to terminating the grievor's employment, given the circumstances.

[60] According to Mr. Langer, in addition to the grievor, three CXs and a CM were all investigated for providing false information to the RCMP. In the case of ML and the CM, Mr. Ard concluded that they also provided false testimony to the RCMP, but neither was terminated. Rather, they received what Mr. Langer described as minor financial penalties. Neither ML nor the CM was subjected to a review for cause; only the grievor and another CX were. Only the grievor's reliability status was revoked. According to Mr. Langer, in his career, he has seen only one successful revocation — that of the grievor.

[61] The grievor testified that he started his career as a CX-01 at Kent Institution in 1997. He moved to the institution in 2007, where he remained until he was suspended

in June 2016 during the disciplinary investigation. Between 2015, when the RCMP began investigating him, and the date of his suspension, nothing changed for him at work. His post rotation remained the same; he rotated through all the units and shifts, but mostly, he carried out hospital escorts.

[62] On May 20, 2016, the grievor was on a hospital escort at the Abbotsford Regional Hospital when he found out about the RCMP investigation. Three uniformed correctional officers approached him, a CM and two CX-02s, along with an RCMP officer and the CX-01 working the escort with him. He was told to put his hands up. The RCMP officer disarmed and handcuffed him and then told him that the other CX had committed suicide by shotgun. The CM present told him to go with the RCMP officer, who then walked the grievor down the hall, still in handcuffs.

[63] When the RCMP officer reached the patrol car, he removed the handcuffs and put the grievor in the back seat of the patrol car. He asked the grievor if he planned to harm himself; the grievor responded that he had no reasons to. The officer then advised the grievor that their conversation was being recorded and that he could leave if he wanted to. The officer then asked the grievor about his drug use, his trip to Seattle, and his relationship with the other CX. When the grievor was asked if he knew about the ongoing investigation, he initially denied being told about it by ML, who had also informed the other CX. Mr. Loewen had informed the grievor about the other CX's reaction — he was heard to say that he was "f---ed".

[64] When Cst. Spencer asked the grievor if he used drugs or knew of anyone who did, according to the grievor's testimony, he said that he did not and had never used drugs, although he knew of coworkers who used them. When his representative asked the grievor during his testimony why he denied using drugs, he responded that he was ashamed and afraid for his job and that had he been given 10 minutes to take in the news about the other CX rather than being immediately questioned, he might have answered differently. He also knew that purchasing and using drugs was a crime and that if he were caught, it would significantly impact his job. According to the grievor, in hindsight he wished that he had been forthcoming.

[65] Cst. Spencer then drove the grievor to the institution. During the drive, they spoke about fishing. When they arrived, it was obvious to the grievor that everyone knew what had happened with the other CX. He entered and met with Mike Page, his

union representative, and Mr. Demers, the deputy warden. According to the grievor, he had contacted Mr. Page to help. Mr. Page told him to tell management everything, so he told Mr. Demers that he had struggled with alcohol and drug dependency in the past and that he needed help. Mr. Demers appeared supportive, according to the grievor, but did not request any medical information. Mr. Demers told him to take a couple of days off because of everything that had happened. After that, he was suspended because of the disciplinary investigation.

[66] According to the grievor, he had admitted that he associated with drug dealers and criminals and that he had purchased narcotics. He originally denied providing false testimony to the RCMP but was forthcoming when he spoke to Mr. Ard. He did not intend to lie about knowing in advance about the RCMP investigation. Denying it was a "stressed-out mistake", according to his testimony. In his testimony, he also claimed that he did not lie about knowing RR; he knew him as Robin and not by his legal name. When the RCMP investigator pointed out to him that he was in business with the man and had to know him, according to the grievor, his response was, "Oh! You mean Robin!" They had briefly been involved in a small, home-based business.

[67] As for making 144 phone calls to drug dealers, the grievor did not dispute it, if that is what the phone records show, but he was quick to point out that it does not mean that he met those drug dealers 144 times. According to him, it might have taken 10 calls to set up 1 buy.

[68] As for the attempt to import narcotics from the United States, the grievor maintained that he did not know anything about it. The other CX had been talking to him for some time about fishing and had mentioned that he wanted to buy a boat in Seattle. The grievor had accompanied the other CX to the United States many times when he had purchased vehicles to import, so he did not question the other CX's interest in bringing back a boat. In the grievor's opinion, regardless of the boat's age or size, the other CX would save money by going to the United States, since Americans were anxious to sell their toys. According to the grievor, Mr. Ard would not know anything about it since he has never gone to the United States to purchase a recreational vehicle or boat.

[69] Since the grievor's vehicle was equipped for towing, it was decided to take it instead of the other CX's vehicle. The grievor drove, and the other CX relayed the

directions he was receiving from the person he was speaking to on the phone. The grievor was certain that if the other CX had been making a drug deal while sitting beside him, he would have heard as much and would have turned around and returned home. On the way to Seattle, the grievor did not feel well, so they stopped and had a meal with beer. The drive to Seattle was very calm. Had the grievor had any suspicion that the other CX was engaging in trafficking, he would have confronted him about it.

[70] Since July 2015, the grievor has crossed the border many times without incident and without being required to submit to secondary screening. According to him, doing so would have been impossible had the border services officers on either side of the border had any suspicions about him.

[71] At the disciplinary hearing held before Mr. Huish, according to the grievor, it was made clear to him that Mr. Huish did not believe that he showed any remorse for the effect of his actions on the CSC. He reported that he told Mr. Huish that that was not true and that he was very sorry. He was never given the chance to express his remorse. The disciplinary hearing was the first opportunity to speak to the employer since after Mr. Ard interviewed him, he had no communication with the employer.

[72] The only time the grievor spoke to Mr. Huish, other than at the disciplinary hearing, was on the phone when Mr. Huish called to schedule the disciplinary hearing. On that call, he mentioned to Mr. Huish that he had been unable to secure Sun Life benefits for counselling because of the ongoing criminal investigation. Apparently, Ms. Justason had informed his Sun Life case manager that he was under a criminal investigation.

[73] In his testimony, the grievor admitted to using cocaine but testified that it was only for a four-month period in 2015. He stated that cocaine was not his problem. He did not like its effect on him, and it was too expensive. On the other hand, alcohol was a problem, but it did not interfere and had not interfered with his work. He admitted that he might have occasionally gone to work hungover, but he never allowed his drinking to interfere with performing his duties. Alcohol is socially acceptable. Once suspended, his alcohol use increased until November 16, 2018, when he took his last drink. He made two attempts at treatment in 2018. The first time, he was sober for six weeks before he relapsed.

[74] He attended the Edgewood Health Network's treatment program and spent six weeks at the Maple Ridge Treatment Centre. Now, he attends Alcoholics Anonymous meetings every Friday and is on Naltrexone to overcome his alcohol cravings. He has also been prescribed different medications for anxiety and depression than he was on in 2015, which are much more effective, and he sees a psychiatrist regularly. He offered to allow the employer to speak to his psychiatrist at the disciplinary meeting, but Mr. Huish never followed up on the offer.

[75] Despite what Mr. Huish said, the grievor insisted that he apologized to Mr. Huish. He owned up to his mistakes; he knew that he had discredited the CSC. He knew that by purchasing and taking drugs, he was breaching his peace officer duties. He did not deny doing it but stated that he did so only for a brief four-month period. He also admitted that he purchased cocaine via dial-a-dopers who were known criminals and that associating with criminals is a violation of the Standards of Professional Conduct. As for the review-for-cause interview, he answered every question honestly.

[76] Mr. Page, the local president of the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN at the institution, attended a meeting with the grievor and Mr. Demers on May 24, 2016, at which the grievor told Mr. Demers that he had an addiction and that he needed and wanted help. According to Mr. Page, Mr. Demers appeared supportive. The grievor did not mention what type of addiction he was suffering from, according to Mr. Page. At that time, the grievor was on paid sick leave. After the meeting, the employer launched the disciplinary investigation, during which the grievor was placed on unpaid sick leave.

[77] When the grievor attempted to secure long-term disability benefits under his Sun Life coverage, he was denied them because Ms. Justason had informed Sun Life that he was the subject of an ongoing police investigation. It had to be clarified through Mr. Huish and Labour Relations for the grievor to obtain the coverage to which he was entitled. Mr. Huish had Ms. Justason call Sun Life to correct the information she had provided.

[78] Mr. Page was present during the disciplinary hearing and the review-for-cause meetings. The disciplinary investigation was held up by the security clearance review. When Mr. Page asked Mr. Huish why there was a delay, Mr. Huish advised him that the

discipline process was part of the security review process. At the security review meeting, the grievor responded honestly, according to Mr. Page, although he added that he did not remember much of what was discussed at the meeting.

[79] Mr. Page did not foresee any problem with the inmates were the grievor reinstated. They would just assume that he had been transferred from another institution. He also did not anticipate that any of those who worked at the institution would have a problem with the grievor being reinstated.

[80] Dr. Lindsay Jack is a registered psychologist specializing in forensic psychology and the treatment of those in the criminal-justice system with concurrent substance-abuse disorders. According to her, these disorders are trauma based and are rarely reported. First responders, including peace officers, have a high rate of substance abuse and use drugs and alcohol as a means of self-treatment.

[81] The grievor was referred to Dr. Jack on February 25, 2019, by his representative for an assessment of his mental health and substance abuse. In particular, Dr. Jack was asked about his diagnoses and whether they met the definition of substance use or a substance-abuse disorder, the prognoses for the diagnosed conditions, and the role the conditions played in his ability to rationalize and be forthcoming in stressful situations.

[82] Dr. Jack carried out a 1.75-hour clinical interview of the grievor, followed by 45 minutes of psychological testing and a 30-minute follow-up interview to obtain additional information. She noted that she had limited file information from the time of the investigations (July 2015 to December 2016). The grievor told her that he did not talk about his difficulties or symptoms with medical professionals at that time, and he denied that he had any substance-abuse issues. As a result, in her words, Dr. Jack was "over-reliant on Mr. Aujla's current reports about his symptoms and functioning leading up to and during 2016-2017". By "current", she meant March 2019, when the grievor was preparing for the hearing of his grievances.

[83] Dr. Jack reached the diagnostic conclusions that the grievor met the criteria for alcohol-abuse disorder and that he was in partial remission. He also met the criteria for stimulant-abuse disorder and was in full remission, since he reported being clean for more than a year. She could not offer a diagnosis on his depression and anxiety at the time as she examined it retrospectively. The prognosis for someone like him was

optimistic, given his period of abstinence, but he was at risk of relapse in certain circumstances.

[84] To be diagnosed with substance-abuse disorder, a patient is evaluated for the presence of symptoms and is scored on a scale of 5. A 12-month period is the criteria for a diagnosis. Symptoms must have occurred within a 12-month period but not necessarily for the entire period. The symptoms must cause impairment in functioning, and there must be pharmacological criteria, such as tolerance or withdrawal. Since there was no medical documentation to rely on to corroborate the grievor's report of his drinking and drug use, Dr. Jack testified that she was over-reliant on his self-reporting at the interview. No accurate contemporaneous reports supported his version of events, and Dr. Jack did not think it appropriate to interview his ex-wife, given the nature of their relationship at that time.

[85] The grievor repeatedly stated that alcohol use did not affect his job performance. It was his predominant impairment, and it persisted until 2018. His stimulant use lasted three or four months. He informed Dr. Jack that he did not report his substance use because he did not want to get in trouble. He knew that drug use was illegal and that it could mean the end of his job.

[86] Dr. Jack testified that she expects people with substance-abuse issues to deny or minimize their use because of the shame they feel and because they are not ready to stop the abuse. It was not possible for her to assess the grievor's situation in 2015 since the medical record provided to her was dated after the period for which she was asked to perform the assessment. The record was dated 2018, while the period she was asked to assess was 2015 to 2016.

[87] According to Dr. Jack, addicts tend to minimize their alcohol or drug use to avoid the shame and the consequences of using those substances. When an addict is actively using drugs or alcohol, his or her memory of events may be affected; an addict is not a reliable historian. When using heavily, an addict is not reliable when relating events during that period of use. Put broadly, substance abuse impairs judgement. The degree of impairment differs with each person, according to Dr. Jack. When intoxicated, an addict may suffer from impaired judgement and attention, and his or her emotional state may be impacted. An individual who has been diagnosed with

substance-abuse disorder requires time to process information if he or she is in an acute state of intoxication or withdrawal.

[88] The grievor did not minimize or deny his use in 2016 and 2017, but he did not tell anyone about it either. His test results and score on the validity scale were consistent with what Dr. Jack heard in her interviews with him, according to her testimony. His emotional state was consistent with what he discussed; for example, he was tearful when discussing the loss of his friend.

[89] According to Dr. Jack, the fact that the grievor did not report his alcohol or drug use to the employer was not unusual. Most first responders and law-enforcement officers are reluctant to report such things because of the consequences to jobs that are safety sensitive. The grievor had a tendency to minimize his use out of shame and in an attempt to avoid the consequence of using drugs and alcohol, in her opinion. Regardless, the grievor knew what he was doing, was able to make decisions knowing right from wrong, and knew the consequences of his actions as long as he was not intoxicated or going through withdrawal at the time.

III. Summary of the arguments

A. For the employer

[90] The employer terminated the grievor for disciplinary reasons effective March 24, 2017, pursuant to its authority under s. 12(1)(c) of the *Financial Administration Act* (R.S.C., 1985, c. F-11). Based on Mr. Ard's disciplinary investigation report and the information received at the disciplinary hearing, and considering both the aggravating and mitigating factors, the employer concluded that the grievor did not display the values and ethics required of a CSC employee. It lost confidence in his abilities to perform his CX-01 duties. He grieved that the discipline imposed on him was unwarranted and excessive as well as discriminatory.

[91] As for the revocation of the grievor's reliability status, the departmental Security and Intelligence Division was asked to review that status under Appendix D of the Treasury Board's Standard for Security Screening. After the sensitivity of the information his position could access and the content of the adverse-information report were evaluated, the decision was made to revoke his reliability status pursuant to section 19 of Appendix D. The grievor alleged that the employer violated the

relevant collective agreement by doing so. He also alleged that the revocation was a sham, a camouflage, and disguised discipline.

[92] Several dates are key to this matter. In July 2015, the grievor and the other CX went to Seattle to ostensibly buy a boat according to the evidence. In September 2015, the RCMP launched its investigation of the grievor, the other CX, and others after it received a report from Homeland Security that two CSC employees, the grievor and the other CX, had driven into the United States and had met with a known gang member and drug dealer Mr. J, whom Homeland Security was surveilling. Homeland Security reported that it suspected that the two CSC employees attempted to buy cocaine with the intention of importing it into Canada.

[93] On September 9 and 10, Cst. Spencer observed the grievor purchasing cocaine and displaying behaviour consistent with using it. On May 20, 2016, after the other CX's suicide, the RCMP interviewed the grievor. He was never charged as a result of the RCMP investigation.

[94] On June 22, 2016, Mr. Ard launched his disciplinary investigation into the four allegations against the grievor. Mr. Ard concluded that the grievor associated with drug dealers and criminals, that he used drugs and narcotics, and that he went to the United States intending to purchase and import drugs. On December 22, 2016, Mr. Huish held the disciplinary hearing, after which he concluded that the grievor had violated CD-060 and the Standards of Professional Conduct. Thus, he decided that terminating the grievor's employment was appropriate.

[95] In January 2017, at an adverse-information interview, the grievor admitted to lying to the RCMP and to Mr. Ard. As a result of the review of the security concerns, the employer decided to revoke his reliability status. The termination and revocation-of-reliability-status letters were given to him at the same time.

[96] When dealing with a termination, the Federal Public Sector Labour Relations and Employment Board ("the Board") must consider whether the employer had just cause for discipline and whether its decision to dismiss the employee was excessive in the circumstances and if so, what alternative measures should be substituted. In this case, the grievor was terminated on the basis of four allegations, three of which involved off-duty conduct. The false statements occurred while on duty when he was guarding a prisoner at the Abbotsford Regional Hospital and during the disciplinary interview.

[97] Following *Millhaven Fibres Ltd. v. Oil, Chemical & Atomic Workers International Union, Local 9-570*, [1967] O.L.A.A. No. 4 (QL) ("*Millhaven*"), to have cause to terminate an employee for off-duty conduct, an employer has the onus to show the following ("the five *Millhaven* factors"):

> …
>
> *(1) the conduct of the grievor harms the Company's reputation or product*
>
> *(2) the grievor's behaviour renders the employee unable to perform his duties satisfactorily*
>
> *(3) the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him*
>
> *(4) the grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Company and its employees*
>
> *(5) places difficulty in the way of the Company properly carrying out its function of efficiently managing its Works and efficiently directing its working forces.*
>
> …

[98] According to Cst. Spencer, the primary investigator in the operation, the genesis of Op Peacetime was a report from Homeland Security that 2 Canadians entered the United States to purchase 10 kg of cocaine. They were identified as CSC employees. Op Peacetime lasted 9 months, during which it was found that the grievor associated with drug dealers and criminals outside his employment, based on surveillance and his phone records. He also associated with known gang members, all of which is listed in the RCMP report. He lied about those contacts in his interview with Cst. Spencer on May 20, 2016, and again at the disciplinary hearing.

[99] The grievor never denied going to Seattle with the other CX or that they met with Mr. J, although he claimed that he did not know Mr. J's name. None of the investigators believed the boat story. Cst. Spencer believed the report he received from Homeland Security. When arranging to meet someone for the alleged purposes of purchasing large quantities of cocaine, there are big trust issues, so the other CX would not have brought someone with him to the meeting with Mr. J whom he did not trust. The question is whether the Board believes that the grievor did not know what was going on.

[100] The grievor gave his version to the Board. Cst. Spencer testified and gave his interpretation, based on his experience. Mr. Ard interviewed the grievor about the trip and concluded that his story did not make sense. The 10- to 12-foot aluminum boat that was purportedly being bought could have been bought anywhere on the B.C. lower mainland. It was not unique or expensive, so it made no sense that the pair would go through all the effort of going to Seattle and importing it.

[101] Mr. Ard analyzed the phone calls between the other CX and Mr. J Fourteen were made between 11:17 a.m. and 4:17 p.m. and totalled 13 minutes. Three occurred after the meeting at the docks in Seattle. The grievor was with the other CX then and would have heard the conversations. According to the grievor, the calls were about getting directions to the docks. If so, why would they have needed directions after they had left the dock area without the boat? It is not logical that the calls that occurred after the grievor and the other CX left the docks were about directions. Mr. Ard concluded that he did not believe the grievor's story.

[102] Mr. Ard also concluded that the grievor had associated with drug dealers and criminals but not with gangs. He admitted that he purchased narcotics in 2015. When he denied it to the RCMP, he provided it with false testimony. He also repeatedly denied having contact with drug dealers when confronted with his phone records, which showed that he contacted one of them 41 times and another one 70 times during the surveillance period. Mr. Ard had issues with the grievor's credibility. The story he provided about the boat made no sense. His story about worrying that the other CX would be ripped off was without any merit.

[103] Mr. Huish explained that each CX is a peace officer and a role model for inmates. As a CSC employee, the grievor was subject to the CD-060, and the Standards of Professional Conduct. At the disciplinary hearing on December 22, 2016, he was given the opportunity to discuss how his actions had not rendered him unsuitable to be a peace officer and role model. Instead, he took the opportunity to tell Mr. Huish how hard the process had been on him. He told Mr. Huish that he regretted his actions, but according to Mr. Huish, he was not apologetic. The grievor lied to the RCMP; doing so discredited the CSC and was contrary to its mission. His actions discredited its reputation. When he was asked about his dealings with drug dealers and criminals, he attempted to minimize his relationships with them and even went as far as denying that he knew their names.

[104] The grievor's actions rendered him unsuitable to be a CX. They were incompatible with the CSC's mission and his peace officer status. The termination was appropriate. The bond of trust was broken. He jeopardized himself and others. There is a real and substantial risk of him being compromised if he is returned to a position at the institution.

[105] In his testimony, the grievor admitted to purchasing drugs. He recalled signing the oath when he became a CX. He admitted that he used illegal drugs and that when purchasing and using them, he knew he was violating CD-060. He claimed only that there was no interference with his work, not that he did not use or purchase drugs. He simply denied the purpose of the Seattle trip, not that he went there with the other CX and met with Mr. J. The phone records are conclusive. They show that he contacted drug dealers, which he did not dispute. He disputed only that he knew their names.

[106] The employer established through a formal investigation that the grievor purchased and used cocaine, associated with criminals and drug dealers, provided false information to the RCMP, and travelled to Seattle to purchase cocaine with the other CX. These serious acts violated the Standards of Professional Conduct and CD-060. He discredited the CSC, given its mission. He discredited its reputation by putting his needs above its needs.

[107] The grievor admitted that he knew he was violating CD-060. To this day, he denies that he went to Seattle to purchase drugs, despite logical evidence to the contrary. Mr. Page, his union representative, said that the grievor should be believed because there is no reason not to believe him. Dr. Jack's evidence is relevant only to the allegations of lying. Her diagnosis was retroactive to the period of the offence and should not be considered as it was not available to the employer at the time. It is also not helpful since it relied heavily on the grievor's self-reporting. The fact that people with a substance-abuse disorder may not be forthcoming is not true of everyone. The grievor knew right from wrong and admitted that he knew what he was doing was wrong. He knew that his actions put his job at risk.

[108] Possessing cocaine, even in small amounts, is a form of misconduct (see *Dionne v. Treasury Board (Solicitor General of Canada - Correctional Service)*, 2003 PSSRB 69). CD-060 and the Standards of Professional Conduct are clear about the expectations of a CX. The employer was not required to remind the grievor that using illegal drugs

violates these expectations and damages its reputation (see *Nicolas v. Deputy Head (Department of Fisheries and Oceans)*, 2014 PSLRB 40).

[109] CXs are expected to act within the law. As a peace officer, the grievor was responsible for enforcing the law. The conduct he displayed was incompatible with his peace officer status. Reinstating a CX dismissed for drug possession would send the message that drug possession is compatible with a CX's duties when it fundamentally is not. As a peace officer, a CX is expected to act within the law and to serve as a role model for inmates, to help them reintegrate into society. Through his actions, he lost the employer's trust and is considered a threat to institutional security.

[110] An adjudicator should not attempt to second-guess the employer in this respect. The Board must not only weigh the interests of the employer and the grievor but also those of the other employees, the inmates, and the public at large (see *Richer v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 10). CXs are held to a higher standard. Every time a CSC employee is found to have associated with criminals, in the eyes of partner law-enforcement agencies and the public, the employer's reputation suffers significantly (see *Braich v. Deputy Head (Correctional Service of Canada)*, 2017 FPSLREB 47 at para. 211).

[111] The grievor claimed that he has a disability and alleged that the employer discriminated against him. He had the initial burden of establishing a *prima facie* case of discrimination by proving that he has a characteristic protected from discrimination, that he suffered some adverse impact, and that the characteristic was a factor in that adverse impact. Evidence is required to support the existence of the disability, and the employer must know of it when the decision is made which may have an adverse impact on that disability (see *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3; and *Moore v. British Columbia (Education)*, [2012] 3 SCR 360).

[112] In *Stewart v. Elk Valley Coal Corporation*, [2017] 1 SCR 591 ("*Elk Valley*"), a failure to comply with the company's drug policy resulted in the employee's termination. The Supreme Court of Canada rejected the argument that the employee's addiction was a factor in the dismissal. At paragraph 39, the Court found that it cannot be assumed that an addiction diminishes an employee's ability to comply with

workplace rules. That case elevates the burden on an employee seeking to establish a nexus between his or her disability and the claimed adverse impact.

[113] It cannot be assumed that because the grievor has a substance-abuse disorder, the nexus is automatic. There is no evidence that the employer was even aware that he had a disability. It was never made aware that he had that disorder; in fact, he repeatedly denied using cocaine. In addition, even if he has such a disorder, there is no evidence to link it to his termination. There is no evidence that he lacked the capacity to make rational choices or that he lacked the ability to follow the employer's policy. Dr. Jack testified that he knew right from wrong. He testified that he knew that using cocaine was wrong. He told Dr. Jack that he feared for his job. Therefore, there is no *prima facie* case of discrimination.

[114] As for the matter of the revocation of the grievor's reliability status, from the Federal Court of Appeal's decision in *Attorney General of Canada v. Heyser*, 2017 FCA 113, it is clear that the Board has jurisdiction to examine the revocation process and determine whether there was cause to conduct the review. In this case, there was cause. The revocation process was independent of the discipline process. Mr. Huish had nothing to do with the revocation process.

[115] The revocation review and the disciplinary process were not related. Those involved in the revocation process did not have authority to discipline the grievor. The interviews were separate from the disciplinary process, and the committee's conclusions were its own. The departmental security and intelligence officer's determination stemmed from the same facts but from a completely separate process. The disciplinary process was underway when the revocation process began. The revocation of the grievor's reliability status did not result in his termination. The reasons for his termination posed a legitimate risk to the employer's security. For those reasons and because the foundation of trust had been broken, his reliability status was revoked.

B. For the grievor

[116] The grievor seeks a judgment in his favour on the three grievances, which are his termination grievance, in which he alleged that he was terminated without cause; his discrimination grievance, in which he alleged that the employer discriminated against him on the basis of his disability; and his third grievance, in which he alleged

that the revocation of his reliability status violated the relevant collective agreement and was a sham, a camouflage, discrimination, and disguised discipline.

[117] The employer had the burden of proving on the basis of clear, cogent, and compelling evidence that the grievor committed all the acts for which he was terminated. In this case, the employer relied on four allegations to terminate him. During the disciplinary investigation, he admitted to associating with criminals and to purchasing drugs. There is no factual basis upon which to establish that he was involved in criminal activities or that he posed any harm to the employer's reputation. According to the Federal Court of Appeal in *Lloyd v. Attorney General of Canada*, 2016 FCA 115, the employer must prove each and every allegation it intends to rely on to discipline an employee. In this case, there is no evidence that the grievor lied to the RCMP or that the employer's reputation suffered any harm.

[118] On June 24, 2016, when the grievor was notified that he was under a disciplinary investigation, he disclosed that he had begun taking antidepressants after hearing of the death of his close friend, the other CX, in May. Cst. Spencer testified that it is not surprising that some peace officers are dealing with addiction; it exists within the RCMP. When he was asked about any impact he foresaw of this case on the employer's reputation within the RCMP, he replied that he saw none. In his evidence, Mr. Huish chose to limit his comments about reputation to the CSC's criminal-justice partners. Mr. Ard changed false testimony to false information during the course of his investigation, without seeking the approval of the delegated authority.

[119] The grievor did not lie to the RCMP. He was in denial, which was part of his substance-abuse disorder. He did not lie during his review for cause, despite what Mr. MacAulay said. The grievor denied attempting to acquire narcotics in the United States. Cst. Spencer had no evidence, direct or otherwise, to prove his allegations. The other CX's intentions are impossible to know. The employer's evidence is hearsay and unreliable. It did not verify whether Mr. J had a boat or a criminal record. He and the grievor shared no telephone calls.

[120] The CSC relied heavily on the inaccurate impression created by Cst. Spencer. It knew nothing about his source at Homeland Security. It was impossible for the grievor to challenge his information. Mr. Ard relied on speculation about the nature of the

calls between the other CX and Mr. J to infer what the grievor knew or did not know, even though the longest call was 1 minute and 40 seconds.

[121] Homeland Security is not a reliable source of information. Cst. Spencer admitted to creating false connections in his report. For example, he noted that RR, the man the grievor knew as Robin, had a wife who was a CSC employee, when in fact, they had separated.

[122] The grievor purchased cocaine only because of his addiction to it; therefore, his termination was excessive. His disability got him in trouble at work; it impaired his relationships, which is covered by the *CHRA*. Dr. Jack's expert evidence cannot be challenged. The grievor had no legal source of cocaine, so he had to associate with criminals, which created the nexus between his addiction and the reasons for his termination. He telephoned drug dealers only because of his addiction.

[123] The grievor is in the same situation as was the CX in *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2018 FPSLREB 28, in which the adjudicator found that the CX associated with criminals and purchased drugs from them only because of his disability. In *Nadeau*, the CX sought medical treatment much closer to the incident. Had the grievor in this case done so, it would have been much better, but Dr. Jack's assessment is at hand. The employer did not object in 2019 when it received a copy of the referral letter. It was aware of the grievor's addiction and of the fact that he had been referred for a psychological assessment before it issued its final-level reply. It could have waited until the assessment was completed; there was no undue hardship.

[124] The employer had the duty to inquire into the grievor's drug use when signs appeared that he might need accommodation (see *Rio Tinto Alcan Primary Metal v. CAW-Canada, Local 2301* (2008), 180 L.A.C. (4th) 1). When the employer launched the disciplinary hearing, it knew that he was using cocaine. It requested the RCMP report, which described him demonstrating drug-use behaviour, such as going to the bathroom repeatedly. At his meetings with Mr. Demers in May 2016, he explained that he was having difficulties. He asked for help and had leave approved. The employer should have concluded that his issues were the result of his alcohol use.

[125] This situation is akin to *Nadeau* in that it involves a combination of culpable and non-culpable behaviours. The RCMP investigation was a sign of change in the grievor's behaviour. It is possible that because of it, the employer concluded that the

grievor was “dirty” and that it simply did not want him back in the workplace. The employer chose to ignore the signs of his disability. His substance-abuse disorder impacted him negatively, which made it a disability. The employer was obligated to initiate the accommodation process, even if he had not requested accommodation.

[126] Denying drug use is characteristic of a substance-abuse disorder. The grievor disclosed symptoms of drug use to the employer, but it chose to ignore them. He discussed them at the disciplinary hearing. Mr. Huish accepted that the grievor contacted drug dealers and criminals because of his addiction. The grievor discussed his alcohol use during the security interview. He established the existence of his disability on a *prima facie* basis, but the employer did not prove that it had a *bona fide* occupational requirement for refusing to accommodate him.

[127] Mr. Ard’s report is judgemental, biased, and prejudicial to the grievor. The termination was excessive because it was based on non-culpable behaviour and on unproven grounds. The grievor seeks reinstatement, but the employer has said that doing so would be too risky and inappropriate. There is no evidence to support the employer’s concerns about the grievor being compromised or posing a risk to its reputation or to the safety of the institution. Clearly, there is no risk, since both he and the other CX were kept on-site during the RCMP investigation.

[128] According to Dr. Jack’s undisputed evidence, the grievor’s prognosis is good. He was remorseful and apologetic during the review of his reliability status and during the disciplinary investigation. The employer never considered all the mitigating factors and did not assess his rehabilitation potential. The termination of his employment was a foregone conclusion. He seeks reinstatement and will agree to drug and alcohol testing, as long as there is privacy protection.

[129] The reliability status review was the perfect scenario for a sham. It is impossible to believe that the disciplinary and security review processes were independent of each other. The security review process was not triggered when the departmental security and intelligence officer received the allegation that the grievor had provided false information to the RCMP. The disciplinary investigation report was the source of the allegations. No one ever bothered to verify the truth of the grievor’s answers during his interview. Nothing was false about the information he provided. There was no proof that he shared or misused government information or that he was a security risk. The

others investigated in Op Peacetime, with the exception of one other individual, were not subjected to security reviews. Both the grievor and this other individual are Sikhs.

[130] Ms. Sicard took part in a conference call that was held to discuss whether to terminate the grievor's employment. In the call, it was decided that discipline should be delayed until the employer completed the security review; clearly, they were linked. The Treasury Board directed the CSC that the termination and revocation-of-reliability-status letters had to go out simultaneously; otherwise, the CSC could not revoke the grievor's reliability status. The timing around the entire process is questionable.

[131] Mr. Huish was aware of both processes, according to Mr. Langer, who kept him apprised of the progress of both of them. Ms. Sicard admitted that she used the disciplinary investigation report to conduct her security review. That breached natural justice in that the grievor received no right to comment. Only one process was underway — the discipline process. During the security review process, the employer was obligated to act in good faith (see *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109). It pursued discipline without cause in the form of the reliability status revocation, which was orchestrated only to support the termination. The entire process was choreographed. Were the grievor's termination of employment for disciplinary reasons struck down at adjudication, he would still be terminated, because he would no longer meet his employment conditions, given that his reliability status revocation would still stand.

[132] It was predetermined that the Resolution of Doubt Committee would be convened after the review-for-cause interview was completed. The entire process was predetermined from the first meeting with Mr. Thompson, Mr. MacAulay, and Mr. Fabiano. The employer never considered that perhaps there would be no cause to revoke the grievor's reliability status. Everything was based on the disciplinary investigation report.

C. Employer's rebuttal

[133] The grievor had the burden of establishing his medical defence. Dr. Jack's evidence did not help him establish his accommodation need. The duty to accommodate is a tripartite obligation that the employer, the union, and the employee share (see *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970). The

duty to inquire ended when the grievor insisted that he was able to perform his duties and that his drug and alcohol use did not impair that performance. Furthermore, initially, he denied using cocaine, and once he did admit to it, he stated it had been only for a brief period in 2015. The employer had no reason to doubt him, and his evidence supported that statement. *Elk Valley* makes it clear that someone with a disability may be disciplined and that one cannot assume that a nexus exists between the culpable behaviour and the disability.

IV. Reasons

[134] I will start by making findings of fact that are key to my determination of the appropriateness of the employer's disciplinary action in this case.

[135] Much speculation revolved around what the grievor knew or did not know about the purpose of his trip with the other CX to Seattle in July 2015. Like many others involved, I find it hard to believe that the grievor was naïve enough to believe the boat story, which he presented to the RCMP and Mr. Ard. It is not plausible that given his concern that the other CX might be ripped off, he did not have more details about the meeting location and the events of that day, including a more detailed description of the boat. It is also not plausible that he drove in the same vehicle as the other CX for at least 2.5 hours while the other CX was on the phone repeatedly with Mr. J and that he remembers only that they discussed directions to the meeting place, which was at a dock. Similarly, it is not plausible that the calls that occurred after the meeting were also about directions to the meeting location.

[136] At the very least, it has been proven that the grievor went to the United States with the other CX for the purpose of associating with a known gang member and drug dealer, Mr. J who was under Homeland Security surveillance, which itself was a violation of the CD-060 and the Standards of Professional Conduct. Also proven was that the grievor associated with criminals for the purpose of conducting illegal purchases, i.e., cocaine, and that he used an illegal drug, again cocaine, for four to five months before his termination. Those actions also violated CD-060 and the Standards of Professional Conduct.

[137] The grievor's representative argued that the employer's evidence is hearsay and unreliable because it did not check whether Mr. J had a boat or if he had a criminal record. In my estimation, it was reasonable for the employer to rely on the information

that Homeland Security gave the RCMP about what occurred during its surveillance of the other CX, the grievor, and Mr. J at the port in Seattle that day in July as it was reasonable to rely on their reports of the nature of Mr. J's criminal pedigree. Furthermore, the grievor and Mr. J might not have called each other, but the grievor was certainly present during the calls between Mr. J and the other CX. As for the other CX's intentions that day, they were serious enough that he told ML that he was "f---ed" when he heard about the RCMP investigation. Immediately after that, he committed suicide, which cannot be ignored.

[138] It is clear to me that in his interviews with the RCMP, the grievor was not forthcoming with the truth about his cocaine use and his involvement with criminals and that Mr. Ard was justified in his conclusion that the grievor was not truthful. He acknowledged before me that he had not been completely truthful when he denied that he used cocaine, but he claimed he deliberately obfuscated the truth because of what it would mean to his career. I have no evidence that when he made the lies, he was going through withdrawal or that he was intoxicated at any point in the interviews. At no point did his representative raise that as a possibility when cross-examining both Cst. Spencer and Mr. Ard. Therefore, based on the evidence of Dr. Jack that the grievor knew what he was doing, that he was able to make decisions knowing right from wrong, and that he knew the consequences of his actions as long as he was not intoxicated or going through withdrawal, I conclude that he knew what he had done was wrong and that he deliberately lied to his employer.

[139] This is in complete contrast to the situation in *Nadeau*, in which the dog handler admitted his addiction at the first opportunity, sought immediate treatment, which the employer paid for, and was immediately remorseful for his actions. I heard nothing of the like from the grievor. I did hear that his use did not interfere with his work. I did hear that his alcohol use increased significantly after his termination and that it resulted in his hospitalization. I did hear that he did not like the effects of cocaine and that he used it only for a brief period in 2015. I did hear that he repeatedly denied using cocaine. He also denied meeting, knowing, associating with, and purchasing cocaine from known criminals, unlike the grievor in *Nadeau*, who self-reported his illegal activities.

[140] The two cases, *Nadeau* and the one before me, do not share the same fact situation and are easily distinguished on the basis of how the grievors conducted

themselves before, during, and after the disciplinary processes, not to mention the remorse demonstrated. I concur with Mr. Huish when he described the remorse expressed by the grievor as being about the impact that the events had on him and not about the impact his actions had on his relationship with his employer and on its reputation.

[141] The grievor alleged that he was fired because of his disability and that therefore, he was discriminated against. To demonstrate that an employer engaged in a discriminatory practice, a grievor must first establish a *prima facie* case of discrimination that covers the allegations made and that if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 at para. 28). Based on the grievor's arguments, there must be evidence to support the existence of a disability and that this disability was a factor in his termination (see *Moore* at para. 33).

[142] An employer faced with a *prima facie* case can avoid an adverse finding by adducing evidence to provide a reasonable explanation that shows that its actions were in fact not discriminatory or by establishing a statutory defence that justifies the discrimination (see *A.B. v. Eazy Express Inc.*, 2014 CHRT 35 at para. 13).

[143] The grievor testified that he did not have a problem related to cocaine. In fact, he denied using drugs of any kind, and cocaine specifically, aside from the four-month period in 2015. He did admit that alcohol use was a problem, but at no time did he link his purchase of cocaine or other actions to the effects of alcohol use. Overall, he did not establish the nexus between his disability and the reasons for his dismissal.

[144] I heard from Dr. Jack that she had to rely heavily on the grievor's self-reporting due to limited objective evidence from the period at issue. She was brought into this situation to offer her expert assessment of his situation in 2019, which I have no reason to doubt she accurately described. But even she testified that she could not speak to the situation as it existed in 2015, when the grievor committed the actions for which he was terminated. Her focus was the period from 2016 onward. In his testimony, he admitted that he knew what he was doing in 2015; yet, he pursued his course of action and chose to lie about it later out of fear of losing his job.

[145] The grievor argued that the employer had a duty to inquire into his drug use when there were signs that he might need accommodation. According to his representative, the employer launched the disciplinary hearing knowing that the grievor was using cocaine. In the circumstances of this case, what the employer may have known about the grievor's substance use and how it approached any corresponding duty to accommodate does not assist the grievor in discharging his burden to establish that his disability factored into the actions that led to his termination. There is nothing in the evidence that suggests that, as the grievor argues, the employer should have concluded that his actions were the result of his substance abuse.

[146] Given all the evidence, and according to the ruling in *Elk Valley*, nothing before me would have prevented him from complying with the employer's rules and policies and the laws of Canada. He expressed this repeatedly throughout this process when he told Cst. Spencer, Mr. Ard, Dr. Jack, and me that he knew that what he was doing was a serious threat to his job.

[147] The grievor was terminated for associating with criminals, purchasing drugs, lying to the RCMP and his employer, and having a detrimental impact on the employer's reputation, all of which was proven on the balance of probabilities. He did not establish that a disability was a factor in his actions or in the employer's decision to terminate him.

[148] Dr. Jack identified the grievor's disability as a substance-abuse disorder. The adjudicator in *McNulty v. Canada Revenue Agency*, 2016 PSLREB 105 at para. 188, found as follows:

> ***188*** *… I have no medical evidence that, as the British Columbia Court of Appeal stated in* Health Employers Association of BC*, "… the employee's misconduct was 'caused by symptoms related to' the disability …". To paraphrase the findings as set out in* Thunder Bay (City)*, I have no expert evidence that alcohol dependency would remove any inhibitions or control that the grievor should otherwise have had with respect to the actions she undertook ….*

[149] According to Dr. Jack's evidence, unless the grievor was going through withdrawal or was in a state of extreme intoxication at the relevant times, he knew his actions were wrong. I have no evidence that his control over his actions was removed

or that his ability to follow CD-060, the Standards of Professional Conduct, the employer's rules, and the *Criminal Code* was inhibited.

[150] Also in *McNulty*, at para. 170, the adjudicator points out that it is important not to assume that addiction is always a causal factor in an addicted employee's misconduct. To find *prima facie* discrimination, there must be evidence that the employee's misconduct was linked to symptoms related to the disability. Without that link, it is both hard to envision and difficult to comprehend the grievor's suggestion that the employer should have accommodated him

[151] Therefore, the grievor did not establish that his misconduct, namely, purchasing cocaine, associating with criminals, and lying during two investigations, was linked to a substance-abuse disorder. Furthermore, there is no evidence to establish that he lacked the capacity to follow the employer's rules. He was capable of rational choices and of cooperating with the police. He chose to ignore the employer's rules and the laws of Canada and to lie to the police all the time, knowing the implications. He admitted that he did so because he feared the implications his actions would have on his job. As such, and consistent with the Supreme Court of Canada's findings in *Elk Valley*, I find that the grievor did not establish a *prima facie* case of discrimination on the prohibited ground of disability.

[152] *Millhaven* is the seminal case in the area of off-duty conduct. It sets out the test for when an employer may consider an employee's off-duty conduct worthy of discipline. It established the five factors to consider. An employer does not have to establish them all. It is sufficient to establish a nexus between the impugned behaviour and the workplace (see *Unifor, Local 892 v. Mosaic Potash Esterhazy Limited Partnership*, 2018 SKQB 68). The employer does not have to prove the existence of each of the five *Millhaven* factors (see *Matte v. Canada Revenue Agency*, 2019 FPSLREB 57). It is sufficient for the employer to show a nexus between the grievor's illegal activities and association with criminals, including the trip to Seattle, and his lies to the investigators, which violated the employer's Standards of Professional Conduct and CD-060 and conflicted with his peace officer status.

[153] I do not need proof beyond a reasonable doubt that the purpose of the Seattle meeting was to purchase drugs. The burden of proof in labour relations cases is the civil burden of proof, which is on the balance of probabilities. Given all the known

facts and that the other CX and Mr. J met and had a discussion, that Mr. J was a known gang member and drug dealer, that at no time was a boat present, and that Mr. J was under surveillance by Homeland Security, which reported the encounter to the RCMP, it is sufficient to conclude that the subject of this meeting was drug-related and that on the balance of probabilities, the grievor and the other CX went to Seattle with the intention of arranging to purchase and import cocaine.

[154] The grievor's representative argued that even if the grievor's actions warranted discipline, which I have determined is the case, termination was excessive and unreasonable in the circumstances. I disagree. As stated in *Richer*, at paras. 120, 133, and 134, CXs are expected to act within the law. As a peace officer, the grievor was responsible for enforcing the law. The conduct he displayed was incompatible with his peace officer status. Reinstating a CX dismissed for purchasing illegal drugs and associating with criminals outside the workplace for illegal activities would send the message that such behaviour is compatible with a CX's duties, when it fundamentally is not.

[155] I also concur that as a peace officer, a CX is expected to act within the law and to serve as a role model for inmates, to help them reintegrate into society. Through his actions, the grievor lost the employer's trust and is now considered a threat to institutional security. I also concur that as an adjudicator, having found that the employer's lack of trust in the grievor is warranted, I should not attempt to second-guess it on the subject of institutional security. The Board must not only weigh the interests of the employer and the grievor but also the interests of the other employees, the inmates, and the public at large (see *Richer*).

[156] The employer's role is to assess the degree of potential or actual threat that the grievor poses to the institution. Mr. Page's opinion is not of primary importance. The Board's role is to determine whether the employer's decision to terminate the grievor was reasonable in the circumstances and if not, the appropriate penalty. Part of that determination involves examining the employer's assessment of the risk to the workplace posed by the grievor. Assessing the degree of threat or the security of a correctional institution is not part of that process, per se. Rather, the question of how the employer's determination played into the reasons for termination is part of it. I can consider legitimate the employer's concerns that the grievor might be a target for

blackmail or flipping, given his past involvement with drugs, and can consider it a valid factor when determining the appropriate disciplinary penalty.

[157] As stated as follows in *Peterson v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 29 at para. 129:

> ***129*** *The grievor was well aware of the implications of his illegal activities if they were discovered. His attempts to disguise them is proof of this and brings not only his suitability to be a CX into question but clearly indicates that the employer's trust in him was not warranted which renders the continued employment relationship untenable. As was said in* Bridgen v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 92 at para 106:*
>
> > 106. As general context for considering what is misconduct among correctional officers, the authorities are clear that correctional officers are to be held to a higher standard of conduct than employees who do other work (McKenzie v. Deputy Head (Correctional Service of Canada), 2010 PSLRB 26 (CanLII), at para 80). The reason for this higher standard is because "[p]ersons who join the corrections service know that more is expected of them by their employer than would be expected of employees in other occupations" (Re Govt. of the Province of British Columbia v. B.C. Government Employees' Union (Larry Williams Grievance), [1985] B.C.C.A.A.A. No. 26 (Chertkow) (QL); cited in Government of British Columbia v. British Columbia Government and Service Employees' Union (Jaye Grievance), [1997] B.C.C.A.A.A. No. 813 (Hope), at para 28 (QL)).

[158] The grievor knew that his actions were wrong, particularly given the extraordinarily high percentage of the population of inmates incarcerated for similar crimes, for whom he was responsible. Before me is the fact that a peace officer charged with rehabilitating inmates did not act in the best interests of Canadians and failed to act at all times with integrity and honesty. He actively sought, purchased, and used cocaine, which is an illegal drug; he associated with criminals, and knowing that his actions constituted a serious criminal offence, he attempted to conceal his activities by lying to the RCMP and the employer's investigator, even in the face of clear evidence that contradicted him, to preserve his employment. A lesser penalty would trivialize the nature of his violation of the Standards of Professional Conduct and CD-060 as well as the Values and Ethics Code for the Public Sector. The employer was justified in terminating his employment.

[159] I agree with the employer that the grievor's misconduct fell within the category of off-duty conduct and that to justify disciplining an employee for misconduct

committed while off duty, an employer must prove that depending on the circumstances, the behaviour in question detrimentally affected its reputation, rendered the employee unable to properly discharge his or her employment obligations, caused other employees to refuse to work with that person, or inhibited the employer's ability to efficiently manage and direct its workplace (the *Millhaven* factors). I also agree that public servants face additional restrictions on their off-duty conduct as compared to regular members of the public (see *Lapostolle*).

[160] Not all *Millhaven* factors need be met to support a termination of employment as a result of off-duty conduct. It is sufficient to establish that the grievor's off-duty conduct caused embarrassment to the employer and damaged its reputation, which the employer has clearly established. However, in this case, it is also about more than the employer's reputation; it is about the safety of staff, inmates, and the institution at which the grievor was employed. It is also about the public's faith in the correctional system.

[161] CXs are expected to conduct themselves in a manner consistent with the laws of Canada and with promoting inmate rehabilitation. The grievor did not conduct himself that way. I accept the evidence of the employer's witnesses that his conduct harmed its reputation, that his behaviour rendered it impossible for him to act as a peace officer, and that his behaviour made it difficult for the employer to work safely and efficiently, given the risk of compromise should he be reinstated (see *Millhaven*).

[162] The basis upon which the grievor was terminated included that his actions were unacceptable, that they brought the employer's reputation into disrepute, and that he violated the employer's Standards of Professional Conduct and CD-060 as well as the Values and Ethics Code for the Public Sector, all of which resulted in the destruction of his relationship of trust with the employer, which established a nexus between his impugned activity and the employment relationship. The injury to its reputation was sufficient to establish the nexus (see *Peterson*; *Tobin v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 76; and *Tobin v. Canada (Attorney General)*, 2009 FCA 254). Direct evidence of damage to the employer's reputation was not required. One must be mindful of a CX's role in the correctional system and the impact on public opinion should someone, who has committed an offence for which others have been incarcerated, be placed in charge of supervising incarcerated persons.

[163] I disagree with the interpretation of *Lloyd* offered by the grievor's representative. The Federal Court of Appeal did not state as she argued that the employer must prove each and every allegation it intends to rely on to discipline an employee for the disciplinary action taken to stand. Key to *Lloyd* is paragraph 23, where the Court directed, "The adjudicator was required to consider the appropriateness of the length of the 40-day suspension in light of the two acts of misconduct that had been established … This he did not do."

[164] Any one of the acts that the employer alleged and proved to my satisfaction in and of itself was serious enough to warrant a grave disciplinary penalty, up to and including termination, considering a CX's special obligations. Put together as it was in this case, I conclude that the termination was not excessive or unreasonable.

[165] The grievor's representative pointed to procedural defects in the course of Mr. Ard's disciplinary investigation, such as changing the allegation from providing false testimony to providing false information. Ultimately, in my opinion, they mean the same thing and amount to obfuscation of the truth or lying in the course of the investigation, which I concluded the grievor did. It is trite law that hearings before an adjudicator are *de novo* hearings and that any prejudice or unfairness that a procedural defect might have caused is cured by the adjudication of the grievance (see *Maas v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 123 at para. 118; *Pajic v. Statistical Survey Operations*, 2012 PSLRB 70; *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.)(QL)); and *Patanguli v. Canada (Citizenship and Immigration)*, 2015 FCA 291).

[166] As for the matter of the review for cause of the grievor's reliability status, I do not concur with the employer's counsel that the process as described by the employer was administrative. Rather, it was an extension of the disciplinary process and as such was a sham. It is clear to me that the security review process and the disciplinary process proceeded in lockstep from the very beginning. They were in fact one process from the very beginning when Mr. MacAulay and Mr. Fabiano, who were responsible for the security review process, sat in on briefings with Mr. Thompson, who was responsible for the disciplinary process. This is further compounded by the presence of Ms. Sicard at the labour relations briefings as is evidenced in the briefing note prepared by Ken Palmer a labour relations officer in the Pacific region and the coordination of both processes by Mr. Langer from the regional labour relations office.

[167] Contrary to what the employer's representative argued, the employer did not make its decision after evaluating the sensibility of the grievor's position and the information in the adverse-information report. No good-faith assessment was made after the fact that a review for cause should be conducted. In my opinion, it was decided from the outset that the grievor's reliability status would be subjected to a review for cause upon receipt of the RCMP notification. Had the employer proceeded with a review for cause based on this information alone, my decision might have been different, but it did not. It chose to proceed with a joint discipline and security review process, which delayed the outcome of the disciplinary process, to ensure the outcome of the security review process. No distinction was made between the disciplinary and status review processes until the very end, when the delegated authorities were different.

[168] Ms. Sicard's presence throughout the discipline process and the interview process and at the review committee assured the continuity between the disciplinary and status review processes. She was aware of the intended outcome of the disciplinary process since she attended the labour relations briefings. Although she did not testify to this effect, she is recorded in the minutes of the briefings as having been present, and I heard no evidence to contradict it.

[169] The roles of Mr. Langer and Ms. Sicard in both processes guaranteed a consistent outcome and violated the independence of the processes and the rules of natural justice. The grievor did not receive an independent review of his reliability status. It was biased from the beginning by Ms. Sicard's presence and the role she played throughout, which guaranteed that the outcome would be consistent with the disciplinary outcome. For these reasons, I find that the review for cause was a sham and disguised discipline.

V. Confidentiality Order

[170] Having reviewed the Op Peacetime report (Exhibit 2, tab 3F) and Dr. Jack's report with its attachments, the Board has determined that both should be sealed because they contain information related to undercover police investigations and personal medical information. To determine whether restrictions such as this should be placed on the open court principle, an evaluation of the circumstances against the test set out in *R. v. Mentuck*, 2001 SCC 76 (known commonly as the "*Dagenais/Mentuck*" test), is required.

[171] The *Dagenais/Mentuck* test is generally cited as having two parts. It requires the decision maker to first determine if an order limiting the open court principle is necessary in the context of the litigation to prevent a serious risk to an important interest, and second to determine whether the salutary effects of the order would outweigh its deleterious effects on the public's right to open and accessible adjudication proceedings.

[172] The Op Peacetime report (Exhibit 2, tab 3F) identifies people who are not parties to these grievances and who have a right to their privacy, along with police surveillance records, which are confidential. Personal medical files are protected information and as such must be shared only for an appropriate use, which public viewing would not be. Allowing these exhibits to become part of the public record would serve no public or judicial interest and would be a serious risk to security and privacy interests. For those reasons, I order the Op Peacetime report (Exhibit 2, tab 3F) and Dr. Jack's medical report, with attachments, sealed. For the same reasons, in this decision I have anonymized the names of certain individuals documented in the OP Peacetime report.

[173] Both sides submitted case law in support of their arguments. I have not addressed each case individually; rather, I have referred only to those of primary significance.

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

(The Order appears on the next page)

VI. Order

[175] The grievance in file number 566-02-14204 is denied.

[176] The grievance in file number 566-02-14323 is allowed. It is declared that the employer violated the principles of natural justice in the conduct of the grievor's reliability status review and that it constituted disguised discipline. Consequently, the results of the review process are revoked.

[177] The grievance in file number 566-02-14324 is denied.

[178] The Op Peacetime report (Exhibit 2, tab 3F), and Dr. Jack's medical report, including all medical records attached, are ordered sealed.

April 15, 2020.

Margaret T.A. Shannon,
a panel of the Federal Public Sector
Labour Relations and Employment Board