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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

TREVOR SMITH

Grievor

and

DEPUTY HEAD

(Canada Border Services Agency)

Respondent

Indexed as
Smith v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Himself

For the Respondent: John Craig, counsel

Heard at Medicine Hat, Alberta June 4 to 6, 2019,
and by written submissions filed June 21, July 5 and 19, 2019.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] In 2007, Trevor Smith ("the grievor") began work with the Canada Border Services Agency ("CBSA" or "the employer") as a border services officer ("BSO" or "officer"). He became a full-time superintendent at the Port of Entry ("POE") at Coutts, Alberta on November 18, 2014. By all accounts, the grievor was an excellent and dedicated employee. He had a clear discipline record until October 12, 2016 when he received a three-day suspension for his role in two workplace incidents, both of which had taken place the previous year.

[2] The first occurred on July 22, 2015 and is referred to as the "beer run" incident. The grievor allowed three BSOs to take orders from other officers, and himself, to leave the port to buy beer that was on sale at the Sweet Grass, Montana duty-free store. Officers JL, RE and CV declared five flats of beer each on their return. Officer MF, the primary inspection officer staffing the NEXUS line through which they returned did not refer them inside to pay duty and taxes on the beer, and they paid none.

[3] The grievor also allowed Officer WM to go on a similar mission two hours later. Officer LN, the primary inspection officer, did not refer him in to pay duty and taxes, but he went in of his own accord and paid on the five flats of beer and two bottles of alcohol he had bought for himself and another officer. However, in doing so Officer WM completed his own B15 form to make the payment, which is a breach of policy.

[4] The employer alleged that the grievor had neglected his duties by allowing the officers to leave during their shift and had allowed preferential treatment to occur by failing to ensure that they paid duty and taxes on the beer they brought in, which included his two flats. In doing so he had breached the CBSA *Code of Conduct Part B (Accountability and Professional Conduct), Part C (Leadership Conduct)* and *Part D (Expected Standards of Conduct, Section 12 (Neglect of Duty).*

[5] I find that the grievor breached the *Code of Conduct* Parts B, C and D by allowing the officers to go without ensuring that they were on their break time and without fully considering whether the absence of three officers at the same time would negatively impact operations. However, I find that the grievor breached no policy in

effect at the time, by not ensuring that they paid duty and taxes on the beer or by not personally paying on his two flats.

[6] The second incident took place on November 12, 2015 and is referred to as the "port runner" incident. Two inexperienced BSOs, Officers CV and TK, pursued an unknown port runner beyond the boundary of the port, contrary to policy. The employer found the grievor guilty of misconduct when he failed to direct them back by radio and went to get them instead. The employer alleged that he had breached the CBSA *Standard Operating Procedures on Use of Force and Reporting* (*clause 2.4.1*), the *Prairie Region Port Runner Protocol*, and the *Code of Conduct: Part B (Accountability and Professional Conduct)* and *Part D (Expected Standards of Conduct, Section 12 (Neglect of Duty).*

[7] The employer failed to show that the grievor violated any of these policies. I find that he engaged in no misconduct in his handling of the port runner incident. To the contrary, in my view, he handled the incident well given the circumstances, and showed professionalism and leadership in its aftermath.

II. Witness testimony

[8] The employer called Marlene St. Onge, Acting Chief of Operations at Coutts POE at the time of both incidents and Kevin Hewson, District Director, Southern Alberta & Southern Saskatchewan District ("SASSD"). Director Hewson conducted a fact finding into the beer run incident and determined the amount of "combined" discipline for both incidents.

[9] It also called Michael Fogarty, who conducted a fact finding into the port runner incident. Mr. Fogarty had been an operations superintendent in Saskatchewan but had been assigned to an accommodation position created for him in the Regional Integrity Unit. He described his duties as assisting Regional Director General Kim Scoville and Michael Shoobert with administrative investigations that had been assigned back to the region from the Professional Standards Investigations ("PSI") unit in Ottawa. It was in this capacity that he was assigned to conduct the port runner fact-finding.

[10] The testimony did not describe in detail either the Regional Integrity Unit itself or Mr. Shoobert's rank or role in it, but Director Hewson referred to him as the head of

the unit. Although clearly engaged in directing the investigation of both incidents, neither Mr. Shoobert nor RDG Scoville testified.

[11] The grievor called no witnesses. He did not testify and, therefore, was not subjected to cross examination. He provided documentary evidence and adduced evidence through cross examination of the employer's witnesses.

[12] All the border services officers mentioned in this decision are referred to by their initials only, to preserve their privacy.

III. The beer run incident

A. Past practice

[13] The grievor believed that officers at Coutts often went to the U.S. during their breaks to buy goods or pick up parcels. He did not think he was allowing anything that was different from the norm or contrary to policy.

[14] The evidence indicated that the grievor had some reason to think this. A/Chief St. Onge testified that this had been a more common practice in the past when a different configuration of the two ports of entry meant that a short walk across a parking lot would get you to the U.S. duty free store. However, it was clear that the practice, while less frequent, had certainly not stopped. It was not clear how frequent or widespread it was, what exactly the rules surrounding it were, or to what extent engaging in it without following the rules had been tolerated.

[15] The applicable collective agreement provides for a 30-minute unpaid meal break and two paid 15-minute breaks. It seems that these days a trip to the U.S. duty free can take about 40 minutes. The acting chief testified that sometimes employees put in for short term leave in case they don't make it back within their 30-minute meal break period. No such leave was requested or granted in this case. However, the grievor had understood that the officers were using their rest breaks to cover the time.

[16] Director Hewson testified that it would not have been acceptable to combine meal and rest breaks to cover the 40 minutes they were out of the workplace. However, A/Chief St. Onge was clear that neither the collective agreement, nor policy, prohibited this. In cross examination, Director Hewson did not disagree.

[17] However, he also testified that even if the officers were legitimately on their breaks, they should never have been allowed to leave the port or to enter the United States. A/Chief St. Onge clarified that there were no such prohibitions. On cross examination Director Hewson acknowledged that there was no requirement to stay at port during unpaid meal breaks. As well, the only restriction on the 15-minute paid rest breaks was that they were subject to operational requirements, as determined by the superintendents.

[18] These trips south had been discussed in management meetings. Minutes of a 2012 briefing records a management member raising the issue that:

> *… BSO's are leaving the port to go south to pick up parcels and/or get gas on paid time and are gone for extended periods of time – some without notifying Supt's. This practice needs to stop. It was suggested that this messaging should go to individual BSO's as this does not apply to all employees.*
>
> [*Sic* throughout]

[19] Director Hewson asked the officers he interviewed for the fact finding if beer runs were a common practice at Coutts. These are some of their answers as recorded in his notes:

> *BSO JL: "Not a common practice that I am aware of. I think it happen as it was on sale that day. It has happen in the past, maybe not as a group, but I know officers have gone down in the past be it to pick up parcels in Sweet Grass."*
>
> *BSO WM: "Because the beer was on cheap and its common for officers to go down on their lunch breaks to go to border storage or to pick something up…it was common practice to go down on your lunch break."*
>
> *BSO MF: "I know they do it, on their lunch break or after work but I have no idea how often."*
>
> [*Sic* throughout]

[20] Director Hewson also raised this issue in his August 14, 2015 email report to RDG Scoville and Michael Shoobert which detailed the results, to that point, of his investigation of the beer run incident. He concluded as follows:

> *This issue may raise other similar issues of employees leaving the workplace to retrieve parcels or purchase goods in the USA* ***go beyond the meal period or done on shift.***
>
> [Emphasis added] [*Sic* throughout]

[21] The evidence indicates that, in general, such trips were considered acceptable if completed on the 30-minute meal break, or the meal break plus short term leave, or the meal break plus the 15-minute rest breaks with a superintendent's permission. In other words, as long as they did not occur on paid time.

[22] However, the management briefing minutes and Director Hewson's email suggest that the employer was aware that, at times, these trips went beyond the meal break, without short term leave or use of break time, and, therefore, encroached on paid time. There was no evidence that, despite being aware of it, the employer had taken any steps to stop it. Accordingly, I find that prior to the beer run incident, it had been tolerated, and, therefore, condoned.

[23] As a fairly new superintendent, the grievor thought he was following suit when he gave his approval. In his written reports, his fact-finding interview and his pre-discipline comments the grievor noted that he had received no specific training when he became a superintendent and simply tried to follow what he had seen done in the past. I believe that the grievor genuinely thought, and had some reason to think, that this was an acceptable workplace norm and that he would not have otherwise authorized it or participated in it.

[24] Nevertheless, although the evidence did not conclusively establish that the three officers were away from the port on paid time as alleged, it was clear that the grievor had neglected to ensure that they were not on paid time or to consider the possible impact on operations. Accordingly, even given the element of condonation, as a superintendent he was responsible to know and apply the policy, rather than making such a decision based on what he had seen in the past and thought was the norm. He should have checked with a more experienced superintendent or with the acting chief. A/Chief St. Onge testified that she would not have authorized the beer run had she been consulted.

[25] A/Chief St. Onge was a principled and credible witness. Her testimony was clear that such absences were acceptable on approved leave or combined breaks but should not be authorized when operations were busy.

B. Wearing uniforms

[26] Director Hewson further posited that the officers had crossed the border in uniform. In cross examination, he could not explain how he had determined that. He had neither seen them cross, nor viewed video footage, and could not say what they were wearing or whether their flashes were covered.

[27] Although being in uniform with flashes displayed would have been a serious *Code of Conduct* violation, Director Hewson did not ask any of the officers, in their fact-finding interviews, if they had worn their uniforms or covered their flashes. Two of the officers had volunteered the information that they had removed the appropriate parts of their uniform, but even they were not further questioned on the subject.

[28] Director Hewson simply testified at the hearing, with no basis for the statement, that they had been in uniform when they crossed the border, implying that this was another act of officer misconduct for which the grievor was responsible. On cross examination, he was asked why the officers were not investigated or disciplined for wearing their uniforms to the duty free store. After all, had they done so, it would have been a serious conduct violation. He replied: “good point.”

C. Impact on operations

[29] When Director Hewson asked the grievor why he let the officers go during the busiest time of the day, the grievor said he did not recall but that there was probably a lull in the traffic. The evidence shows that there was not a lull in the traffic. However, neither was it the busiest time of the day. The traffic logs show that 12:00-1:00 p.m. was the busiest period that day, followed by 2:00-3:00 p.m. and that 4:00-5:00 p.m. (when the BSOs were absent) was the third busiest hour of the day. Despite the clear documentation, Director Hewson’s fact-finding report stated that the grievor allowed the BSOs to leave during the busiest hour of the day.

[30] Director Hewson reported that at 4:00 p.m. commercial traffic was backed up to the overpass on the U.S. side and the wait time was 15 minutes. Much was made of this in his testimony. He said that this was unacceptable, that a second commercial lane is to be opened whenever there is a 20-minute wait, and that that does not preclude opening one earlier if resources are available. Doing so helps to prevent a traffic build-up, which takes longer to clear once it develops. He implied that the officers’ absence

caused or contributed to the development of an unacceptable wait time and prevented the opening of a required second lane.

[31] A/Chief St. Onge testified that 20-minute wait times in commercial were not uncommon. The documentary evidence showed that during the month of July 2015, commercial wait times of 20 minutes or more occurred 66 times, that is, more than twice a day, every day, on average. On cross examination, Director Hewson agreed that commercial wait times of 20 minutes were not uncommon especially in summer, were not unreasonable and that there was no policy that required a second lane to be opened whenever this occurred.

[32] A/Chief St. Onge testified that due to shift overlaps, 12:30 to 6:00 p.m. is the most heavily staffed period of the day and, therefore, breaks are almost always scheduled within this time. There were 15 officers on shift during this period. She did not think the officers' absence caused the delay. However, I note that a second lane was opened to clear the traffic build up in commercial, upon their return.

[33] A/Chief St. Onge testified that one of the absent officers had been called to assist with a gun seizure in secondary and had not responded. She noted that the examination took one hour and forty minutes which was not unreasonable and actually quicker than usual. She also mentioned that officers are fully trained to carry out firearm seizures and examinations on their own and commonly do so in small ports where the minimum staffing complement is two officers. However, the BSO scheduled to staff the counter had had to cover for the firearm call.

[34] Director Hewson noted that there were several employees on overtime and that if they were not needed, they should have been sent home. However, A/Chief St. Onge clarified that these officers were on overtime because they were replacing employees who were on leave.

D. Who is responsible for payment of duty & taxes?

[35] Each of the three officers imported five flats of beer, some of which were destined for three other officers. Two were for the grievor. The importing officers properly declared the beer but were not referred inside to pay duty and taxes by the primary inspection officer. They did not pay any and neither did the grievor or the other three officers who received flats. Fifteen months later at his pre-disciplinary

hearing on September 12, 2016, the grievor paid $12.72 in duty and taxes for his two flats.

[36] Director Hewson's testimony as to who was responsible to pay duty and taxes, if anyone, was unclear and contradictory. He said that the importers bringing in the beer were responsible to pay all the duty and taxes, whether some of it was for other people or not. However, he also agreed that receivers could meet importers at the border and pay the duty and taxes and said that the receivers should have paid on their beer. He also said that the officers returned through the NEXUS line and that NEXUS rules require that all imports must be personal, and cannot be for others. However, the grievor challenged Director Hewson's rendering of the NEXUS rules as being incorrect, stating that personal imports in the context of the NEXUS rules meant imports that were not commercial in nature. The NEXUS rules were not entered into evidence.

[37] A/Chief St. Onge confirmed that recipients can have other travelers import goods on their behalf with written authorization. She said that this happens from time to time at POE Coutts and gave the example of wine purchasing clubs that had been allowed to import for friends with authorization. There have been periods when this practice has been accepted at the port and periods when it has not been. Her evidence showed that the rules are changeable. She also confirmed that recipients can meet importers and pay the applicable duty and taxes.

[38] However, the beer receivers in this matter, although present at the port, did not meet the returning officers to pay duty and taxes on their orders of one or two flats each, nor was there evidence that they provided their co-workers with written authorization to import on their behalf.

[39] Director Hewson could not clearly explain who was responsible to pay any applicable duty and taxes. I find that he simply did not know. However, despite the utter lack of clarity as to the rules, he never waivered from insisting that the grievor should have ensured that the importers paid on all the beer including his two flats and that he should have paid on his two flats.

[40] Of course, the question of who should pay need only be answered if there are applicable duties and taxes to be paid. That decision, as I understand it, is up to the primary inspection officers. Once a traveller declares casual goods it is the primary inspection officer who either releases without requiring payment or refers the traveller

inside to pay duty and taxes. This decision is referred to as “release” or “refer.” Releasing is also referred to as “waving through” or “waving up the road.”

E. What were the wave-through thresholds?

[41] Director Hewson stated categorically that CBSA policy is to wave through only those declared goods on which the value of applicable duty and taxes would be $3.00 or less. This threshold was set in 1999 in memo R17-1-3 which is still in effect. Anything over $3.00, according to Director Hewson, is not to be waived, although he could not identify any time when he had advised the staff of this. Although challenged on cross examination with a good deal of evidence that this policy was no longer generally applied, that the officers used their own discretion and that an approximate threshold of $15.00 to $20.00 had been commonly used for years, he insisted that $3.00 was the threshold.

[42] Director Hewson was asked about his stated priorities for the POE. He acknowledged that when he arrived in 2009 he felt strongly that employees needed to turn their attention away from small duty collection and focus their efforts on the increasing volume of high-risk activities instead. He agreed that the staff had been strongly and repeatedly advised that this was also a key priority of RDG Scoville. He had spelled out these expectations in a memo dated May 25, 2010 addressed to the ports in his district, entitled *Southern Alberta District Key Priorities.* After a discussion about organized crime groups and the amount of contraband moving through the border this memo concluded:

> *We need to focus on the business directly in front of us. In order for us to have any type of success in dealing with issues such as this* ***we need to focus on a few key priorities and then closely examine the other activities that we are performing****. These priorities will include:*
>
> - *Matters of National Security*
> - *Identifying and dealing with serious criminality (IRPA)*
> - *Move to a fully integrated workforce (POE Vision)*
> - *Seizures of significant quantities of contraband – drugs, weapons, and proceeds of crime*
> - *Identifying instances of smuggling or fraud, where criminal charges would apply*
> - *Gathering of intelligence on high risk targets or shipments*
> - *Implementing a robust lookout interception policy*

> · *Matters that directly relate to public safety and security (e.g. Officer Power type activities, or response to major events, etc..*
>
> *By focusing on key priorities such as these and **dispensing with some of the other more traditional activities (small duty collections, low value seizures)** we will be better placed to deal with the higher risk activities, some of which are listed above.*
>
> [Emphasis added]

[43] Asked what he meant by the phrase "dispensing with," Director Hewson said that in hindsight he should have said "reducing" rather than "dispensing with" because collecting duty and taxes is an important part of what the Agency does. However, in a January 9, 2011 email to the chiefs of his district about a significant drug seizure, he again directed staff to "dispense with" these activities as they no longer fit into the mandate. He challenged the chiefs in his district to evaluate the relevance of them:

> *As I have stated previously – as a District we need to focus on the business directly in front of us. The amount of contraband being moved through our POE's by organized crime I believe is staggering…. As we continue to focus on the priorities below and **dispense with** some of the more 'traditional activities' **that no longer fit into our CBSA mandate**…our success will continue to grow.*
>
> ***Once again, I would like to challenge each and every one of you to continue focusing on these few key priorities** and then **closely examine and evaluate the relevance of the other activities that we undertake**. I also want to recognize each of you who are rising to this challenge and who are day in and day out enforcing our mandate…your efforts have not gone un-noticed.*
>
> *These priorities include:*
>
> · *Matters of National Security;*
>
> · *Identifying and dealing with serious criminality (IRPA);*
>
> · *Seizures of significant quantities of contraband – drugs, weapons and proceeds of crime;*
>
> · *Identifying instances of smuggling or fraud, where criminal charges would apply;*
>
> · *Gathering of intelligence on high risk targets or shipments;*
>
> · *Matters that directly relate to public safety and security*
>
> *Congratulations to those officers at POE Coutts who made this most recent significant seizure. It was one that has set the standard for drug enforcement, both within and external to the District.*
>
> [Emphasis added]

[44] As an aside, the next day the grievor received a letter of commendation for his role in this drug seizure from the A/Regional Director General at the time thanking him for his "outstanding efforts" and his "professionalism in managing this significant event."

[45] In a 2014 document entitled *Update on POE Operations and Enforcement in the Prairie Region,* RDG Scoville used almost identical language to send the same message and concluded as follows:

> *By focusing on key priorities such as these and* ***dispensing with*** *some of the other more traditional activities (small duty collections, low value seizures, IRPA matters, etc.) we will be better placed to deal with the higher risk activities… some of which are listed above. When you step into the Primary or Secondary role, these priorities should be on your mind and be your focus.* ***During slow periods of traffic, you may*** *have the opportunity to explore other activities, however these priorities should always be front and centre when executing your daily duties. It is all part of evolving into a more professional, armed law enforcement entity.*
>
> [Emphasis added]

[46] However, despite this clear push towards a different focus and away from small duty collection, Director Hewson testified that he did not believe that the officers thought that there was an unofficial $15.00 to $20.00 wave-through rate that they could apply at their discretion.

[47] Further, although he sometimes attended management meetings in his district, and reviewed the minutes when he could not attend, he was unaware that his managers had ever discussed the issues inherent in relying on officer discretion, the varying wave-through rates or the idea of setting a consistent standard. However, A/Chief St. Onge testified that there had been a lot of talk among managers about setting a standard threshold.

[48] Minutes of a July 19, 2010 management briefing recorded this discussion:

> *It seems that some officers are having trouble finding middle ground when it comes to sending Travellers inside or up the road.*

[49] Minutes of a May 16, 2011 management briefing states:

> *Doug reported that during the Sunday briefing concerns were expressed by staff regarding staffing, and the collection of duty*

> *and taxes. It was suggested that some BSO's need clarification with the SSET [Secondary Skills Enhancement Training]. The basis of SSET is to let the smaller stuff go in an effort to concentrate on the big stuff.*
>
> [*Sic* throughout]

[50] Minutes of a February 20, 2012 management briefing recorded this:

> *Snow bird season is fast approaching. Inconsistencies from booth to booth to counter were discussed. It was decided management would set the wave through rate and take responsibility for advising staff. The management team will discuss and make a decision at a later date.*

[51] Minutes of a February 27, 2012 management briefing stated this:

> *Maureen advised that the wave through rate has been set at $15.00-$20.00. It was suggested that this issue would settle itself.*

[52] Director Hewson did not recall that this issue was discussed during the Southern Alberta and Southern Saskatchewan District (SASSD) management team meeting on January 7, 2015 which he had arranged and attended. He was referred to his email of January 5, 2015 which advised that RDG Scoville would be meeting with the management team. The attached agenda listed "B15 Direction and threshold – Trevor S." as a discussion topic for the meeting.

[53] He was similarly unaware that the topic had been discussed at the Regional Management Committee level. Minutes of the October 22, 2013 meeting of that committee records a discussion of various aspects of this issue, for example: "Thresholds – are they on par with other Regions?"

[54] Director Hewson did acknowledge that he was aware of the National Peak Periods Strategy - 2013 Summer Peak Period Evaluation paper. Among other things, this study reported that: "*A review of the B15 data points to the possibility that B15 referrals are being managed differently regionally and that each region has its own process with unofficial wave-through policies at the POE*". It recommended that B15 processing guidelines and threshold limits be reviewed and amended as necessary.

[55] The evidence was clear that, for a number of years, this issue had been discussed at every level: at the port, in the district, at the region and nationally. It had even hit the news media; two news reports from 2013 and 2014 were entered into

evidence. It was a controversial issue impacting a number of competing interests: efficient movement across the border, staffing issues & overtime costs, the need to focus resources on high risk and national security issues, and the impact of cross border shopping on Canadian businesses. If Director Hewson thought the border officers at Coutts were applying a $3.00 rule set in stone in 1999 as he repeatedly claimed, he was doubtless the only CBSA employee, or member of the news-reading public, who thought so.

[56] A/Chief St. Onge, on the other hand, acknowledged that the $3.00 threshold, although having never been officially revoked, was generally not applied at the port at the time of the beer run, nor had it been for years. Asked if she could recall Director Hewson ever advising employees, prior to the beer run, that $3.00 was the standard wave-through rate, she stated that she could not.

[57] She testified that she, personally, followed the $3.00 rule, but only because her prior experiences as a union representative had taught her that following written policy to the letter, regardless of how it is, or is not applied, is the only thing that can save an employee in the end. A/Chief St. Onge made it very clear that this was a personal choice on her part as a matter of self-protection. She thought it would be wise for all officers to do the same for their own protection, however, she knew that she was one of a very few people who operated this way. She was only able to identify one other officer who possibly applied the $3.00 rule, also as a personal choice.

[58] She also explained that memo R17-1-3 that established the $3.00 threshold is not available online, where most policies are found. An officer would have to review the paper memo in a binder in the reference library. Not many officers would be able to find it without assistance. She had to scan it when the grievor asked for a copy after the fact finding.

[59] The acting chief confirmed that Director Hewson and RDG Scoville regularly and strongly exhorted staff to stop focussing on low value collections. Her interpretation of the direction to “dispense with” collections was that it meant to stop focussing on them, not to stop them completely. However, she further confirmed that neither of them had ever explained to officers or management what they meant by low value collections. She and others had tried and failed to get clear direction on it.

[60] A/Chief St. Onge confirmed that the grievor had specifically asked RDG Scoville how small duty collections were to be defined in the SASSD management meeting of January 7, 2015. He had not responded that the threshold was to be $3.00 unless otherwise stated by superintendents, nor had he answered the question as to what the threshold was or should be.

[61] The acting chief agreed that wave-through rates were often raised to deal with increased traffic volumes and wait times. Superintendents were supposed to raise and lower thresholds as needed but in practice they typically told officers only when to lower it back down. In other words, they assumed and relied on the officers' discretion to apply appropriate thresholds as required. She said that different employees applied different rates and that no clear threshold had been set. As she put it "I'm afraid we didn't nail it down." She said that $20.00 was commonly used and that it was not an unreasonable standard.

[62] The evidence was clear that the officers generally applied thresholds of about $20.00, and had discretion to go below or above that amount depending on the circumstances. For example, the grievor had once waved 10 flats up the road which had resulted in a complaint. However, no discipline had resulted, Director Hewson had signed off on it and had not corrected the grievor's threshold.

[63] In a post-beer-run email dated March 25, 2016 A/Chief St. Onge advised her superintendents as follows:

> *With snowbird season well underway for this weekend, the* ***normal*** *threshold will be set at $20.00. T****his threshold was previously in place for years and will be our starting point every day during the long weekend****. Superintendents have the ability to raise the threshold as per Kevin's email. If you require guidance during this weekend on anything, I am the On-duty Chief for the weekend.*
>
> [Emphasis added]

[64] She testified that after the fallout from the beer run investigation the superintendents were leery to raise the thresholds and unsure of their authority to do so. She sent this email to reassure them that they should still do their job, that $20.00 was a reasonable and time-tested starting point and that they should raise the threshold from there, as necessary.

[65] On cross examination Director Hewson agreed that the phrase "small duty collections" was never explicitly defined by himself or RDG Scoville despite both of them strongly promoting a move away from these activities. He offered multiple evasive responses as to how he would define them, eventually declaring that what low value duty collections meant to him was $3.00 or less. This response was meaningless and lacked credibility. Asked if it was possible for officers to collect on anything below $3.00 in the CBSA computer system, Director Hewson admitted that it was not. It was only when I asked him directly that Director Hewson acknowledged that small duty collection meant more than $3.00 and up to whatever a superintendent decides.

F. Did the wave-through thresholds apply to the officers as well as the public?

[66] The R17-1-3 memo set a national standard amount of $3.00 or less of duty and taxes to be waived, however, it also gave superintendents discretion to raise that threshold as necessary based on operational needs. A/Chief St. Onge confirmed that former Director Al Cody had specifically advised staff that they were entitled to the benefits of the R17-1-3 memo, that is, whatever benefits the general public received in terms of raised wave-through thresholds was to be applied to them as well. Director Cody's June 24, 2005 email reads, in part, as follows:

> *In April of 2002 as a result of an internal fact-finding, employees were required to pay duties and taxes on all importations without benefit of R17-1-3. … As a result of the Workplace Assessment and successful representation to Region by the Steering Committee, employees are now allowed the benefits of and are to be guided by R17-1-3 which is great news.*
>
> [Emphasis in the original]

[67] A/Chief St. Onge testified that since that written notice, the staff had never been told anything different or informed that this no longer applied. They assumed that they were still to be treated the same as the public; until the beer run incident they had been given no reason to question that. As long as officers receive only the same benefit offered to the public, her understanding was that this is not to be considered preferential treatment. Preferential treatment occurs when an officer receives a benefit not available to the public.

[68] A/Chief St. Onge wrote exactly that in her email dated September 1, 2016 to Director Hewson. In order to determine the amount of discipline to recommend for one of the BSOs, the labour relations consultant had asked Director Hewson whether

the expectation for either a BSO or a superintendent was that duty and taxes would be paid regardless of whether it was 2, 4 or 10 cases of beer. Director Hewson did not respond. He sent the inquiry to A/Chief St. Onge and then forwarded her response to the labour relations consultant. The acting chief had responded, in part, as follows:

> *Some employees would state that they would wave two dozen beer ($6.59) and maybe even four dozen beer ($13.18) for anyone including an employee or a traveller…* ***The expectation was, at the time, that employees would pay the same as travellers at any given time.***
>
> [Emphasis added]

[69] Director Hewson testified that he was unaware of Director Cody's email advising officers that they were allowed the wave-through benefits of R17-1-3. In his view, the officers were aware that they were not to be treated the same as the public. He did not say anything about the acting chief's email that had advised him otherwise.

[70] A/Chief St. Onge testified that even after the beer run, despite being directly asked the question, neither Director Hewson nor RDG Scoville had ever explicitly said that employees were no longer to be treated the same as the public in regards to wave-through policy or practice. Whenever she had asked Director Hewson about this he had referred her to his January 21, 2016 email to staff and his March 24, 2016 email to management. He refused to answer her question and has only ever referred her to his emails.

[71] Director Hewson's email to staff directed them to abide by memo R17-1-3 and stated that:

> *'The Customs Act regulations* ***apply to each of us as much as to every other Canadian****. When importing goods into Canada, you must do so while you are not on duty and report to primary to make a full declaration of your goods, paying any* ***applicable*** *duties and taxes."*
>
> [Emphasis added]

[72] This seems to say that employees are under the same regulations as the public, but it is not clear what is meant by "applicable duties and taxes." When a member of the public declares goods and is released by a primary inspection officer, there is no duty and tax to be paid. Is that the case for the officers as well? Neither this memo to staff, nor Director Hewson's March 24, 2016 memo to management, clearly answers

the question of whether raised thresholds continue to apply to staff or only to the public.

[73] A/Chief St. Onge testified that the staff continue to ask this question as she has been unable to get a direct answer in order to advise them. Minutes show that the question had been raised in every meeting with the superintendents from February to August, 2016, with no answer ever given.

[74] Director Hewson confirmed that the acting chief had specifically asked him this question and that he had responded that the answer had already been provided in his emails. In other words, he confirmed that he had refused to directly answer her question. Asked why he did not just tell the acting chief the answer to her question, Director Hewson responded: "I don't know."

[75] Director Hewson's lack of transparency and outright refusal to clearly tell his chief what the rules were so that she could advise the staff, was troubling. He also evaded the question on the witness stand. He eventually said that he had put out a memo in January, 2016 that clarified that staff was to be treated differently from the public. Given the example of a traveller waved through with two flats versus a BSO waved through with two flats, he confirmed that the BSO should pay regardless. He said that this was so "especially after January, 2016" because as he put it "then I made it clear." As indicated earlier, I do not think that his email actually did clarify the point, however, for the purposes of this matter Director Hewson's statement was a clear acknowledgement that, even in his view, he had not made it clear prior to the beer run.

[76] He went on to testify that even if the staff were entitled to the same wave-through threshold as the public at the time of the beer run, he had reviewed the B15s completed that day and there had been some that showed duty and taxes paid on less than five flats. On cross examination he could not say whether these B15s included other goods besides the beer or whether they had been included in his fact-finding file. While he reported that there were some B15s for five flats, most of them were for larger amounts. The B15s themselves would have provided more information relevant to the thresholds being applied, such as the time of day they were completed and the badge number of the officer who completed them. However, they were not introduced into evidence.

[77] Finally, Director Hewson testified that even if the officers were entitled to the same wave-through benefits as the public, this incident would still be considered preferential treatment. He based this on his view that officers are held to a higher standard of conduct than members of the public. If it landed on the front page of the newspaper, in the public's opinion it would not pass the "smell test."

[78] Certainly, officers are held to a higher standard of conduct. But the employer cannot say they are entitled to something and then accuse them of not meeting their higher standard if they accept it. The policy either entitles them to the same wave-through benefits as the public or it does not. The acting chief testified that the staff was officially told by their director that they were so entitled in 2005 and had been told nothing different at the time of the beer run. If the employer thought that the policy would not pass muster with the public, it could have changed it clearly and definitively, and notified the staff of the change. Instead, it remained ambiguous even after the beer run and, inexplicably, requests for clarification from the acting chief and the superintendents were stonewalled.

[79] I find that the importing officers were entitled to the same wave through benefits as the public at the time of the beer run. Having declared the goods and been waved through by their primary inspection line co-workers, I don't see that there were duty and taxes to be paid.

[80] The primary inspection officers may have exceeded the limits of their discretionary thresholds. However, that decision was made by them, not by the importing officers. A/Chief St. Onge was asked on re-examination if this was not tax evasion. She replied that if goods were declared and the primary inspection officer did not refer in for payment, then it was not tax evasion.

G. Was the grievor responsible if duty & taxes were owing?

[81] The grievor's suspension letter states that he violated the *Code of Conduct* because he "did not ensure that the BSO's importing the alcohol paid the applicable duty and taxes owing on the alcohol being imported, which also included the alcohol being imported on your behalf." (*sic* throughout) Reviewing the *Code of Conduct* sections that the grievor was alleged to have violated, I see none that would require him to ensure that the officers paid duty and taxes, even had they been obligated to do so. It is not clear to me why the employer seeks to hold the grievor responsible for the

officers' conduct upon their return to port. He had no reason to think that anything was amiss in that regard.

[82] Director Hewson's fact finding report states that the grievor knew that the officers who bought or ordered beer did not pay any duty and taxes. There was no evidence that the grievor knew that. There was no indication as to how Director Hewson came to that conclusion. He did not ask the grievor in his interview if he knew that. He simply concluded that he did and stated it in his report.

[83] The evidence does not suggest that the grievor told the officers not to pay duty and taxes. Or that he told those who ordered beer not to take responsibility for the beer brought in for them. Or that he knew how many flats of beer each of them would buy or whether it would exceed the individual threshold of the primary inspection officer. Or that the primary inspection officer would wave them through.

[84] In short, he had nothing to do with the officers' conduct on their return to port. His misconduct was allowing them to go, possibly on paid time, potentially impacting operations, full stop.

[85] The *Message from the President and the Executive Vice-President* introducing the 2012 version of the *Code of Conduct* states the following:

> *The Code of Conduct fulfills the requirement of section 6 of the Public Servants Disclosure Protection Act (PSDPA) and should be read along with the Values and Ethics Code for the Public Sector and the Policy on Conflict of Interest and Post-Employment.*
>
> *Collectively, the two Codes and the Policy* ***are binding on all CBSA employees and new recruits****.*
>
> [Emphasis added]

[86] This message is made very clear to all CBSA employees. Every officer is responsible for meeting the high standard of conduct set out in the *Codes* and the *Policy*. Director Hewson testified to that effect. It was also clear from the officers' responses in their fact-finding interviews that they fully understood that.

[87] As well, the grievor was only held responsible for the conduct of the first three officers on their return, even though the discipline letter states that he also engaged in misconduct when he allowed the fourth officer, WM, to leave two hours later.

[88] Officer WM advised the grievor that he planned to use his 6:00 p.m. meal break to purchase beer at the duty-free shop. He left the port at 6:03 p.m. and returned 41 minutes later, declaring five flats of beer and two bottles of alcohol. He requested short term leave to cover the extra 11 minutes over and above his meal break, but did so only after the fact. Director Hewson's fact-finding report stated that he had "claimed overtime in the importation of alcohol while on shift" and also that "he created his own personal B15 while on shift." The officer was investigated, found guilty of violating the *Code of Conduct – B. Accountability and Professional Conduct* and was disciplined for his actions.

[89] However, the employer did not seek to hold the grievor responsible for any of this officer's actions. There was no suggestion in the fact-finding report, the discipline letter or in Director Hewson's testimony that the grievor had any responsibility for what this officer did, or did not do, upon his return.

[90] The grievor should not have let Officer WM go to the duty free, at least without ensuring that short term leave had been requested and granted. However, it was clear that, in the employer's view, whatever the officer did after that was on him. If the grievor was not responsible for this officer's actions, he cannot be held responsible for the actions of the other three.

H. Procedural fairness and natural justice

[91] Director Hewson agreed on cross examination that he was required to abide by CBSA policies and procedures to conduct his fact-finding. He confirmed that he had access to the CBSA *Fact Finding Reference Guide*, the *Government of Canada Guidelines for Discipline*, Appendix A - *Guidance for managers with respect to discipline*, the CBSA *Discipline Policy*, the CBSA *Professional Standards Investigator's Manual*, *Manager's Guide to Conducting Internal Investigations*, and the *Initial Fact Finding Job Aid*.

[92] I will refer only to the *Fact Finding Reference Guide* ("Reference Guide") and the *Initial Fact Finding Job Aid* ("Job Aid") as they are the most directly applicable. However, I have reviewed all of these policies and guides. The requirements of procedural fairness and natural justice they lay out are consistent with, repeat or expand upon the requirements set out in these two documents.

[93] Director Hewson acknowledged that while he had probably read some of them over the years, he had not reviewed any of them for this fact finding.

1. Delay

[94] The *Fact Finding Reference Guide* states that a fact-finding should "**normally be completed within 10 days**". The *Initial Fact Finding Job Aid* is more specific: "The process **must** be simple, fair, without bias **and be completed within 10 business days**". The *Job Aid* makes it clear that the 10 days is mandatory and clarifies that they are business days.

[95] Director Hewson did not complete his fact finding within 10 days. In fact, he only started it in February 2016, six months after the July 22, 2015 incident, even though it had been reported five days after its occurrence. During those six months, the incident was investigated by the PSI unit in Ottawa, the Regional Integrity Unit and by Director Hewson himself at the request of Michael Shoobert.

[96] On December 16, 2015, Director Hewson received an email from Mr. Shoobert advising that PSI had assigned it back to the region to complete. He was surprised and not pleased to get it "back in his lap" as he thought that either PSI or the Regional Integrity unit was taking care of it.

[97] Even then, though, the fact finding was still not officially begun for another few months. It finally began in February 2016 but was not completed until a year after the incident on July 8, 2016. Discipline followed three months after that.

[98] The discipline letter itself is undated but was given to the grievor and signed by him on October 12, 2016 - one year and three months after the incident.

2. Manager to conduct fact-finding

[99] I asked A/Chief St. Onge why she had not conducted the fact finding once it was assigned back. Coutts port of entry was her shop, after all. The acting chief chose her words carefully and said that Director Hewson had "volunteered" to do it. Director Hewson used that word too. He said that he discussed it with the acting chief and another chief, both of whom were very busy, so he volunteered to do it and both chiefs agreed. However, he later acknowledged that the idea that he should do the fact finding had "come up" in conversation with Mr. Shoobert. Mr. Shoobert had thought it was a good idea. He also said this:

> *No I didn't make the decision to have a fact finding. It was made for me. On December 16 Mike Shoobert sent me questions and asked me to put them over my name.*

[100] On page 3, the *Fact Finding Reference Guide* sets out who does what:

> *Employees (including management) must report misconduct to their Manager.*
>
> *Directors must report misconduct to Professional Standards.*
>
> ***Managers must conduct Fact Finding**s. Security and Professional Standards Analysis Section (SPSA) will record all incidents and provide advice to Managers and assist in systems checks and audits.*
>
> *Professional Standards Investigations will conduct formal administrative Investigations if required.*
>
> *Labour Relations will provide advice and guidance directly to local management on the status of an employee after misconduct is alleged.*
>
> [Emphasis added]

[101] The *Reference Guide* sets out the basic steps in an administrative investigation. Any allegation of misconduct received must be reported to PSI to be reviewed, analyzed and entered into the Professional Standards Case Management System. **Local management then conducts a fact finding,** discusses the results with PSI and a decision is made to either close the file, impose discipline, or launch a formal investigation, if more information is required. It further states that: **"The Manager responsible for the employee against whom the allegations are levied, is responsible for conducting the Fact Finding**." The *Job Aid* states the same thing: "**The manager responsible for the employee must conduct the initial Fact Finding upon the advice/direction of Professional Standards."**

[102] It was clear that upper management had directed Director Hewson to conduct the fact finding. It was not clear why A/Chief St. Onge, the manager responsible for the grievor, was not allowed to conduct it, as policy repeatedly requires. She confirmed that she normally conducted the fact findings.

[103] It was also clear from Director Hewson's comments that neither the acting chief, nor himself, made the decision that a fact finding was required. The decision was "made for him" and the questions to ask the employees were given to him, to be put over his name.

3. Grievor's right to know the case against him

[104] Director Hewson first asked the grievor for information on November 19, 2015, four months after the beer run and one week after the port runner incident had occurred. The subject line of the email was "Information Request." He did not advise the grievor that he was being investigated. The grievor asked if he could be informed as to what, if any, allegations had been made. He asked if the director's request for information was part of a fact finding, a local management review or a Professional Standards investigation. He asked if a complaint had been brought forward and if so, could he see it? As the grievor put it in one of several emails:

> *I'm not trying to be difficult but if you are trying to determine if there is a case of employee misconduct, I believe I have the right to be made aware of what type of fact-finding this is and what allegations have been made. If I am mistaken then please let me know.*

[105] Director Hewson repeatedly refused to answer any of the grievor's questions and advised that he was just asking for information. For example, in one email:

> *As I stated numerous times, I am looking for information on the events that day. Once I have more information, I will be in a better position to determine the next steps. My request for information stands.*

[106] On cross examination, Director Hewson was referred to the CBSA policies and guides regarding fact findings and investigations. He was asked if they provided for "information requests" to be made. The director replied that they did not but that the grievor had simply been asked for a report. He confirmed that he had refused to answer the grievor's questions because he was not conducting a fact finding or investigation at that point, he had just been asked to get a report from the grievor.

[107] Asked whether he thought this process had provided the grievor with natural justice, he responded: "when the fact finding was held, yes." As for the "information request", he was "just asking for a report for Mike Shoobert"

[108] The *Reference Guide* section on procedural fairness states:

> *Due process must be observed. Procedural fairness requires you to: inform people against whose interests a decision may be made of the substance of any allegations against them or grounds for*

> *adverse comment in respect of them, and give them an opportunity to respond.*

[109] CBSA policy appropriately reflects the fundamental principle of natural justice that a grievor must know the case against him. This grievor was not even allowed to know **if** there was any allegation against him, let alone the specifics of it. And this, after repeated inquiries to that effect as he tried in vain to protect himself and to obtain some semblance of procedural fairness.

4. Extensive investigation prior to the fact finding.

[110] The *Reference Guide* sets out what a fact finding should be, as follows:

> · ***A Manager's first opportunity to ask employees for reports, or question them i****n response to an 'untested' allegation. It is* ***a collection of information*** *which allows for* ***preliminary assessment*** *of a complaint by Management.*
>
> · ***An employee's first opportunity to speak with their Manager*** *and present their side of events* ***before a complaint turns into a formal investigation.***
>
> · ***Simple and quick***
>
> · *Normally completed within* ***10 days****.*
>
> · *Results are to be communicated to Professional Standards and then a decision will be made as to whether or not the Manager has enough information to:*
>
> *Close the file due to lack of credibility or proceed to a pre-disciplinary process;*
>
> *or transfer the matter to formal Professional Standards Investigations if significant questions remain unanswered.*
>
> [Emphasis added]

[111] This fact finding was certainly not the employer's first opportunity to ask employees for reports or to question them. Or the employee's first (or any) opportunity to speak with his manager. A comprehensive and largely complete investigation had taken place before it was even decided to officially begin a fact finding.

[112] Director Hewson had received permission to review video footage and traffic logs and had done so. He had obtained permission to audit employee emails but had not done so. He thought that Mr. Shoobert likely had, but he was not told. The importing and the primary inspection officers involved had been identified and reports

had been requested and received from four unnamed BSOs and one superintendent. These reports were not entered into evidence. Shift planning schedules and the grievor's desk had been checked for short term leave requests. The POEMS data base had been checked for meal time changes. The Travellers Entry Processing System, the Integrated Primary Inspection Lines ("IPIL"), and the B15 forms had been checked. The personal vehicle and license plate number of the officer who drove to the U.S. had been identified. Four months after the event, in November 2015, and still three months before the "fact finding" was officially begun in February, 2016, Director Hewson asked the grievor for information and refused to tell him the reason for the request, or that he was under investigation.

[113] Some of this investigation was conducted by Director Hewson at Mr. Shoobert's request, some by regional or PSI personnel. The evidence was not clear on exactly who did what. In emails sent in August and September, 2015 Director Hewson detailed some of what he had investigated. Mr. Shoobert, in turn, passed on results of the regional investigation in his email of December 16, 2015 which advised that the file had been assigned back to the region for completion.

[114] It was put to Director Hewson that, having already gathered all of this information, he was simply using the fact finding to confirm his suspicions, rather than to find facts. He did not clearly respond.

[115] CBSA policy provides that a fact finding should be a preliminary look at an allegation. It is supposed to determine whether nothing further is required, whether discipline can be imposed based on its findings or whether a full investigation is required. What occurred between July 22, 2015 and February 2016 when the "fact finding" was officially begun, went far beyond that. It was a full-blown investigation carried out over six months. During this time the grievor did not have the benefit of any semblance of procedural fairness, even when he explicitly and repeatedly requested it.

[116] Director Hewson acknowledged as much when he said that he had provided the grievor with natural justice "when the fact finding was held." There was a good deal of confusion in the evidence about what a fact finding is. The phrase itself was often used to reference only the interview stage. There was no label at all given to the gathering of information that preceded it. There seemed to be an assumption that the fact finding

only began when employees were interviewed, that procedural fairness was only required for that stage and that providing it at that point retrospectively legitimized the investigation that had preceded it.

5. Lack of procedural fairness in the fact-finding interview

[117] Director Hewson confirmed that he had told the grievor that if he continued to take too long to write notes during his interview he would not be allowed to take notes. Asked whether making a 35-minute fact finding interview a bit longer by taking notes would have been unreasonable, he did not directly answer. He said he simply wanted the interview to move along.

[118] Director Hewson confirmed that he had required the grievor to sign a copy of his (Director Hewson's) notes and that these were notes of only the grievor's answers. They were missing the questions asked. He agreed that, given this, the only way that the grievor could retain a copy of the questions was by trying to note them down as they were asked.

[119] Director Hewson was not sure if fact finding interviewees were usually required to sign notes consisting only of answers and declined to offer his opinion as to whether this was fair to the employee. He said that he did not look at whether it was fair or not; he had been told to do it that way by PSI so that is what he did.

[120] Director Hewson further confirmed that having signed the notes containing only his answers, the grievor was also refused a copy of them.

6. Viewing recorded video footage contrary to policy

[121] One of Director Hewson's first avenues of investigation was to seek permission to view video footage. He viewed the arming room footage to ascertain the duration of the officers' absence from the port.

[122] He was aware of the *CBSA Policy on the Overt Use of Audio-Video Monitoring and Recording Technology* ("AV Policy") that allows the viewing of recorded video footage only in cases of serious misconduct. The *Code of Conduct* states that serious misconduct includes, but is not limited to: theft; assault; criminal activities or associations; fraud; excessive use of force or aggression; improper storage or handling of defensive equipment; client complaints that could attract media attention; and

misuse of information technology. I note that the alleged misconduct falls into none of these categories.

[123] On cross examination, Director Hewson evaded answering whether he thought he was investigating "serious misconduct" such that viewing video footage would be allowed by the policy. Eventually, he indicated that it was simply "misconduct" under the *Code of Conduct*. I find that viewing the video footage was contrary to policy.

7. Omitting relevant and potentially exculpatory information

[124] As discussed earlier, Director Hewson repeatedly refused to acknowledge any awareness that officers at Coutts applied a $15.00 to $20.00 wave-through threshold at their discretion. This refusal was puzzling in the face of a good deal of contrary evidence as detailed earlier and it reflected poorly on Director Hewson's credibility. However, the most striking evidence of this came out of his own fact-finding interviews, his notes of which were obtained through an ATIP request. What they reveal is directly contrary to Director Hewson's denials in this regard.

[125] These are the questions he asked the grievor and seven officers about their thresholds:

> *28. What is your normal threshold for referring and collecting duty and taxes for alcohol purchases by Canadian residents who are in the USA for the day?*
>
> *29. What is the average threshold that officers in Coutts use for referring and collecting duty and taxes for alcohol purchased by Canadian residents who are in the USA for the day?*
>
> *30. What is the national policy threshold for duty and tax collection?*

[126] These are not questions one would expect to be asked by someone who thought the $3.00 threshold was still being applied. Director Hewson acknowledged as much on cross examination. As well, it was clear from the officers' responses that they all had their individual thresholds that management expected them to apply at their discretion. Not one of the seven officers interviewed said that they applied a $3.00 threshold. However, none of this information found its way into Director Hewson's fact-finding report, which simply addressed the question of thresholds as follows:

> *Memorandum R17-1-3*

> *Casual goods imported by a traveller may be released without the assessment by BSOs when the duties and GST owing are deemed not to exceed the threshold of $3.00. In the case of alcohol, this threshold will include federal duties, GST, and provincial mark ups.*
>
> *Amounts higher than $3.00 may be waived by superintendents only in cases where the volume of collections would result in unacceptable delays, high volumes of return resident travellers subject to small assessments, when interdiction activities under way, or for other reasons determined by local management.*

[127] After asking three specific questions about it in each and every fact-finding interview Director Hewson testified that he omitted the officers' answers from his report because they were not relevant. I find that he asked the questions because he knew they were relevant and that he omitted the responses from his report because they were potentially exculpatory.

8. Different treatment of employees - the primary inspection officers

[128] Director Hewson testified that it is the primary inspection officer who makes the decision to release or to refer travelers in to pay duty and taxes. Officers LN and MF were the primary inspection officers who failed to refer their co-workers in for payment on the goods they had declared.

[129] Five officers were waved through that day, the first three who went together, then two individual officers who each went after 6:00 p.m.. All five declared beer, or beer and alcohol, in amounts that exceeded the typical unofficial thresholds, but were nevertheless released from payment of duty and taxes by the primary inspection officers. All five importing officers were interviewed by Director Hewson. They were all respondents in the fact finding and were disciplined.

[130] Officer MF was the primary inspection officer on the NEXUS line when the group of three officers returned to port with five flats of beer each. She was interviewed first as a witness, then re-interviewed as a respondent. The fact-finding report for Officer MF states that only one NEXUS card was read by the automatic reader and that she did not manually scan those of the other two occupants. She entered her decision to release into the IPIL system. Director Hewson found that she had shown a lack of accountability and had violated the *Code of Conduct, Part B. Accountability and Professional Conduct*.

[131] Officer LN was the primary inspection officer for WM, the fourth officer the grievor allowed to leave on his 6:00 p.m. meal break, and for RT, a fifth officer who went after his shift and, therefore, did not require permission. Unlike Officer MF, Officer LN was interviewed only once, as a witness. He was not re-interviewed as a respondent.

[132] The fact-finding report for Officer LN states that he not only failed to refer Officer RT in to pay duty and taxes on four flats of beer but also failed to obtain any identification or receipts. He did not gather any of the information required to release or refer Officer RT and he put nothing into the IPIL system. Director Hewson found that Officer LN had violated the *Code of Conduct, Part B. Accountability and Professional Conduct* because:

> *[LN] did not scan or capture [RT]'s identification data into IPIL as per CBSA policy and guidelines. As a result no release or refer decision was captured by the IPIL system.*

[133] However, Officer LN also failed to refer Officer WM in to pay on his five flats and two bottles. Officer WM went in to pay on his own accord, but for this one-person, same day crossing, Officer LN entered data into the IPIL system to the effect that two travelers had returned after 48 hours in the United States. Officer LN had no explanation for inputting incorrect data into the system. He said only that he did not remember the day in question at all, but that he would not input incorrect data into IPIL on purpose.

[134] Director Hewson's fact-finding report states the following:

> *This analysis is based on statements provided by [LN] during the fact-finding interview and the review of information that reveals that [LN] input incorrect information into IPIL regarding [WM]'s absence from Canada on July 22, 2015.*
>
> …
>
> *[LN] input incorrect data into IPIL based on the known traveller history of [WM] on July 22, 2015 and CCTV video footage. Based on the above analysis and weighing the information gathered, BSO [LN] did not violate the Code of Conduct – B. Accountability and Professional Conduct. This allegation is* ***unfounded****.*
>
> [Emphasis in the original]

[135] Director Hewson could not credibly explain how he concluded that Officer LN had not violated the *Code of Conduct* when he recorded a two-day stay for two travellers for his co-worker's 41-minute beer run across the border. Nor could he explain why the conduct of each of the two primary inspection officers was treated differently. Although Officer MF did not do everything by the book, she at least entered information into the system that a release decision had been made. Officer LN left no trace at all of Officer RT's crossing and entered incorrect information in respect of Officer WM's crossing.

[136] On the face of Director Hewson's fact-finding reports, it seems evident that LN's conduct was rather more serious than Officer MF's, yet he remained a witness, not a respondent. The only explanation for this is found in the rather cryptic line in the fact-finding report that:

> *[LN] did not recall any other officers importing beer or officers doing a "beer run" that day. As a result he was not re-interviewed based on his answers in the first interview.*

[137] One can only wonder why Officer LN's lack of knowledge about the earlier group would exonerate him from being a respondent based on his own conduct processing the two officers who went down later. The comment does align, however, with the employer's general approach to these incidents which placed great emphasis on the grievor's responsibility for the actions of the group of three, but showed no interest in holding him responsible for the actions of the primary inspection officers or for the actions of Officer WM.

[138] One can also only wonder why the most serious allegation against Officer LN was inexplicably determined to be unfounded. Director Hewson was asked on cross examination if he had told Officer LN "don't worry I'll take care of you." Director Hewson agreed that he did indeed say this to Officer LN, however, he said he could not remember the context. I asked him to confirm this answer. He confirmed that he had said this to Officer LN and commented that he did not see any issue with telling the officer this.

[139] Neither of the primary inspection officers was suspended. Director Hewson's testimony was somewhat vague on the issue, but he suggested that they may have received other discipline or counselling. No explanation was given for treating the

actions of each of the two primary inspection officers so differently, or for treating both of them differently from the importing officers.

9. Different treatment of employees - the beer receivers

[140] The employer alleged that the grievor should have paid on his two flats and should have ensured that the other beer receivers did so too. Director Hewson expressed this view in both his testimony and his fact-finding report. However, any notion of their responsibility to pay arises only in the context of stating that the grievor should have ensured that they did. They seem to have had no individual responsibility apart from the allegation against the grievor. Director Hewson's fact-finding report had only this to say about the beer receivers:

> *Smith should have ensured he paid on the beer he ordered and he also should have ensured that the officers who imported or* ***received the beer*** *should have paid the applicable duty and taxes on the beer.*
>
> [Emphasis added]

[141] However, the entire investigation, which ultimately ran from July 2015 through February 2016 ignored the beer receivers. The evidence did not indicate that they were investigated in any way. They were not interviewed, not even as witnesses. They were not disciplined or even counselled. One of them, Director Hewson's neighbour, was not even identified.

[142] Asked if he had known that his neighbour was the third officer who received beer but was not named in the fact-finding interviews as the others were, Director Hewson simply replied that "no one told him that." Nor did he ask, apparently. There was no explanation for his failure to make any inquiry at all as to this officer's identity.

[143] Nor was there any explanation for the employer's general lack of interest in the beer receivers, except in the context of faulting the grievor for not having ensured that they paid or in the context of faulting the grievor himself, as a beer receiver.

10. Conclusion re beer run investigation

[144] The investigation/fact-finding carried out in this matter was characterized by multiple breaches of procedural fairness and by apparent bias, none of which was credibly explained by the employer. As well, Director Hewson's testimony was marked by an extraordinary lack of credibility. Wherever his testimony differed from that of

A/Chief St. Onge, which it frequently did, I prefer and rely upon her honest and principled testimony.

11. Statement from Coutts Border Services Officers

[145] Forty-nine officers signed a statement dated October 6, 2016, just prior to the grievor receiving his suspension letter. No witness attended the hearing to speak to this statement, however, its contents are relevant and are quite consistent with the testimony heard and the other documentary evidence considered in this matter. It is reproduced, in full, below:

> *2016-10-06*
>
> *To whom it may concern,*
>
> *As Officers of Canada Border Services Agency at the Coutts Port of Entry we have been under a great deal of pressure over the years as a result of fluctuating traveller volumes, decreasing staffing numbers, constantly changing priorities, and now unjust disciplinary actions. Officers were briefed and counselled to support Southern Alberta District Key Priorities beginning in 2010 to 2016. During this time, we have attended briefings, received emails, and had conversations with Superintendents, Chiefs, and Director Hewson instructing us to focus on the key enforcement priorities and not duty and tax collection. We fully supported these priorities by reducing the collection of duties and taxes in order to focus our efforts on high risk enforcement activities and expediting traveller processing times.*
>
> *At no time prior to March 2016 were Officers advised that their discretion levels are solely limited to R17-1-3, which states CBSA officers are required to collect duty and taxes on casual goods when the amount owed is $3 or more unless advised specifically by a Superintendent that the wave through threshold has been raised. Officers regularly used their own discretion based on traffic volumes, enforcement activities, and staffing numbers when they were not collecting duties and taxes at the $3 level. The Director and various Chiefs condoned this process and the Superintendents were expected to promote and cultivate the philosophy within the Officer ranks. Furthermore, management has never instructed Officers to process employees differently than the travelling public. As a result of the recent changes, we have repeatedly asked management if the wave through thresholds apply to off-duty employees and have still not received an answer from senior management.*
>
> *We believe our senior management has grossly mismanaged the wave through threshold policy as they provided inconsistent information and neglected to provide any clear direction or expectations to employees. We have abided by and continue to abide by the instructions given to us by our management and we*

> *strongly feel that we or our coworkers should not be subjected to malicious disciplinary measures as a result of mismanagement.*
>
> *Sincerely,*
>
> *Coutts Border Services Officers*

IV. The port runner incident

[146] On November 12, 2015, an unidentified driver with U.S. license plates passed through a primary inspection line without stopping. Two inexperienced BSOs grabbed the keys that management had hung near the door of the office for this purpose, jumped in the vehicle known as the "chase" or the "designated port runner" vehicle and gave chase. All of this was in line with policy and practice at the port; they did what they were supposed to do. However, they continued to chase the port runner beyond the boundary of the port which was against policy. One of the officers had been at Coutts POE less than a year; the other had started there only a few weeks before.

[147] The grievor was the superintendent on shift. His suspension letter stated that his misconduct was failing to direct the officers back to port. That is what the fact finding report said, as well. However, at the hearing it became clear that the allegation was failing to direct them back "at the first opportunity." That, in my view, is quite a different allegation. Inexplicably, in closing argument, the allegation reverted to simply failing to direct them back.

[148] The actual vehicle pursuit was of very short duration, likely under one minute. The exact distance the BSOs pursued the runner is unknown, but the evidence indicates that it was perhaps 1 km. The turn-off to a commercial vehicle weigh station is about 1.3 kms up the highway. One of the officers thought the weigh station marked the limit of how far they could go, and, therefore, they stopped the chase before reaching it.

[149] After ending the chase, they slowed down and continued driving, looking for a place to turn around on the highway. They missed one turn off and before finding another they spotted the port runner vehicle. It had stopped up ahead on the side of the road near the train tracks, about three kms from the port. They pulled up a car length behind but did not exit the vehicle. The only contact occurred when the port

runner started to get out. One of the officers opened his door, leaned out, and shouted to the port runner to stay in the vehicle.

[150] The grievor was in radio contact with the officers and had understood that they had stopped the chase and were on their way back. However, they then advised him that they had come upon the port runner on the side of the road and were parked behind him. Static was coming through the radio and communication was difficult. In the heat of the moment, the grievor decided to leave the port to find the officers, ensure their safety and direct them back. An experienced BSO, Officer JP, was also concerned for her co-worker's safety and volunteered to assist. The grievor and Officer JP went to retrieve the junior officers.

[151] On reaching them the grievor pulled up beside their vehicle and told them through the passenger window that they had gone too far. As it was not safe to be parked side by side on the highway, he then pulled behind their vehicle and got out to speak with them. The grievor asked the officers what had happened and if they had had any contact with the port runner, who was now sitting in his vehicle with his hands up. They advised that except for shouting at him once to stay in his car, they had had no contact and had not exited their vehicle. The grievor then directed them to return to the port and they all left before the RCMP arrived. Video footage shows that the grievor was back within 10 minutes. The BSOs had been out of the port for 15 minutes.

[152] The employer states that the grievor had been a superintendent for one year and had acted in the position for various periods between 2011 and 2014, five to six months in total. Therefore, he should have been aware of the clear prohibition against pursuing vehicles beyond the port. He had admitted lacking knowledge of his role and responsibility in this particular situation and unfamiliarity with the rules or policies is not an excuse. The onus was on the grievor to be aware of important documents governing his conduct at work, especially given his seven years of service and his management position.

[153] It is not clear why the employer would argue this as the grievor never said that he was unaware of the policy. To the contrary, he knew that officers were not to chase port runners beyond the boundary. It is exactly what he told Officer JP before they left

the port, it was the first thing he told the BSOs when he pulled up beside them on the highway and he said it again in his fact-finding interview.

[154] However, the policies only say that this should not happen; they say nothing about what a superintendent should do if it does happen. Both A/Chief St. Onge and Director Hewson confirmed that there was no policy, protocol, guidance or training to guide a superintendent in this kind of situation. Port runner occurrences are not frequent. The grievor had been a superintendent for only one year and this was his first experience with a port runner. It was also his first experience with junior officers engaging in a vehicle pursuit beyond the boundary.

[155] The grievor fully and openly acknowledged that he did not immediately know what to do in the first few minutes of an unfamiliar, fast moving situation, in which he was also faced with difficult, intermittent radio communication. He did his best to respond to the situation. The employer recognized this and did not challenge the fact that he had acted entirely in good faith and did nothing with ill intentions.

A. The port runner policies

[156] Clause 2.4.1 of the CBSA *Standard Operating Procedures on the Use of Force and Reporting* (“*Operating Procedures*”) states in part:

> *2.4.1 Officers are **not expected to** stop persons fleeing to or from Canada in high-risk situations (e.g. to establish roadblocks to stop port runners or to participate in vehicle pursuits). Such situations, or those similar in nature, will remain the responsibility of the police. The Agency **must ensure** the safety of employees and the public in the area.*
>
> [Emphasis added]

[157] The 2014 *Prairie Region Port Runner Protocol* was sent by RDG Scoville to Prairie Region management staff on June 27, 2014 and was forwarded to all staff at Coutts. Under the subtitle "Immediate procedures" the protocol states:

> ***Make attempts to prevent the vehicle and occupants from exiting our area** within our capabilities, policies and legislation - **do not pursue** the vehicle and occupants **beyond the POE.***
>
> [Emphasis added]

[158] The employer argued that its policies were clear, however, the *Operating Procedures* state that officers are “not expected” to stop persons fleeing to Canada;

they do not explicitly prohibit them from doing so. One can easily imagine an ambitious and enforcement-minded officer wanting to do more than what is "expected." Typically, it is a good thing to distinguish oneself by going beyond expectations in an employment setting.

[159] The *Prairie Region Protocol* more clearly states that officers are to "make attempts" which include pursuit, but that they are not to pursue beyond the POE.

[160] That the policies were not clear is further illustrated by the employer's post-port-runner-incident attempt to change or clarify them. As with the duty and taxes policy, the evidence showed that officers and superintendents continued to ask for clarification of the port runner policy after the event. Director Hewson could not pinpoint the change or clarification that he testified had been made. The evidence was not clear but it appears that, ultimately, the original policy was reinstated.

[161] Director Hewson further alleged that the grievor had violated the 2012 Operational Bulletin PRG-2012-46 (*Unmanned Border*) entitled *Patrolling Between the CBSA Ports of Entry (POEs) and Reporting Sites* which states, in part:

> *The purpose of this Operational Bulletin is to remind Border Services Officers (BSOs) that they are not to patrol, approach or pursue any person or conveyance found* ***along the unmanned border between the CBSA POEs*** *and reporting sites. These types of activities are not in line with the Agency's policy and may pose safety hazards, risks and liabilities. Accordingly, these types of activities* ***are not permitted****.*
>
> [Emphasis added]

[162] This policy had never been mentioned prior to the hearing and was not listed in the discipline letter as a policy that had been violated. Director Hewson agreed on cross examination that it does not relate to port runners, but rather to people who cross between ports of entry, commonly referred to as "border jumpers." Nevertheless, even in closing argument the employer continued to allege that the grievor had violated the non-applicable border jumper policy.

[163] The employer alleged that the grievor had breached all of these policies by failing to call the BSOs back to port immediately, over the radio. It said that he had failed to consider the very serious health and safety risks inherent in the incident. It referred to the following passages in the *Code of Conduct*:

> *"…ethical leadership entails, amongst other things, taking into consideration our own health, safety and security and that of our colleagues," "As professionals, employees are expected to carry out and follow applicable policies" and "An action or inaction that is not in keeping with the Code may entail disciplinary action".*

B. The port runner incident fact-finding

[164] The same questions arise with this incident, that is, why A/Chief St. Onge was not consulted about the need for a fact-finding and why she did not conduct it. It was obvious in her initial correspondence to upper management that she did not see such a need. Nor did District Director Hewson indicate, in his report of the incident, that he thought this was required. However, he was not consulted either. As with the beer run incident, the decision to have a fact finding came from upper management. And, the grievor's manager was not allowed to conduct it, despite that being a clear policy requirement.

[165] Nor was Director Hewson tasked with the fact finding this time. He testified that he was specifically told right at the beginning that it was not his file and he was directed to do nothing. (He had initially been told that in respect of the beer run, as well, but had subsequently been assigned to complete the fact-finding). However, the initial direction to do nothing did not change this time.

[166] Superintendent Fogarty testified that Michael Shoobert asked him to conduct the fact finding about a week after the incident. He submitted his report, and the notes on which it was based, directly to Mr. Shoobert.

[167] I note, in passing, that under the heading *What is essential for a Fact Finding?* the *Reference Guide* states that:

> *Any indication of a misconduct allegation being contracted out (or assigned to a manager from another district) for management fact finding or investigation is an indication of a possible disconnect in the system and Professional Standards Investigation (PSI) must be consulted immediately.*

1. The fact finder's credentials

[168] The employer presented Superintendent Fogarty as an officer with specialized expertise in administrative investigations. He testified in the same vein and also said

that he had specialized training in this area. However, on cross examination he could not specify any such training at all. Ultimately, he responded that:

> *I would assume some time back when I was a superintendent I would have had administrative investigations training, no official training course, it would have been similar to what you have received as a BSO, interviewing techniques, training is what we learn as officers and superintendents to get the job done.*

[169] To the question "did you receive a specific training course?" Superintendent Fogarty eventually answered: "No, not that I recall."

[170] I note Superintendent Fogarty's testimony in this regard as it goes to credibility and because his expertise was highly vaunted not only in the employer's opening statement, but even in closing argument, after the evidence had revealed an inadequate investigation and a notable disregard for procedural fairness.

[171] Superintendent Fogarty initially agreed that he was required to abide by all CBSA policies and procedures to conduct his fact-finding. He confirmed that he had access to the same policies and reference guides that Director Hewson had acknowledged. However, when questioned more specifically about how he had conducted the fact-finding, his responses revealed that he was unfamiliar with the contents of the policies and guides and that he had not followed them in many respects. He admitted that he had not reviewed the policies prior to conducting the fact-finding but just knew that they were there.

[172] When questioned as to why he did not follow the procedures set out in the *Reference Guide* or the *Job Aid*, both of which specifically relate to fact findings, Superintendent Fogarty ultimately suggested that they related to professional standards, that he was not a professional standards investigator, and that, therefore, they did not apply to him and he did not have to follow them.

2. Delay starting the fact finding

[173] Asked why the fact finding had not been completed, or even started within the required 10 days, Superintendent Fogarty vaguely suggested that "people were busy doing reviews" and that "it was over the Christmas period." Asked if he thought that the information he gathered was accurate given the delay, he stated that it was 100

percent accurate because it was provided by officers involved in a chase and that they would have remembered everything.

3. Failure to gather all relevant information

[174] Asked if any of the officers had taken notes of the incident, Superintendent Fogarty replied that he had no idea. The fact finding report reveals that Officer TK volunteered the information that the first thing he did upon returning to port was to make notes of the incident in his notebook. Superintendent Fogarty did not follow up or ask to see these notes.

[175] Nor did he ask Director Hewson for information or discuss the details of the case with him. He did not speak to A/Chief St. Onge at all. Although neither had witnessed the event, the grievor had called both of them immediately after the incident to report it. As well, both of them could have provided a good deal of information as to how port runners were dealt with at the port and about the use of the chase vehicle.

[176] Although Director Hewson testified that he was ordered to do nothing, the evidence revealed that he made three "information requests" and had received three reports on the incident. However, Superintendent Fogarty failed to ascertain if there were any existing reports and Director Hewson inexplicably failed to pass them on. As a result, the fact-finder was entirely unaware that Director Hewson had received reports from Officers CV and JP, as well as from the grievor, and never saw them.

[177] Officer JP's report was dated December 23, 2015. She reported that she saw the port runner run the primary inspection booth. She saw Officer TK run out the door. She ran to the primary inspection booth to get the license plate details and she either called the RCMP or directed someone to do it. She was in contact with the grievor at the port after he spoke with the officers on the radio. She was engaged in the incident and volunteered to go with the grievor to retrieve the junior officers. This is an excerpt from her report:

> *Supt. SMITH was walking towards the door behind me at the immigration counter. He was wearing a coat and had keys in his hand. I asked him what he was doing. SMITH replied that the guys [TK] and [CV] had gone too far and that he was going to get them. As I had watched the behaviour of the vehicle in question I had a concern for the safety of my fellow officers, and asked SMITH if he would like assistance. SMITH replied yes.*

[178] On the way to retrieve the officers, the grievor and Officer JP discussed the situation and what should be done. On reaching them, the grievor pulled up beside them and spoke across Officer JP who was in the passenger seat to tell them they had gone too far. Officer JP was there when the grievor asked the officers what had happened and when he directed them back to port.

[179] In short, this witness had the most complete information available about the grievor's role in the incident, from start to finish, about events in the port office and on the highway. She could have provided all of this information had she been asked. Yet, Director Hewson did not give her report to the fact-finder. And Superintendent Fogarty, although aware of her role in the incident (he names her in his fact-finding report) did not interview her.

4. Grievor's right to know the case against him

[180] On December 20, 2015, Director Hewson asked the grievor for information about the port runner incident. He did not advise him that there was any allegation against him or that the information was requested in the context of a fact finding.

[181] About two and a half months after the incident, Mr. Fogarty sent the grievor an undated notice advising for the first time that this was a fact finding and scheduling his interview for February 1, 2016. The notice states:

> *I have been requested to conduct an administrative investigation regarding* ***the use of government vehicle*** *at the Coutts port of entry on November 12, 2015 and* ***potential Code of Conduct violations.***
>
> [Emphasis added] [*Sic* throughout]

[182] The reason for the interview was vaguely worded referring to the "use of government vehicle" and "potential *Code of Conduct* violations." It says nothing about failing to direct the officers back to port. It says nothing about any allegation against the grievor. It does not say that he is a respondent. I find that the vagueness was deliberate given this sentence:

> *We will discuss the specific details at that point in time when we sit down to conduct the interview.*

[183] It goes on to advise that the interview can be conducted "on a 1-on-1 basis" or that the grievor may have an observer, subject to approval. There is no mention that William Paolini, Regional Security Manager, Prairie Region would be present as well.

[184] The notice does not say who requested Superintendent Fogarty to conduct the investigation and the notice is simply signed 'Michael Fogarty, Superintendent, Canada Border Services Agency, Regina, Saskatchewan. Signing the interview notice with only his rank and no further information would, in my view, suggest to any superintendent that they were to be interviewed as a witness, regarding BSO misconduct.

[185] Not only does the notice fail to say that the grievor will be interviewed as a respondent, I find that he was not, in fact, interviewed as a respondent.

[186] The fact finding report itself specifically identifies him only as a witness and states that the purpose of the fact finding was: *"to determine all relevant facts with respect to the allegations of misconduct of [BSO TK and BSO CV] and to establish a factual documented base upon which decisions can be made by Management concerning these events."* The allegations were that "*on November 12, 2015, [BSO CV and BSO TK] violated the Agency Code of Conduct and Values and Ethics Code for the Public Service by being in a pursuit of a port runner vehicle off Canada Border Services Agency property in a government vehicle*." The grievor is not mentioned.

[187] Superintendent Fogarty agreed that the fact finding was framed to look solely at the conduct of the two officers, but that in the end it dealt with the grievor as well. He acknowledged that although the grievor was only a witness, that findings had been made against him in the conclusion of the fact-finding report. He did not seem to register that there was any procedural unfairness with that kind of approach to fact finding.

[188] The *Fact Finding Reference Guide* states:

> *A fact finding is not a fishing expedition; a scope of inquiry must be established and the manager responsible for conducting the fact finding must stick with it. Any allegations that are raised which are outside of the scope of the fact finding must be notated and may be followed up separately by another fact finding or investigation.*

[189] There was no indication in Director Hewson's December "request for information" or in the notice of the fact finding interview, or even in the fact finding report itself, that there was ever any allegation against the grievor. There was no evidence that the grievor was a respondent in this matter until he was advised that he would be disciplined.

[190] Conducting a fair fact finding means ensuring that the respondent knows he is a respondent and knows the specific allegation(s) he is required to answer. This is not only CBSA policy it is a fundamental principle of natural justice.

5. Fact finding interview notes

[191] Superintendent Fogarty said that to write his report he relied on notes that someone took for him during the fact finding interviews. He could not recall who this person was. He testified that he had submitted the notes to the employer with his report and did not know why they could not be located. The employer gave no explanation for its inability to produce the notes.

[192] As with Director Hewson's fact-finding process, the interviewees were asked to sign their assent to the accuracy of the notes taken. However, the notes did not include any of the questions asked, only the answers given. There was no explanation for this odd and unfair process.

[193] Notwithstanding that some of the answers were simply 'yes' or 'no', Superintendent Fogarty was adamant that he could recall each of the questions he asked. It was unnecessary to write them down. This was surprising testimony given that he could not remember the note-taker with whom he conducted the interviews.

[194] More surprising, and disturbing, was that Superintendent Fogarty's concern was only with his own ability to remember the questions. The grievor's entitlement to see them so that he could know what he was being asked to sign, was not considered.

6. Radio Communication

[195] The grievor had indicated in his initial November 12, 2015 Significant Event Notification ("SEN") report, in his December 20, 2015 response to Director Hewson's request for information, and in his fact finding interview that the radios were not working properly, that static was coming through and that communication was difficult. Superintendent Fogarty testified that the BSOs never said anything about

radio issues; that they seemed to know the whole time what was going on at the POE. However, the notes taken of the fact-finding interviews (obtained through an ATIP request) indicate otherwise, as follows:

> *"Couldn't hear them on the radio" (grievor interview)*
> *"Radio was static after leaving the port" (BSO CV interview)*
> *"Radio with POE was crackly" (BSO TK interview).*

[196] Superintendent Fogarty agreed that he did not test the radios or make any other inquiries as to how they were working that night, even though he was assigned to conduct the fact finding within a week of the incident. He did not try to ascertain if there had been any witnesses in the office who might have overheard the radio conversation.

[197] He failed to interview Officer JP who had been in the vicinity, was paying close attention, was engaged in what was going on and who may well have overheard the radio conversation. Certainly, she spoke to the grievor immediately afterwards, according to her report, and was concerned about the safety of her co-workers. It seems rather likely that she might have had some information to provide about how well the radios were working.

[198] Without making inquiries of Officer JP or anyone else, Superintendent Fogarty simply concluded that the radios had been working fine because the grievor had been able to hear that the officers had stopped near the train tracks. He did not write this in his report but was very clear in his testimony that he simply did not believe that the radios had not been working.

[199] In my view it was not appropriate for the fact-finder to conclude that the grievor was being untruthful about the radios, without making any further inquiry. His testimony that the officers had not mentioned this was incorrect – they both had. As for the grievor managing to hear that the officers were near the train tracks, he did not say that the radios were not working at all, just that communication was intermittent and difficult. It was a factor that led him to go find the officers once he heard that they were no longer looking to turn around but were now up near the tracks, parked behind the port runner vehicle.

[200] Further, the grievor was as transparent as one could possibly be about this whole episode. He held nothing back including his own failure to know exactly what he should have done. Transparency and honest self-assessment should not be met with baseless suspicion and accusations of dishonesty. That it was, suggests a lack of neutrality on the part of the fact finder.

7. Speaking briefly with the officers – another delay?

[201] Superintendent Fogarty found that the grievor did not immediately instruct the BSOs to return to the port even when he reached them near the train tracks. He wrote that ***"even then there was a delay.***" This was based on the grievor briefly discussing the matter with Officer JP and speaking briefly to the officers to ask them what had happened and if they had had any contact with the runner, before directing them back.

[202] The latter conversation was estimated to have lasted 15-20 seconds. The grievors and the officers related the same two questions asked and answered. The very brief duration of the conversation was not challenged. Had there been any doubt as to how long either conversation had lasted, Officer JP could have been asked for her estimate, but she was not.

[203] To characterize these exceedingly brief discussions as another "delay" is, in my view, another indicator of the fact finder's lack of neutrality. Worse, it was repeated in the employer's closing argument as follows:

> *'Mr. Smith then left the workplace and drove out to the spot near the train tracks roughly three kilometres from the port and pulled up behind the BSO's vehicle.* ***Even at this point in time*** *Mr. Smith did not immediately instruct the BSO's to return to the CBSA compound."*
>
> [Emphasis added] [*Sic* throughout]

[204] Of course, the grievor spoke briefly to the officers before directing them back. What would the employer have him do? Drive by and yell at them out the window to return to port without asking any questions at all to determine the situation? If the officers had had contact with the runner, they might have had crucial information to convey. They might have determined that he was impaired or experiencing mental health issues. Or that he was armed and dangerous. RCMP officers were already on their way to what might have been a dangerous encounter. The grievor can hardly be

faulted for trying to ascertain whether the officers had any critical information to provide that might have saved lives.

[205] The fourth item under *Immediate Procedures* in the *Port Runner Protocol, Prairie Region* checklist is:

> ***Call placed to RCMP or local police of jurisdiction … with the following information. If the specific information is not known at the time of the original call, please ensure that you update the RCMP/local police as the information becomes available:***
>
> - *Vehicle license plate*
> - *Vehicle description (colour, make, model)*
> - *Occupant names*
> - *Occupant description*
> - *Direction of travel*
> - *Known or believed or suspected Cautions*
> - *Foreign Nationals or Canadian Citizens*
> - *If you feel that what you observed during the port run through is elevating your risk assessment, please ensure that those details are relayed; ie high rate of speed, cutting in front of other vehicles in order to cross, etc.*
> - ***Inform dispatch to place a BOLO through CPIC to (insert location) detachments.***
>
> [Emphasis in the original]

8. Viewing recorded video footage contrary to policy

[206] Superintendent Fogarty viewed the video recordings of the port runner incident. Like Director Hewson, he was aware of the *AV Policy* that allows the viewing of recorded video footage only in cases of serious misconduct and only if formal allegations have been made. He agreed on cross examination that the policies specifically define a fact finding as not being a formal investigation. He further agreed that the port runner incident did not fall within the specific categories defined as serious misconduct. However, he said it was serious misconduct because it fell under the first line, that serious misconduct only "includes but is not limited to" the categories listed.

[207] I find that viewing the video footage was contrary to policy. As explained later in this decision, however, Superintendent Fogarty was not the only one to breach this

policy. Mr. Shoobert sent the footage to the Security and Professional Standards Analysis section where an analyst viewed and analyzed it. Director Hewson and Mr. Paolini viewed the video and RDG Scoville intended to; whether he actually did so was not in evidence. In short, a number of people either viewed the video or read and relied upon the analysis of it prepared by the analyst.

9. No flashing lights on grievor's port vehicle

[208] Superintendent Fogarty could not say why his report said that the vehicle driven by the grievor had turned on its flashing lights, given that there were no such lights on that vehicle. Asked if he might have reported that because the Regional Security Manager, Mr. Paolini, had said this in an email to RDG Scoville, Superintendent Fogarty responded with surprising defensiveness that "he had viewed the video himself, he had never met Mr. Paolini, had no idea who he was, what he did, or what he even looked like."

[209] Director Hewson testified that Mr. Paolini and Superintendent Fogarty conducted the interviews together and he did not know why Superintendent Fogarty would deny knowing or ever meeting him. Superintendent Fogarty had been retired for three years by the time of the hearing and the employer argued that he had simply forgotten Mr. Paolini's name. That explanation would be entirely understandable in most circumstances, but it sheds little light on the vociferous denial of having any idea who he was, what he did, or what he even looked like.

[210] Director Hewson testified that he had put the emergency lights on the designated port runner vehicle. He further testified that there had been "confusion" in the video analysis which stated that the truck the grievor drove **may** also have turned on flashing lights. He confirmed that he had corrected this misinformation and had advised that there were no such lights on that vehicle.

[211] However, it appears that while Director Hewson told Mr. Paolini that there were no flashing lights on the truck the grievor drove, neither of them told Superintendent Fogarty. Therefore, the misinformation was repeated in the fact-finding report that not only the port runner vehicle, but also the vehicle driven by the grievor was flashing (non-existent) emergency lights.

10. Fact finder's bias

[212] Mr. Fogarty's fact finding, in my view, was inadequate and did not meet the principles of natural justice. His testimony also raised credibility concerns. His conduct on the witness stand was that of a hostile and defensive interested party. He was non-responsive to legitimate questions. Perhaps most telling was his response when asked if he thought his fact-finding indicated a need for policy and procedural changes or training. His answer was a firm "no."

[213] These were some of Superintendent Fogarty's findings:

> *Both BSOs are newer to the CBSA work environment and **acted in a fashion that showed their lack of experience and understanding** of the legal and CBSA policies related to pursuit of vehicles.*
>
> *It appears from the interviews that **the BSOs did not understand** the proper use of the 'high risk vehicle' which appears to be commonly known as the 'chase' or 'designated port runner vehicle, and **led them to believe** this was the intended purpose of the CBSA vehicle. This leads me to believe that **his understanding would be** that this vehicle's intended purpose was used to pursue port runners.*
>
> *I believe that both [BSO CV and BSO TK] made an **error in judgment due to inexperience and understanding of their roles and responsibilities**. Superintendent SMITH was also **unsure of the proper actions that should be taken** when such an event happens.*
>
> [Emphasis added] [*Sic* throughout]

[214] No objective consideration of these findings could conclude that they indicate no need for policy or procedural changes, or for training. This answer was not credible and revealed the fact finder's bias.

C. Employer's punitive approach to the incident

[215] From the way the fact finding was framed regarding "use of a government vehicle," and from RDG Scoville's initial emails, it would seem that his main concern with the incident was learning that the port had a "designated port runner" vehicle. It is not clear why that concern morphed into questions about the grievor's conduct and RDG Scoville did not testify. Therefore, we are left with only his email correspondence which strongly suggests that it was Mr. Paolini's mistaken reference to flashing lights

on the grievor's vehicle that caused the regional director general to set his sights on the grievor.

[216] The grievor submitted a comprehensive SEN report on November 12, 2015, two hours after the event, at 8:50 p.m.. He sent an update the next morning at 8:00 a.m. having heard from the RCMP that the port runner had been assessed for mental health issues and had been safely returned to the United States. The RCMP considered the event closed. The grievor's emails gave fulsome reports of everything that had occurred during the incident and in its aftermath. On receiving the grievor's SEN report the night of the incident, RDG Scoville asked Director Hewson and A/Chief St. Onge for their thoughts. Director Hewson responded as follows:

> *Just got an update … Realized they were outside the POE and stopped. They thought they could go as far as the weigh scale. Took the next turn off to return and saw the vehicle. Supt had a hard time communicating with our radios and drove up to tell them to return. No contact made with the client. Police called and intervened.*

[217] Although asked for their thoughts, neither the district director nor the acting chief raised any issue with the incident. Director Hewson merely summarized the facts of the events.

[218] The following evening, November 13, 2015, RDG Scoville responded to the grievor's SEN and update. He asked no questions and raised no concern about the conduct of the grievor or the officers involved, but simply inquired as follows:

> *"One question on this file – what does it mean … 'designated port runner' vehicle??"*

[219] The grievor responded the same evening and advised how the vehicle was used, among other things, to get the attention of port runners before they leave the area. He explained that it was parked in front of the office so that officers could quickly jump in and signal the driver with its emergency lights. The grievor noted that it had been largely effective in the past, most port runners stopped before leaving the area. However, the events of the previous evening had been the exception - the runner had continued. The newer officers had not experienced this before and went a bit too far before realizing they should stop. The grievor concluded that: "Staff are being

reminded about our port runner policies in briefings so hopefully we don't have any confusion moving forward."

[220] A/Chief St. Onge testified that she thought that was the end of the matter. The evidence reveals nothing further until a week later.

[221] However, on Friday, November 20th at 12:52 p.m. RDG Scoville received an email from Mr. Paolini that contained some apparently interesting, albeit incorrect information:

> *Hi Kim*
>
> *I have the video from Coutts for the run through of November 12, 2015. It was an obvious run through as seen from two different cameras at 6:37:30 PM.*
>
> ***The last video is the most interesting** and is from the traffic lot. The camera is facing north. This video shows two BSOs entering a port van vehicle and proceeding north giving chase at 6:37:47 PM with lights flashing. At 6:42:25 PM, a CBSA port truck leaves the parking lot proceeding northbound. **The lights start flashing at the turn onto the highway.** Both vehicles return to the port at 6:52.33 PM. (redacted) officers were also in the pickup truck.*
>
> *Would you like to review?*
>
> [Emphasis added]

[222] At 3:39 p.m. RDG Scoville forwarded Mr. Paolini's email to Director Hewson with the message: "You obviously have more issues to address." Director Hewson immediately forwarded this to A/Chief St. Onge with an "FYI." At 4:45 p.m. A/Chief St. Onge received her own message from RDG Scoville forwarding Mr. Paolini's email with the comment: "A little different than what is articulated in your email."

[223] At 4:39 p.m. RDG Scoville responded to Mr. Paolini's question as to whether he would like to review the video. He responded with one exclamatory word: "Yes!!"

[224] I note that the only new information (that the regional director general had not had for a week) contained in Mr. Paolini's email, was the (incorrect) description of the grievor's vehicle flashing lights at the turn onto the highway. Given that, I draw the inference that it was this nugget of information that Mr. Paolini found "most interesting" and that caused RDG Scoville to respond with enthusiasm about reviewing the video. At 5:50 p.m. RDG Scoville asked Mr. Paolini to leave the video on his desk so he could review it and Mr. Paolini replied one minute later: "No problem."

[225] While these email exchanges were taking place, RDG Scoville was also engaged in other email conversations, primarily expressing his displeasure at discovering that Coutts had a "chase" vehicle. At 3:44 pm, he responded to the grievor's explanation about the use of this vehicle which had been sent a week earlier on November 13, 2015. A/Chief St. Onge and Director Hewson were copied:

> *So here is some clear direction from me…on this matter. Under no circumstances are officers to get into that vehicle and chase, follow, take after or pursue any vehicle that has ran the port.*
>
> *That becomes an issue for the police of jurisdiction.*
>
> *In reading this…I find it hard to believe that two officers would jump in a car…and turn the lights on as a deterrent.*
>
> *The vehicle that ran the POE would be gone by then.*
>
> *Shift briefing need to be held to make this crystal clear to everyone…including management.*
>
> [*Sic* throughout]

[226] At 4:48 p.m. RDG Scoville emailed A/Chief St. Onge and the grievor, with a copy to Director Hewson, as follows:

> *I don't care where it is parked…or that it is used for POE business.*
>
> *I want clearly understood that under no circumstances are they to chase, follow, pursue a port runner.*
>
> *That is clearly the responsibility of the police of jurisdiction.*
>
> *I don't buy that two officers would be able to get to that vehicle*
>
> *…hit the lights and deter a port runner. A port runner would be gone.*
>
> *That is when the police of jurisdiction are to be engaged.*
>
> [*Sic* throughout]

[227] A/Chief St. Onge responded, confirming what the grievor had explained about the use of the vehicle at Coutts, as follows:

> *The port vehicle is used for a number of reasons such as driving to the compound where seized vehicles/property are stored as well as directing travellers back to the main office who have driven past the PIL booth but are still on CBSA property. Officers do not drive off of the CBSA property with this vehicle. The farthest they drive is to the end of the CBSA property (up by the compound). On this one occasion an error was made and the officers drove off the CBSA property.*

[228] The acting chief assured RDG Scoville that:

> *We have corrected the officers and immediately made this a shift briefing topic to remind officers of their authority. They are aware they cannot chase, follow, take after or pursue any vehicle that has left the CBSA property. Using this vehicle only on CBSA property has reduced the number of times a vehicle actually leaves the CBSA property and the potential for a traveller to receive a running the port penalty. Waiting for a RCMP response when the traveller is still on CBSA property could potentially cause travellers who have stopped on CBSA property to continue on into Canada.*

[229] All of the concern expressed by upper management focussed on the existence and use of the designated port runner vehicle. None of it raised any issue with the grievor's conduct. The apparent interest of both RDG Scoville and Mr. Paolini in the possibility that lights were flashing on the grievor's vehicle was the only concern raised that may, in their view, have related to the grievor. The fact that Coutts POE used a "chase" vehicle and had done so since before Director Hewson's arrival in 2009, was not the responsibility of the grievor.

[230] Regardless, by the end of Friday, November 20, 2015, it had apparently been determined that he would be disciplined for something, even if it was minor. RDG Scoville's last email of the day was sent to Director Hewson at 8:34 p.m.. The subject line had been changed from "Re: Coutts video footage" to "Accountability" and it reads as follows:

> *Take him to task for that discrepancy. These little inaccuracies…are a slippery slope that leads to even more problems.*
>
> *Swift, decisive action is needed.*
>
> *…*
>
> *Not everything is going to PSI…I want to see matters like this dealt with immediately, swiftly and appropriately.*
>
> *The culture must change.*
>
> *Kim*
>
> [*Sic* throughout]

[231] It is not clear exactly what "discrepancy" or "little inaccuracy" RDG Scoville is referring to, but it is clear by the words he used to describe it, that it was minor. What is also clear is that it would serve as a basis for discipline in order to send a message

to the workplace that "the culture must change." I also note that this correspondence, directing that one of A/Chief St. Onge's superintendents be disciplined, took place solely between RDG Scoville and Director Hewson. It was not even copied to her.

[232] Director Hewson was asked in cross examination if he had been under pressure to discipline employees. He responded that RDG Scoville had high expectations but had never pressured him to hold employees accountable. Given this email, and in the absence of any further explanation or any testimony from RDG Scoville, I find that Director Hewson's response was not credible.

[233] On cross examination, Director Hewson, like A/Chief St. Onge, could think of no officer or superintendent who had ever been disciplined in prior incidents of port runners being chased across the boundary. This included two highly dangerous incidents, one involving a port runner and the kidnapping of a 16 year old girl, the other involving a uniformed superintendent and officers who left the port in pursuit of a border jumper. He could not explain why neither of these serious incidents, both of which had occurred in his district, had resulted in discipline or even a fact finding.

[234] Director Hewson also knew that both he and the acting chief had fully supported the use of the chase vehicle, as had former directors and chiefs at Coutts. It was a practice that predated both of them. The fact finding report noted that management had moved the keys from the back of the office to the front near the door to allow quicker access by the officers. And Director Hewson knew, of course, that he had put the lights on the chase vehicle himself, although there was no evidence that he ever advised RDG Scoville of that.

[235] A briefing note dated September 18, 2011 directs officers to familiarize themselves with the activation of the emergency equipment:

> *Subject: Jeep Grand Cherokee – Black w cage*
>
> *Lights & sirens done last week. Horn activates sirens, cycles through with each press. Double tap horn to stop siren. Familiarize yourselves with operation of sirens, microphone etc.*

[236] In short, Director Hewson knew that the use of a chase vehicle at Coutts, which was clearly the main issue for the regional director general, had nothing to do with the grievor. It was management's responsibility.

[237] He also knew that Mr. Paolini had misinformed RDG Scoville about the grievor flashing emergency lights on a vehicle that had none.

[238] And, according to his testimony he knew that the grievor was an excellent employee.

[239] Despite all of that Director Hewson was not about to challenge the regional director general. He responded at 9:37 p.m. as follows:

> *Ok*
>
> *He's also the supt. that is involved in letting BSO's go on a beer run. He also wants a demotion.*

[240] As an aside, the employer clarified in its closing submission that the grievor had requested a deployment to a BSO position long before this disciplinary process. Both A/Chief St. Onge and Director Hewson confirmed that the request was entirely voluntary on his part and was made for reasons other than and unrelated to any discipline.

[241] On Monday, November 23, 2015, Director Hewson wrote to Mr. Paolini (with no copy to RDG Scoville) to correct the misinformation that Mr. Paolini had passed on to the regional director general:

> *Hi Bill,*
>
> *The second vehicle that left (white pickup) the compound at 6:42 pm does not have an emergency lighting installed on or in it.*
>
> *Only the first port vehicle that left the POE had emergency lights that were activated as it left the parking spot in front of the building.*
>
> *Kevin*

[242] Mr. Paolini replied a few minutes later, also with no copy to RDG Scoville:

> *Thanks, Kevin. I reviewed the footage several times and it did appear that lights had come on at the turn. My apologies.*
>
> *William A. Paolini*

[243] There was no evidence that Director Hewson or Mr. Paolini ever advised RDG Scoville of the mistake.

[244] Superintendent Forgarty was assigned to the fact finding around the same time as this correspondence, about a week after the incident. However, inexplicably, a month later on December 11, 2015, Director Hewson sent an "information request" to the grievor as follows:

> *I am looking for some information regarding the November 12, 2015, port runner incident where a US resident filed [sic]to stop at the primary booth at Coutts.*
>
> *Please provide me with a report detailing your involvement in this incident that evening. Within the report, please include:*
>
> *what transpired*
>
> *date and times of the events*
>
> *actions you and others had taken*
>
> *conversations and decisions made*
>
> *distance driven*
>
> ***emergency equipment activation, etc.***
>
> *any other relevant information.*
>
> [Emphasis added]

[245] All of this information (but for the question about emergency equipment activation) had been provided a month earlier when the grievor had immediately reported the incident by telephone to A/Chief St. Onge and Director Hewson. It had been provided again in the fulsome SEN report he had submitted two hours later. Regardless, the grievor dutifully answered each question and attached the previous reports, noting that the information he was providing duplicated their contents.

[246] He answered the one question that solicited new information as follows: "I drove the white CBSA marked Ford F150 which does not have any emergency equipment."

[247] Of course, Director Hewson already knew that and had already so advised Mr. Paolini. Why it was added to the list of questions to be answered by the grievor is unclear.

V. Reasons for decision

[248] In order to decide this matter three questions must be answered, as follows: was there cause for discipline, if so, was a three-day suspension an excessive response in all the circumstances, and, if so, what alternative should be substituted? (See *Basra v.*

Canada (Attorney General), 2010 FCA 24 (CanLII) and *William Scott & Co. v. Canadian Food and Allied Workers Union, Local P-162*, [1976] B.C.L.R.B.D. No. 98 (QL)).

A. Was there cause for discipline?

[249] In my view, there was cause for discipline for the grievor's role in the beer run incident. As a superintendent, he should not have allowed it to take place and I agree with the employer that it was an aggravating factor that he participated in it by ordering two flats.

[250] The employer's evidence failed to conclusively establish that the officers left the port while on shift. However, the grievor's forthright responses in his reports and fact finding interview establish that he, as superintendent, did not ensure that the officers were on their breaks and did not take note of how long they were out of the workplace. It was also established by the testimony of A/Chief St. Onge that he let them go at a relatively busy time without due consideration of operational needs. Although a 15-minute wait time in a commercial lane is common, that does not mean that it makes sense to let three officers leave at such a time. As A/Chief St. Onge said, it is not acceptable at a busy time, they should have gone after their shift ended at 6:00 p.m..

[251] However, I find that that was the only misconduct on the grievor's part.

[252] The employer has not met its onus to establish that duty and taxes should have been paid on the beer and if so, by whom. Director Hewson's testimony that the wave through threshold was $3.00 and that the staff was not entitled to the same wave through benefits as the public lacked all credibility. The various suggestions as to who was responsible to pay were confusing and contradictory. It was a scatter gun approach, alleging culpability all around but taking disciplinary action selectively.

[253] The employer's focus was on the importers, not the primary inspection officers and not the beer receivers. The employer did not suspend the primary inspection officers for waving their co-workers through, apparently exceeding their unofficial thresholds, or even for inputting incorrect and misleading data into the system. It did not investigate, interview, or discipline any of the beer receivers except for the grievor. It did not even bother to identify one of them. If the other beer receivers did nothing wrong by not paying duty and taxes then neither did the grievor.

[254] The employer also failed to establish that, if duty and taxes were owing, that the grievor was responsible to ensure payment. As superintendent, the grievor was responsible for having officers on the job during a busy time. He was not responsible, in these circumstances, to ensure that the group of three paid duty and taxes on their return, just as he was not responsible to ensure that Officer WM did not fill out his own B15 upon his return.

[255] As for the port runner incident, I find that the grievor engaged in no misconduct whatsoever and did not violate the *Code of Conduct*, Parts B and D, as alleged. To the contrary, given the lack of a protocol or any guidance in the policies, two inexperienced officers, and the radio static, he should be commended for his quick hands-on action and concern for his junior officers.

[256] I note that the *Code of Conduct, Part C. Leadership Conduct* reads, in part, as follows:

> *Ethical leadership entails exploring, seeking to understand, and making ethical judgments in all situations before acting by:*
>
> - *taking into consideration our own health, safety and security and that of our colleagues;*
>
> *…*
>
> *…more experienced employees and managers, at all levels, have a special role in consistently modeling the expected standards of behaviour outlined in the Code of Conduct for new employees, recruits and other CBSA employees. They:*
>
> - *maintain open, positive communications and working relationships;*
> - *recognize the contributions of, and support, newer employees and recruits; and*
> - *foster learning by being approachable and offering advice and guidance, when appropriate.*

[257] In my view, the grievor exemplified all of that. He took hands-on responsibility for his officers' health and safety, quickly sought information that might have kept RCMP responders or members of the public safe from harm, and told the BSOs that they had gone too far but assured them that what was important was to learn from it. He fostered learning by being approachable and acknowledging to the junior officers his own uncertainty in the situation. He offered advice and guidance to them, and seeing that the incident was a teachable moment, to the rest of the staff as well by

holding immediate briefings. He kept his chief and director fully informed and nothing in their email correspondence suggested that they thought he had done anything wrong.

[258] The evidence indicates that the issue RDG Scoville had with the incident was really with the use of a chase vehicle at Coutts. That was not the grievor's responsibility. If RDG Scoville had concerns and wished to stop its use, a directive to that effect to the district director or the acting chief would have sufficed. Disciplining the superintendent who had done his best to respond to a situation that happened to involve the long-established use of that vehicle, was unfair, punitive, and entirely unnecessary.

[259] And, Director Hewson's willingness to go along with it, without ensuring that the director general had all the information, seems to have been more a matter of self-preservation than anything else.

[260] Whatever part of the three-day suspension that can be notionally attributed to the port runner incident is voided.

B. Was the discipline excessive?

[261] Given my finding that there was no misconduct in the port runner incident, this question relates solely to the beer run incident.

[262] Director Hewson testified that he worked closely with Labour Relations and that he went with the lower end of their recommendation of a three to five day suspension. As this quantum was for two incidents, it should be considered modest, especially given the grievor's management responsibility. The employer submitted that the officers involved have received comparable discipline. Therefore, the grievor's discipline should be maintained as the employer wished to send a message to the employee and to the workplace.

[263] The employer's desire to send a message is not a basis upon which discipline should be determined. A message should be sent by memo, not by the use of discipline. CBSA policy repeatedly instructs that discipline should be corrective, not punitive. The employer essentially asks the Board to assist it in making an example of the grievor to teach the whole staff a lesson and change the culture of the workplace. That is not the role of the Board.

[264] In my view, lumping together two distinctly different incidents and coming up with a three-day suspension is inappropriate. The *Government of Canada Guidelines for Discipline*, under the heading *Determining appropriate disciplinary action* states that:

> ***Each incident of alleged misconduct is considered on the basis of individual merit.*** *Based on the circumstances, in management's opinion, what* ***corrective*** *measures are necessary to correct the undesirable behaviour? The application of disciplinary measures is* ***not to be punitive.***
>
> [Emphasis added]

[265] On cross examination Director Hewson was asked if it was normal for two fact findings to be combined together for disciplinary action. He replied that it was not common in his experience and acknowledged that he knew of no other such instance.

[266] At the very end of the process, A/Chief St. Onge was tasked with handling the pre-disciplinary procedure. This was the first time in the year-long process that the grievor was accorded procedural fairness. A/Chief St. Onge properly scheduled a separate meeting for each incident and gave the grievor the opportunity to provide separate written statements which she carefully considered. She wrote two detailed pre-disciplinary reports, each of which contained a long list of mitigating factors. However, Director Hewson never read her reports; he simply had a phone call with the labour relations consultant who relayed this information to him.

[267] I believe that the grievor thought that letting employees use their breaks to go south was a norm at the port, that he trusted the officers to use their breaks and did not fully realize that as a superintendent he had to check on that and also give due consideration to operational requirements. I believe the grievor's statement that he would not have authorized the beer run had he realized that it was contrary to policy. The grievor erred but he had no ill intent to flout policy or to get away with anything. He now fully understands that it was a lapse in judgment and I highly doubt that it would ever be repeated. He has fully recognized his error, shown remorse and apologized as follows in his pre disciplinary comments:

> *As for allowing employees to use their breaks to go across the border, I was following past practices that I had observed during my time working at the Coutts POE. I truly didn't know any better, and I allowed what I had seen done over the years. I didn't realize*

> *this was unacceptable or inappropriate. I made a mistake and I apologize.*

[268] Given all of that, as well as the grievor's excellent performance record, no prior discipline, and the many mitigating factors listed in A/Chief St. Onge's pre-disciplinary report, I find that a written reprimand would have been the appropriate discipline for this conduct. However, given the delay of a year and three months to discipline, I find that whatever part of the three day suspension can be notionally attributed to the beer run incident should be voided, rather than reduced to a written reprimand.

[269] The grievor is an excellent employee who made a mistake. He did not deserve this kind of treatment from his employer.

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

(The Order appears on the next page)

VI. Order

[271] The grievance is allowed.

[272] The three-day suspension is voided and all mention of it is to be expunged from the grievor's personnel file and any other file related to him.

[273] The employer is ordered to pay the grievor his wages lost as a consequence of his three-day suspension, together with any applicable pension, benefits, premiums or other adjustments along with simple interest calculated on a yearly basis at the Bank of Canada prime rate, from October 20, 2016, the first day of the grievor's suspension, to July 19, 2019, the last date of the hearing.

[274] I will remain seized for a period of 90 days should the parties encounter any difficulties with the implementation of this order.

January 29, 2021.

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