Date: 20231218

Files: 566-02-14284 and 44708

Citation: 2023 FPSLREB 119

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

N.L.

Grievor

and

TREASURY BOARD
(Department of National Defence)

Respondent

Indexed as
N.L. v. Treasury Board (Department of National Defence)

In the matter of individual grievances referred to adjudication

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Aaron Lemkow, Public Service Alliance of Canada

For the Respondent: Philippe Giguère, counsel

Heard via videoconference,
February 6 to 10, 13, 15, and 16, 2023.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievances referred to adjudication

[1] Copper and brass are metals of monetary value, which may surprise some. However, for those working in the plumbing industry, the monetary value of copper and brass scrap is well known.

[2] N.L. ("the grievor") worked as a pipefitter-plumber for the Department of National Defence ("the department" or DND). Although the Treasury Board of Canada was his legal employer, for the purposes of this decision, DND is designated as the employer.

[3] The grievor held the pipefitter-plumber position beginning in January 2008. He was suspended in 2015 and was terminated in 2016 for displaying a lack of integrity by stealing and reselling department-owned materials, notably copper scrap.

[4] He was the subject of a criminal investigation as well as an administrative investigation that a DND investigator conducted. In both investigations, the grievor admitted that he had recovered and resold copper and brass scrap gathered during work done for DND and that he had shared the profits with other departmental employees. However, he denied that he had intended to steal. He was charged with theft under $5000. Following a joint Crown-defence proposal, he pleaded guilty to one criminal charge of the possession of property obtained by crime of under $5000.

[5] Despite his confessions and guilty plea, the grievor submits before the Federal Public Sector Labour Relations and Employment Board ("the Board") that his actions did not warrant being subject to disciplinary measures because he was unaware that recovering and reselling scrap for personal purposes was prohibited at DND. He submits that he was unaware that his actions constituted theft of property that his employer owned. He also submits that his employer was aware of and that it condones employees recovering and reselling copper and brass.

[6] Before the department hired him, the grievor was a plumber in the private sector that according to him had a widespread practice by which plumbers recovered and resold the copper and brass scrap produced by their work and shared the resale profits. The grievor submits that he believed that the same practice was accepted at DND. He believed that DND threw away the scrap. In his opinion, there was no

indication that he was required to return the copper and brass scrap to his employer. He disputes his suspension without pay and his termination.

[7] At the hearing, the parties asked me to divide the hearing and make a decision solely on the merits of the grievor's grievances, leaving the remedy to a subsequent phase of the decision-making process if the Board allowed the grievances. I granted the request.

[8] The grievor's identity was anonymized for the reasons set out in *N.L. v. Treasury Board (Department of National Defence)*, 2022 FPSLREB 82. During the hearing and in accordance with the anonymization order, I also ordered that the books of documents that the parties filed be anonymized. The parties also asked me not to identify by name the DND employees who, like the grievor, were charged with offences related to the facts that gave rise to this case. Since those employees' identities are irrelevant to the outcome of this case and they were not called as witnesses, they will be identified solely by their initials in these reasons.

[9] For the following reasons, the grievances are denied.

II. Summary of the evidence

[10] The grievor worked as a pipefitter-plumber for the department from August 2008 until his termination in December 2016. He worked for the Engineering Branch at the Longue-Pointe Garrison in Montréal, Quebec ("the Garrison").

A. The recovery of copper and brass scrap in the private sector

[11] Before he was a DND employee, the grievor worked for approximately seven years as a plumber in the private sector. He worked in small and large commercial sites and in residential plumbing.

[12] Three witnesses described their knowledge and experience in the practice of copper and brass scrap recovery in the private construction industry: the grievor, his former foreman Guy Hurtubise, and an electrician in the Engineering Branch, Gabriel Sigouin.

[13] Before describing the testimonies, I would like to clarify that the words "recover" and "recovery", when used in these reasons, mean "[translation] collecting used materials for reuse, recycle, or trade …" (see the *Larousse Dictionary* online). They

do not include, as the grievor testified, a presumption that the recovered materials are, in all cases, intended for resale. Resale may be an objective of recovery, but it is not the only one.

[14] Subject to some important nuances, the three witnesses described a similar practice of scrap recovery and resale in the private construction industry. They stated that plumbers and electricians gather and collect copper scrap from construction sites during maintenance, repair, and construction projects. The witnesses also all stated that the scrap is resold for profit. However, their testimonies differed with respect to the directives — formal or informal — that their employers gave plumbers and electricians about reselling scrap from construction sites, as well as about who was entitled to the profits from the scrap resale.

[15] Mr. Sigouin testified that because of the copper scrap's monetary value, the construction service agreements frequently specify who, either the client or the construction service provider, is entitled to the copper scrap when a construction project completes. When the construction service provider is entitled to the scrap, the plumbers and electricians recover it and bring it to a central location throughout the year, until their employer resells it. Their employer then uses the profits from the scrap resale to offer a reward to its employees, such as an end-of-year meal. According to him, the plumbers and electricians are not allowed to resell the scrap and keep the resale profits.

[16] The grievor did not contradict Mr. Sigouin's description of a practice by which an employer uses the profits from reselling scrap collected following construction projects to offer a reward to its plumbers. However, he stated that not all employers engage in the practice. He stated that he worked in environments in which employees working in a construction yard collected all copper scrap in a central location during the work. When the work was completed, one of them was responsible for reselling the scrap. The profits were split equally between the employees who worked on the site. The grievor stated that only once did his employer inform him that the copper scrap collected had to be given to the client. It was a very large construction project, and the amount of scrap was considerable.

[17] When he described his residential plumbing work experience, the grievor stated that he had the practice of asking his clients whether they would like to keep the

copper scrap or they preferred that he take it with him after the work was completed. According to him, the clients usually did not want to keep the scrap. He testified that he put the unwanted scrap in his truck and brought it to his employer's plumbing shop. The scrap that all the plumbers collected was accumulated for several weeks or months until the shop foreman brought it to a scrap-metal dealer for resale. The profits were then shared equally among the plumbers. He stated that at one point, one of his employers had changed the practice to instead allow the plumbers to individually resell the scrap that they had recovered during residential plumbing work.

[18] Mr. Hurtubise's testimony largely corroborated the grievor's description of the informal private-sector practice, except for a clarification that he provided in cross-examination. He stated that he asked clients of commercial, industrial, and residential projects whether they wanted to keep the copper scrap. Only when they stated that they did not want to keep it did the plumbers recover and resell it.

B. The grievor's recovery and resale of copper and brass while employed by DND

[19] As noted earlier, DND hired the grievor in 2008. It was his first public-service job.

[20] When he started in his position, the grievor was an employee in the Garrison's electrical-mechanical shop, which had plumbers, tinsmiths, and electricians from the Engineering Branch. The building in which it was located also housed the general shop. The employees there included among others painters, masons, locksmiths, and carpenters. Before August 2013, each shop had its own superintendent.

[21] At the hearing, several allegations were raised based solely on rumours and hearsay about the superintendent's management of the electrical-mechanical shop at the time at issue. I did not consider them. However, the evidence set out that the management of the shop left much to be desired. The superintendent had little interest in supervising and managing his employees. Official communications — written or verbal — from the superintendent, as well as team meetings, were very infrequent. Employees were largely left on their own.

[22] In August 2013, the electrical-mechanical and general shops were merged into a single shop, the production shop. The electrical-mechanical shop's superintendent retired, and Jacques Boily became the production shop's superintendent. He testified

that when he started in that position, he quickly noticed some deficiencies in asset management from what was previously the electrical-mechanical shop. For example, he stated that a shop-tools inventory update revealed that tools of significant value that DND owned were unaccounted for.

[23] Shortly after the merger, Mr. Boily also became aware of allegations that some shop employees were taking and reselling copper and brass that was being removed from several DND buildings. After conducting some initial verifications to confirm whether the allegations could be substantiated, he informed the commander of the Garrison's Engineering Branch of the allegations. The allegations led to a criminal investigation that the Canadian Forces National Investigation Service (CFNIS) conducted, as well as an administrative investigation that the employer conducted. The grievor was one of the employees subjected to the investigations. Three of his plumbing colleagues were also subjected to it, as were two electricians.

[24] Now to return to 2008, when the grievor arrived at the electrical-mechanical shop, to better understand the events that led to the allegations made against him.

[25] On his arrival, the grievor was paired with another plumber, G.G., for learning purposes. The preferred training and learning method in the electrical-mechanical shop was on the job, as of the events that gave rise to the grievances. Employees learned from their colleagues by watching them.

[26] I would like to clarify that as of the facts relevant to this case, another production shop employee also had the initials G.G. That person was an electrician. That is not the person described in these reasons.

[27] Very soon after he began in his position, G.G. reportedly told the grievor that "[translation] here, we recover and resell" copper and brass scrap. The grievor stated that he was surprised and that he asked G.G., "[translation] Wow. You do that?" Apparently, G.G. replied in the affirmative and added that "[translation] we do the same thing as in the private sector". The grievor did not take any steps to validate with the shop superintendent or anyone else in a position of authority what G.G. had told him. He testified that in light of what G.G. had told him, he assumed that the electrical-mechanical shop employees recovered copper and brass scrap, resold it to a local scrap-metal dealer, and shared the profits from the sales. He assumed that DND

allowed employees to recover and resell copper and brass, which was done when he worked in the private sector.

[28] According to the grievor, the electrical-mechanical shop's superintendent told his employees to "[translation] recover" scrap after completing their work and then told them that they knew what to do with it. According to him, those were the only instructions he received from the superintendent on scrap treatment. He stated that he assumed that the shop superintendent was aware of and approved employees recovering and reselling copper and brass for personal purposes.

[29] Shortly after that, the grievor accompanied G.G. to the scrap-metal dealer. He witnessed a sale transaction for copper and brass scrap. He did not receive a share of the profits because he was a newcomer and had not contributed to recovering the scrap that was sold. Only G.G. and W.L., another plumber, shared the profits.

[30] After that transaction, the grievor began collecting copper and brass scrap from the work he did at the Garrison. He was involved in subsequent resale transactions. He shared the resale profits equally with G.G. and W.L. Later on, a fourth plumber, R.K., joined the group, and from then on, the profits were shared between the four plumbers.

[31] The grievor described how this scrap recovery and resale activity took place.

[32] As a pipefitter-plumber, the grievor worked at different Garrison locations. He often worked alone, with little supervision. He could be called on to perform work at other DND locations in the Montréal region. He had access to a departmental vehicle that was assigned to him for his work.

[33] He performed several preventive maintenance tasks and repairs, such as when water pipes broke or toilets were defective. He was also responsible for conducting water quality tests and verifying fire alarm systems. Sometimes, he became involved in new facilities projects and in projects to dismantle water distribution systems.

[34] Approximately 15% of the grievor's work involved copper, and it was typical for him to go more than a month without having to remove copper parts or pipes. However, sometimes, he could be called on to participate in major projects, such as the full dismantling of water distribution systems before a building was demolished. Significant amounts of copper and brass could be removed during those projects.

[35] No evidence was presented to me as to the frequency with which the grievor removed brass materials in the course of his work. The majority of the testimony was about copper.

[36] After completing a task involving removing copper or brass pipes or parts, the grievor placed the scrap in a large garbage can in the back of his work truck.

[37] When the three or four plumbers, depending on their numbers at the time, had collectively gathered a significant amount of scrap, one of them would go to the scrap-metal dealer to resell it. The scrap was transported to the dealer in DND trucks during working hours. The grievor stated that sometimes, he collected scrap for several months before he and the other plumbers had collected enough to resell.

[38] I would like to clarify that while the scrap recovery and resale occurred between 2008 and 2014, the allegations against the grievor that were the subject of the administrative investigation covered December 1, 2010, to August 11, 2014.

[39] The grievor admitted that he had recovered scrap throughout that entire period, to participate in sharing the profits from their resale.

[40] It is not clear from the evidence how many transactions occurred between December 1, 2010, and August 11, 2014, or how much the grievor received during that period as resale profits. However, it is clear that he admitted to being involved in profit sharing 4 times during his DND employment. One or more of the other plumbers completed 3 of the 4 transactions. The grievor completed the other transaction with a scrap-metal dealer in March 2013. In the transaction, he resold 298 pounds of copper and 432 pounds of brass for $1663.40. His share of the profits was approximately $415.

[41] At the hearing, the grievor admitted to receiving an amount equal to $1663 in profits for all four resale transactions described in the last paragraph.

[42] The grievor testified that after he completed the March 2013 resale transaction, he wondered why DND did not recover the copper and brass scrap given its monetary value and the amounts that DND could have obtained from its resale. He testified that he believed that DND threw the copper and brass scrap in the garbage and that it saw no value in the scrap.

[43] According to the grievor, on or about March 19, 2014, W.L. apparently informed him that Mr. Boily had recently issued a directive prohibiting recovering copper and brass for personal purposes. The directive was described in a document entitled "[translation] Recyclable Material Recovery Procedure - Copper and Brass" ("the Procedure"). The Procedure will be described in greater detail later in the summary of the evidence. For the moment, it is sufficient to note that according to the grievor, it is supposedly how he learned that DND did not authorize scrap recovery and resale.

[44] The grievor submitted that before March 2014, he was unaware that he was prohibited from collecting and reselling copper scrap at DND. When he learned the news and became aware of the Procedure, reportedly, he asked W.L., who was then his foreman, why employees were suddenly prohibited from recovering copper. W.L. reportedly told him that it had never been permitted to recover and resell copper. The grievor testified that he immediately complied with the Procedure and that he immediately stopped recovering copper and brass for personal purposes.

[45] On January 14, 2015, in the workplace, the military police arrested the grievor, G.G., W.L., and R.K., as well as two electricians from the production shop. The grievor was charged with, among other things, one count of theft under $5000. Although he denied that he had intended to steal and stated that he believed that he was allowed to take and resell scrap, he cooperated with the criminal investigation. According to the CFNIS investigator who testified at the hearing, Corporal Kevin Plourde, the grievor's admissions enabled the investigators to establish evidence of a conspiracy between the DND employees who were subjected to the criminal investigation. Corporal Plourde also stated that the grievor was the only one of the plumbers and electricians who were subjected to the criminal investigation to claim that he was unaware that he was prohibited from recovering and reselling copper and brass.

[46] The day after his arrest, the grievor was placed on paid leave. A few days later, he was informed that he would be subjected to an administrative investigation for alleged misconduct, notably the theft and sale of employer-owned assets, which was the copper scrap. Shortly after that, the administrative investigation was put on hold so as not to interfere with the CFNIS's criminal investigation. On May 27, 2015, the grievor was suspended without pay on the grounds that his presence at work posed a sufficiently high and immediate risk of concern to DND. He was suspended pending the results of the administrative investigation.

[47] The grievor filed a grievance against his suspension without pay (Board file no. 566-02-14284). It alleged that the time frame for the administrative investigation was unreasonable and challenged the fact that none of the other DND employees who were subjected to the administrative investigation had a similar disciplinary measure imposed on them. At the hearing, he did not adduce evidence to support his allegation that the other employees under investigation were subjected to less-severe disciplinary measures. He also made no submissions on that matter.

[48] On June 3, 2016, after a joint Crown-defence proposal, the grievor pleaded guilty to one count of the possession of property obtained by crime of under $5000 and promised to repay $1663 to the Receiver General, which was the amount of the transaction he completed in March 2013. He received an absolute discharge.

[49] W.L. and R.K. each pleaded guilty to 1 count of the possession of property obtained by crime of under $5000, while G.G. pleaded guilty to 1 count of theft of property of under $5000. They were required to repay the values of the transactions they had made with the scrap-metal dealer. W.L. repaid $1585, R.K. repaid $7534, and G.G. repaid $2987. W.L. received an absolute discharge, while R.K. received a 2-year conditional discharge. G.G. received a 2-year probation, which included 100 hours of community service.

[50] After the convictions, the CFNIS began a second phase of its criminal investigation into the resale of DND assets. The grievor offered his cooperation in exchange for a commitment that the CFNIS investigator, Corporal Plourde, would write a letter to DND informing it of his cooperation with the investigation. It was not clearly established in evidence who had been subjected to the investigation's second phase or whether they were current or former production shop employees. The investigation was discontinued.

[51] When the judicial process involving the grievor ended, the employer restarted its administrative investigation. In September 2016, the grievor received a copy of the final investigation report, which found that the allegations against him were founded.

C. Directives and procedures on managing surplus material, including copper and brass scrap

[52] Before describing the grounds on which the employer terminated the grievor, it is appropriate to briefly describe DND's directives and procedures with respect to

managing surplus material. The grievor is the only plumber who was subjected to the criminal and administrative investigations who claimed that he was unaware that he was prohibited from recovering and reselling copper and brass. He argued that he was poorly trained and misinformed. Thus, the evidence about the directives and the procedures in effect at the time is relevant to the outcomes of the grievances.

[53] Three witnesses, Mr. Boily, Mr. Sigouin, and Danielle Lacroix, a plumber specializing in heating, testified as to what they did with scrap as part of their duties. They all stated that they learned what to do with the copper and brass scrap when they started in their positions. They learned by watching and discussing with their colleagues. Thus, they learned that they had to bring the copper and brass scrap to the Integrated Waste Management Centre (also known as the "IWM") and place it in the metal recovery and recycling container outside the IWM. They also stated that they had asked the IWM employees or their foreman questions arising from any uncertainty about the expectations and requirements for waste management of all kinds. Mr. Boily was the only one who stated that he also had inquired by consulting DND directives on managing surplus material.

[54] The IWM was also known as Building 13 and was subsequently renamed the Repair and Disposal Section, or "R&D".

[55] The IWM was the designated location for residual-material management at the Garrison. Throughout the period relevant to this case, three large containers were set up outside the building that had posters on them indicating the products to be placed in each one, namely, "[translation] metals", "[translation] wood", and "[translation] dry waste". Three large identical posters were also set up near, and on each side of, a ramp leading to the containers that read as follows:

> [Translation]
>
> *Please go to building 13 for access, before disposing of your waste.*
>
> *It is strictly prohibited to dispose of waste without using the access ramp.*
>
> *No residual or radioactive hazardous materials shall be disposed of in the containers.*
>
> *For information, contact R&D at* [mail] *or in case of an emergency call* [telephone number].

[56] Another poster was attached to the fence around the containers' location that read as follows:

> [Translation]
>
> *Please go to the R&D section at bldg 13 for access to the hazardous materials site.*
>
> *It is strictly prohibited to deposit waste or materials in front of the fence.*
>
> *The environment is everyone's business,*
>
> *CO Tech Svcs*

[57] The grievor testified that the use of the words "[translation] dispose" and "[translation] waste" on the posters reinforced his belief that DND sent the waste left at the IWM to the dump.

[58] Robert Picard, a procurement technician who has been with the IWM since 2009, testified about the IWM's role and operation. IWM employees sorted and managed surplus material that Garrison employees recovered, including those in the Engineering Branch. The material that could be resold, including copper and brass, was collected in batches and sold to the public through the GCSurplus auction site. Metals were typically sold to metal recycling companies. Approximately half of the proceeds from the sales of residual materials went to the Receiver General for Canada, and the other half went to the Garrison command staff.

[59] Members of the public who purchased goods through GCSurplus were required to pick them up at the IWM in the Garrison.

[60] Ms. Lacroix and Mr. Sigouin testified that they brought their waste to the IWM, including metals, wood, or dry waste, and that they placed them in the appropriate containers. Neither witness was aware of a written directive on recovering and recycling residual material before March 2014; nor did either know what DND did with the waste. However, each knew that the waste, notably the copper and brass scrap, did not belong to them and that it had to be placed in the IWM containers.

[61] Mr. Sigouin also testified that allegedly in 2006, G.G. asked him what he did with the scrap. G.G. had apparently invited Mr. Sigouin to participate in recovering and reselling copper and brass scrap and would have explained to him that with other employees, he would collect and sell the copper and brass scrap and share the profits

equally. Mr. Sigouin refused to participate in the activities that G.G. described because he knew that the copper had significant monetary value and that the scrap belonged to the employer, not the employees. However, he did not contact his supervisor to report G.G.'s behaviour.

[62] The evidence set out that throughout the relevant period, directives were to be followed at the Garrison for managing surplus material, namely, "Administrative Order and Directive 9200-9", entitled "[translation] *Return and Disposal of Garrison Users' Surplus Material*" (AOD 5 ASG 9200-9; "AOD 9200-9") and "Defence Administrative Order and Directive 3013" ("DAOD 3013"), which deals with surplus material. According to Mr. Boily, a shop's superintendent was responsible for sharing such directives with their employees. However, nothing indicates that the two directives were brought to the attention of the grievor or other electrical-mechanical shop employees in an express manner before March 2014, when Mr. Boily issued and forwarded the Procedure to all production shop employees.

[63] In 2006, the Longue-Pointe Base commander issued AOD 9200-9. It is both a directive for the Garrison's civilian employees and an order for military members working there. According to Mr. Picard and Mr. Boily, as of the facts relevant to this case, AOD 9200-9 was posted on the DND's intranet and on bulletin boards in each Garrison building.

[64] AOD 9200-9's objective is to ensure that through its employees and military members, DND recycles more and seeks beneficial ways to reuse raw materials. AOD 9200-9 describes the procedure that civilian and military employees are to follow with respect to surplus material, including recyclable materials defined as including ferrous and non-ferrous metals, wood, and dry materials such as cement, plaster, plastic, and glass. Under the directive, employees are required to return recyclable materials to the IWM and place them in the containers designated for that purpose so that IWM employees can then sort them and separate obsolete material from material that can be repaired or resold through bulk sales. The directive describes the IWM's responsibility with respect to reselling recyclable materials. AOD 9200-9 also specifies that all proceeds from the sale of metals, notably brass and copper, go to the Receiver General for Canada.

[65] While AOD 9200-9 applies to the Longue-Pointe Base and the Garrison, DAOD 3013 is a departmental directive that has been in effect since 2012. It is a directive and an administrative order that applies to all the department's civilian and military employees. It has two sections. One deals with surplus material in general (DAOD 3013-0), and the other deals with the disposal of surplus material (DAOD 3013-1). Scrap is included in the definition of "surplus material".

[66] One of the objectives of DAOD 3013 is to allow DND to maximize the net revenues that can be derived from disposing of surplus material, to consider the public interest. It indicates that selling surplus material at fair market value is DND's preferred disposal method. It explains roles and responsibilities, as well as the process for disposing of surplus material, including DND's obligation to protect the integrity of materials destined for resale. Only an assistant deputy minister may approve the disposal of material for free or as a donation as an exception to the disposal process.

[67] As of the facts relevant to this case, DAOD 3013 was posted on the Internet, on DND's intranet, and on bulletin boards in each Garrison building.

[68] In addition to being posted on bulletin boards and on DND's intranet, Mr. Boily stated that AOD 9200-9 and DAOD 3013 were also available in binders located in the different Engineering Branch shops. The binders contained several internal guidelines governing the Engineering Branch's operations. Mr. Boily's testimony on this matter was not contradicted or contested. Employees could consult the binders at any time to learn about AOD 9200-9 and DAOD 3013.

[69] In March 2014, and after becoming aware of allegations that certain production shop employees were taking and reselling DND-owned copper and brass, Mr. Boily had secure containers set up outside the building that housed the production shop so that employees could dispose of their copper and brass scrap there at the ends of their shifts. He also established a rigorous process for transferring the waste deposited in those containers to the IWM that involved, among other things, keeping records of the amount of waste collected in Building 7 and received by the IWM.

[70] As noted, in March 2014, Mr. Boily prepared and distributed the Procedure to the production shop employees, including the grievor. The Procedure stated that among other things, all copper and brass materials recovered from any DND-owned location had to be deposited, at the ends of all shifts, in the newly installed secure

containers outside the shop. All production shop employees were required to attest to having read the Procedure. The attestation included an express acknowledgement that DND owned the copper and brass scrap. The grievor signed the attestation on March 19, 2014.

[71] Mr. Boily stated that the Procedure was developed and implemented from an intention to strengthen and make more explicit to the production shop employees the application of Garrison and DND directives on recovering surplus material, including AOD 9200-9 and DAOD 3013.

[72] Also in March 2014, Major Hugo Marcotte, the Engineering Branch commander, issued a document similar to the one that Mr. Boily had prepared. The document, entitled "[translation] Procedures for Recovering Recyclable Materials - Copper and Brass (OP SGM 225)", is a standing order of the Engineering Branch that repeats, for the most part, the Procedure's content and further formalizes it.

D. The decision to terminate the grievor

[73] After an administrative investigation that gathered significant documentary evidence and the testimonies of over 20 Engineering Branch employees, Lieutenant-Colonel François Lagacé recommended that the grievor be terminated. He was then the commander of the Garrison's Real Property Operations Units. When he began in his position, criminal and administrative investigations involving the grievor were already underway.

[74] Before he made his decision to recommend that the grievor be terminated, the lieutenant-colonel reviewed and considered the witnesses' statements during the administrative investigation, the administrative investigation report, and the grievor's response to that report. He also considered the grievor's lack of disciplinary history, his years of service, and information that the grievor disclosed during the administrative investigation, notably his recognition that he had recovered and resold copper and brass scrap that he had collected in the workplace and his acknowledgement that he had shared the profits with other DND plumbers.

[75] Lieutenant-Colonel Lagacé testified that he also considered an email from Corporal Plourde to the Engineering Branch commander at the time. Among other things, the email mentioned the grievor's cooperation with the CFNIS's investigation.

One of the stated objectives of Corporal Plourde's email, who testified at the hearing, was to express his belief in the grievor's sincerity when he stated that he was unaware that recovering and reselling scrap for personal purposes was prohibited at DND.

[76] According to the lieutenant-colonel, if the email's purpose was to help the grievor in the context of the discipline process, the effect was quite the opposite. According to the lieutenant-colonel, the fact that the email indicated that the grievor had explained the operation of a "[translation] scheme" in DND was in itself an acknowledgement on his part that he had been involved in an activity that he tried to hide from everyone's eyes. The lieutenant-colonel also did not find persuasive or convincing Corporal Plourde's statement that the grievor apparently claimed to have become "[translation] … reluctantly involved in this scheme, shortly after joining the [Engineering Branch]". The lieutenant-colonel stated that he felt instead that the time between the grievor's appointment in 2008 and his arrest in 2015 — seven years — served to illustrate that the grievor had had plenty of time to learn about the procedures and realize that the activity in which he was involved was prohibited. The lieutenant-colonel stated that he found it unlikely that the grievor would have been the only one to ignore the fact that the recovery and resale activity in which he was involved was prohibited or unacceptable.

[77] On December 22, 2016, the grievor was terminated for disciplinary reasons. The employer concluded that he had breached the *Values and Ethics Code for the Public Sector* ("the *Values and Ethics Code*"), as well as DND's ethical principles. The termination letter states that the grievor had "[translation] … engaged in behaviour that lacked integrity [when he] stole material, including copper, owned by the employer and resold it". His termination was retroactive to May 27, 2015, the date on which he was suspended without pay.

[78] In January 2017, the grievor filed a grievance challenging his termination (Board file no. 566-02-44708).

[79] The grievor was not the only terminated. DND also terminated G.G., W.L., and R.K.

III. Summary of the arguments

A. For the employer

[80] The employer maintains that the grievor's termination was a reasonable disciplinary measure in all the circumstances.

[81] The grievor admitted that without authorization, he had recovered and resold copper and brass scrap that belonged to his employer. He used Crown assets for personal purposes and did so to make a profit. He colluded with other DND employees. His misconduct stretched over seven years. Whether he intended to steal from his employer is irrelevant. He knew that he was not entitled to the goods that he recovered and resold. Thus, he committed serious misconduct.

[82] The grievor knew or should have known that it was not acceptable to appropriate the employer's assets. He should also have known that he should not rely on the words of a co-worker without authority or decision-making responsibility on such an important issue. He made no attempt to inquire about the procedures for handling residual materials. He did not ask management questions to confirm whether what his colleague had told him was true.

[83] The employer submits that the grievor acknowledged that the scrap he possessed and then resold had been stolen when he pleaded guilty to possessing property obtained by crime. Although it was not a guilty plea for theft, nonetheless, it was an acknowledgement by him that supports a finding that he is guilty of the misconduct that justified imposing a significant disciplinary measure (see *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63).

[84] The employer contends that ignorance of the law is no excuse (see, for example, *Champagne v. Aéroports de Montréal*, [1994] C.P.S.S.R.B. No. 127 (QL); and *Bray v. Bank of Nova Scotia*, [2007] C.L.A.D. No. 128 (QL) at para. 50). According to the employer, it is all the more true when the grievor conducted himself as someone seeking to gain personal advantage to which the employee was not entitled, and it was not an isolated incident (see *Rahim v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 121). Even if the grievor did not have subjective knowledge that his actions constituted theft, which is denied, he allegedly demonstrated wilful blindness warranting significant disciplinary action (see *R. v. Onasanya*, 2018 ONCA 932). Although multiple

indications suggested that recovering and reselling scrap was prohibited, it seems that he decided not to ask management questions or to consult the employer's directives.

[85] The employer also argues that it must be able to trust that its employee will show common sense and good judgment (see *Gannon v. Treasury Board (National Defence)*, 2002 PSSRB 32 at para. 127). The basic rules of conduct that an employer is entitled to expect; that is, common sense and good judgment, must apply even if they have not been explicitly explained (see *Board of Education of School District No. 39 v. U.A. Local 170*, 2011 CanLII 47160 (BC LA)). That is especially true in the DND context, in which employees such as the grievor have access to goods of high monetary value and of military and strategic importance.

[86] The employer submits that in the circumstances of this case, termination was an appropriate disciplinary measure. The grievor's years of service, favourable performance evaluations, and lack of disciplinary history are not mitigating factors that can counter his dishonesty and significant lack of integrity. Stealing is serious misconduct that warrants a severe disciplinary measure. Termination is considered reasonable in cases of theft of employer-owned assets, except in exceptional circumstances (see *Shandera v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 26 at para. 351; *Toronto Transit Commission v. Canadian Union of Public Employees, Local 2*, 2011 CanLII 49050 (ON LA); and *Breweries' Employers Industrial Relations Assn. v. Western Union of Brewery, Beverage, Winery and Distillery Workers, Loc. 287*, 1992 CanLII 14431 (AB GAA)). No such exceptional circumstances are in place in this case.

[87] The grievor stole and resold the employer's assets over a period of approximately seven years. He acted in concert with colleagues. The parties' bond of trust was severed by his premeditated and repeated actions in an effort to obtain financial benefit from the employer's assets (see *Lynch v. Treasury Board (National Defence)*, [1997] C.P.S.S.R.B. No. 127 (QL)). In addition, he did not take responsibility for his actions; instead, he simply criticized his employer and DND management for his poor training and misinformation. There is no justification for departing from the principle that a person who steals from the Crown has no right to be employed by it (see *King v. Treasury Board (Citizenship and Immigration Canada)*, [1995] C.P.S.S.R.B. No. 8 (QL); and *Shandera*, at para. 351).

B. For the grievor

[88] The grievor submits that the employer had the burden of proving that on a balance of probabilities, he was guilty of stealing and selling its assets. It could not simply prove the possession of property obtained by crime, as that is not why he was suspended and terminated (see *Gordon v. Canada Revenue Agency*, 2021 FPSLREB 99 at paras. 102, 103, and 116 to 120).

[89] Theft requires the intention to steal (see s. 322(1) of the *Criminal Code* (R.S.C. 1985, c. C-46); *Toronto Transit Commission v. A.T.U., Loc. 113 (Hicks)*, 1997 CanLII 25000 (ON LA) at 54 to 58; and *Toronto Transit Commission v. Amalgamated Transit Union, Local 113, (Olejko Grievance)*, [2010] O.L.A.A. No. 147 (QL) at paras. 69 and 70). In turn, intention requires knowledge that the property in question belongs to others. Evidence of negligence is insufficient to support a conclusion that the grievor stole from his employer. In addition, the doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point that they see the need for further inquiries but deliberately choose not to make them (see *R. v. Briscoe*, 2010 SCC 13 at paras. 21 to 24). However, the employer did not demonstrate that the grievor knew that the scrap belonged to the employer or that he had any doubt about it and intended to steal it.

[90] The fact that the grievor pleaded guilty to one count of possession of property obtained by crime does not amount to an acknowledgement that he stole the property. In his view, it is merely an acknowledgement that when he pleaded guilty, he was aware of the employer's directives on the management of surplus material and was aware that he had not been entitled to the scrap that he had recovered and resold in the past.

[91] The grievor contends that he has presented credible evidence that demonstrates that there was a practice in the private sector by which plumbers were allowed to recover and resell copper and brass scrap and that it was reasonable for him to believe that DND recognized and accepted that practice. On his arrival at DND, he was paired with a colleague who was recovering and reselling scrap for personal purposes. He had no reason to question or cast doubt on his colleague's assertion that DND employees also followed the practice that existed in the private sector. The employer's directives were not shared with the grievor or other production shop employees. The employer

made no effort to inform the employees of the directives and to ensure that they were understood.

[92] The grievor argues that no disciplinary measure should have been imposed on him in circumstances in which the employer did not share with him the rules to be followed, specifically that recovering and reselling scrap was not allowed at DND (see *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co. Ltd.* (1965), 16 L.A.C. 73 at paras. 31 to 34).

[93] His belief that the employer saw no value in the scrap and that it was sent to the dump was reasonable in the circumstances. The IWM posters were ambiguous, and the evidence set out that the grievor was not alone in ignoring the existence of scrap-recovery directives. Ms. Lacroix, a plumber in the same shop, did not know that such a directive existed. However, in March 2014, and as soon as the grievor learned of a scrap-recovery directive, he complied with it.

[94] The grievor submits that the evidence of the employer's witnesses, notably that of Mr. Boily and Lieutenant-Colonel Lagacé, was not credible. It consisted of either statements and charges based on hearsay or selective narratives that only put forward evidence that supported the witness's and the employer's theory. The grievor also submits that the Board should draw a negative inference from the fact that the employer did not call as a witness the electrical-mechanical shop's superintendent, who was the person responsible for sharing the directives on and practices for recovering residual materials with the grievor and for implementing them. The employer also did not call the investigators who conducted the administrative investigation into the misconduct allegations against the grievor. According to him, the Board should presume that those witnesses would have uncovered adverse facts about the employer's case (see *Milliken & Co. v. Interface Flooring Systems (Canada) Inc.*, 2000 CanLII 14871 (FCA) at para. 11; and *Murray v. Saskatoon (City)*, 1951 CanLII 202 (SK CA) at para. 19).

[95] If the Board finds that the grievor committed misconduct that warranted imposing a disciplinary measure, he argues that his termination was manifestly excessive in a context in which he had not been informed of the employer's directives. He asks the Board not to impose a suspension without pay that is greater than that imposed in *Beaulne v. Treasury Board (Transport Canada)*, [1997] C.P.S.S.R.B. No. 100

(QL). In *Beaulne*, the grievor was terminated for submitting incorrect receipts, to obtain a relocation benefit. The Board found that the grievor had demonstrated significant intentional negligence. Nonetheless, it reduced the disciplinary measure to a 12-month unpaid suspension due to, among other things, the fact that the grievor had not received a copy of the employer's policy on the relocation benefit and that the employer could or should have intervened to stop the situation from the start.

[96] As in *Beaulne*, the grievor argues that there was a culture of workplace laissez-faire in the DND Engineering Branch in which the shop management was aware of employee misconduct and did not intervene. According to him, it was well known that employees were reselling scrap and sharing profits. No attempt was made to conceal the practice (see *Melcher v. Treasury Board (Solicitor General - Correctional Service)*, [1997] C.P.S.S.R.B. No. 35 (QL) at paras. 35 and 36; and *Finning International Inc. v. International Assn. of Machinists and Aerospace Workers, Local 99*, 2013 CarswellAlta 1474 at para. 58). In addition, the grievor argues that his years of service, his clear disciplinary record, the limited number of resale transactions in which he participated, his remorse for breaching — unknowingly — the department's directives, and his cooperation with the CFNIS investigation mean that an unpaid suspension should be substituted for his termination.

[97] The grievor submits that his unpaid suspension during the employer's administrative investigation was excessive and that it became disciplinary. He was suspended without pay for 19 months before he was terminated. He points out that while the employer was required to wait for the criminal investigation and trial to proceed before conducting its administrative investigation, it was required to act promptly after that (see *Lemieux v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLREB 20 at paras. 170 to 174). The employer did not demonstrate why it took it 6 months after the grievor's guilty plea to conclude that he should be terminated.

IV. Analysis

[98] To assess a disciplinary measure that an employer imposed, the Board must answer the following questions: 1) Did the grievor's conduct warrant imposing a disciplinary measure? 2) If so, was the disciplinary measure imposed excessive? 3) If so, what measure should be substituted? (See *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1 ("*Wm. Scott*").)

[99] The Board shall conduct a *de novo* review of the allegations made against the grievor in the light of the evidence presented to it. It is not bound by the findings or conclusions of the employer's administrative investigation.

[100] The parties relied on extensive case law to support their arguments. For the purposes of these reasons, I will refer only to the decisions that clarify the reasoning behind my conclusions with respect to the criteria set out in *Wm. Scott*.

A. Witness credibility, and the failure to call the superintendent as a witness

[101] I will analyze the merits of the grievor's grievances, but first, I will briefly address the issue of some witnesses' credibility. The grievor argued that a credibility issue was central to this case, specifically his credibility as opposed to that of Mr. Boily and Lieutenant-Colonel Lagacé. I will address the issue of the grievor's credibility later in my decision.

[102] First, I would like to make it clear that I found that Lieutenant-Colonel Lagacé was a credible witness. His answers to the different questions he was asked were clear and consistent. His description of the reasons behind his recommendation that the grievor be terminated was neutral and based on the evidence and findings of fact from the administrative investigation. He was able to explain in detail why he preferred some of the findings and evidence over others. I detected no lack of objectivity on his part.

[103] At the hearing, Mr. Boily acknowledged that more than once — in the criminal and administrative investigations — he made several categorical statements based solely on hearsay. He also acknowledged that sometimes, he speaks without thinking. In his testimony before the Board, he chose his words carefully. He also took care to identify his previous comments and allegations that — at that time — had no factual basis. Because of his admitted habit of speaking without thinking, when I rely on Mr. Boily's testimony in my analysis, it will be his testimony that was not disputed or contradicted or that was corroborated by documentary evidence or by another witness's testimony. In any event, my conclusions with respect to the grievor's misconduct and the merits of the disciplinary measure imposed on him are based not on Mr. Boily's testimony but on the grievor's testimony, his admissions, the extensive documentary evidence from both the administrative and criminal investigations, and the other witnesses' evidence.

[104] The grievor also asked me to draw a negative inference from the fact that the employer did not call the electrical-mechanical shop's superintendent as a witness. Specifically, he asked me to find that the superintendent was aware of, or allegedly participated in, the recovery and resale activities.

[105] It is curious that the superintendent did not testify. However, this can be explained by many reasons that have nothing to do with an attempt to conceal evidence. As I will explain later in these reasons, the only evidence presented to me about the superintendent were the grievor's suspicions and Mr. Boily's testimony about an allegation that he allegedly contacted the CFNIS investigators, which he admitted was based solely on hearsay. In the absence of evidence that would reasonably lead me to believe that the superintendent was aware of, or had participated in, the resale activities, I will not draw such a negative inference.

B. The grievor's conduct warranted imposing a disciplinary measure

[106] The employer had the burden of proof with respect to the alleged misconduct. Contrary to the burden that applies in the criminal context, it is not a matter of proving beyond a reasonable doubt that the grievor committed the misconduct that the employer alleged he did. The employer must prove it only on a balance of probabilities, by presenting clear and compelling evidence (see Brown and Beatty, *Canadian Labour Arbitration*, 5th edition, at paragraph 7.13; and *F.H. v. McDougall*, 2008 SCC 53 at para. 46).

[107] The misconduct in question is that of breaching the *Values and Ethics Code* and DND's ethical principles by lacking integrity when he "[translation] … stole material, including copper, which the employer owned, and resold it …".

[108] The grievor's arguments focus largely on the employer's use of the verb "steal". He contends that his actions did not constitute theft as he did not intend to steal, specifically that he was unaware that the copper and brass scrap belonged to the employer and that he was prohibited from taking it for personal purposes. He submits that he believed that in the employer's eyes, the scrap was worthless waste that would be sent to the dump.

[109] Nothing indicates that the employer used the verb "steal" in the termination letter as a technical term. It cannot be presumed that it intended to limit the meaning

of the word “theft” to the meaning given to it in the *Criminal Code* when it added the word to support a statement that the grievor had breached the *Values and Ethics Code* and the department’s ethical principles. In addition, the case law that he cited to support his argument that proof of intent — the intent to steal — is required to warrant imposing a disciplinary measure for theft can be distinguished. Unlike in this case, in *Toronto Transit Commission (Hicks)* and *Toronto Transit Commission (Olejko Grievance)*, an arbitrator was required to interpret and apply a collective agreement clause that expressly stated that theft constituted misconduct that could result in termination. However, the Board is not being called on for that exercise in this case.

[110] The decision as to whether there is a valid ground for imposing a disciplinary measure on a public servant requires reviewing the facts in accordance with the employer’s standards of conduct, not the standards of conduct governed by the *Criminal Code* (see *Bray*, at para. 50). The employer’s standards of conduct are those set out in the *Values and Ethics Code* and in DND’s ethical principles.

[111] The grievor greatly emphasized the importance that the Board should place on the concept of intent, specifically, the lack of intent. He argued that the Board should consider intent in its analysis of the first two criteria in *Wm. Scott*.

[112] In the labour law context, the case law instructs that a grievor’s dishonest intent — or lack of it — is to be considered when determining the seriousness of the misconduct. However, it is possible to meet the first *Wm. Scott* criterion and to find that misconduct occurred that warranted imposing a disciplinary measure in the absence of dishonest intent (see, for example, *Canada Packers Inc. v. United Food and Commercial Workers, Local 162*, [1983] B.C.A.A.A. No. 190 (QL) at para. 36; and *Stelco Inc. v. U.S.W.A., Loc. 8782*, [1995] O.L.A.A. No. 82 (QL) at para. 16). But the employer must be able to demonstrate that the alleged misconduct did not constitute an error made in good faith. As the former Public Service Staff Relations Board recognized in *Gannon*, the employer has the right to punish a public servant for their misconduct but not for an error (see *Gannon*, at para. 130).

[113] I must decide whether the alleged misconduct warranted imposing a disciplinary measure. For the following reasons, I am satisfied that such misconduct occurred and that a disciplinary measure was warranted. I find that the grievor’s

actions constituted a lack of integrity and a serious violation of the values and ethical principles that were part of his conditions of employment.

[114] The grievor admitted that he had recovered and resold copper and brass scrap that he had removed from DND buildings and facilities. He also admitted that he resold copper and brass scrap that other DND plumbers had removed. Although he stated that he believed that in the employer's eyes, the scrap was worthless waste, he knew or should have known that he and the other plumbers involved in the resale activity did not own it. The grievor benefited from it four times.

[115] The grievor took actions that were contrary to the *Values and Ethics Code* and its previous version, the *Values and Ethics Code for the Public Service*. He was aware of the codes. The evidence adduced at the hearing set out that he attended a mandatory, annual values-and-ethics training session as a reminder on that subject. He was also aware of the expectations of public servants set out in the codes. He knew that the expected values and behaviours described in the codes were conditions of employment and that failing to comply with them could result in disciplinary action, up to and including termination.

[116] Integrity is one of the values set out in the *Values and Ethics Code* and its predecessor and is among the expected behaviours described in it. The grievor — like any public servant subjected to the *Values and Ethics Code* — was required to behave in a manner that would withstand the most exacting public scrutiny. He had to refrain from using his DND role to inappropriately obtain an advantage for himself or others. He had to take all possible steps to prevent and resolve any conflicts of interest — real, apparent, or potential — between his official responsibilities and personal affairs.

[117] The grievor did not meet those expectations. He took assets that belonged to his employer. Although he argues that he believed that the scrap was sent to the dump, still, it was not his property. It belonged to DND, and only DND could decide what to do with it. As the Board said as follows, in *Lynch*:

> …
>
> *[88] … it cannot be assumed, nor can it be condoned, that the department's so-called "garbage" could be allowed to become someone else's treasure. In this case, no matter how you cut it, the treasure still belonged to the Crown.…*
>
> …

[118] Taking the employer's assets for personal purposes and reselling them for a personal benefit is conduct inconsistent with the employer's expectations with respect to integrity. He used his DND role to inappropriately obtain a personal benefit.

[119] As mentioned earlier, the termination letter indicated that the grievor had also acted in ways that breached DND's ethical principles. The letter does not indicate the principles that were involved. However, at the hearing, the employer adduced as evidence the ethical principles set out in the *Statement of Defence Ethics* ("the *Statement of Ethics*"), as well as the expected values and behaviours set out in the *Department of National Defence Code of Values and Ethics* ("the *DND Code*") and the *Standards of Civilian Conduct and Discipline* (DAOD 5016-0, 2005; "the *Standards of Conduct*"). Those principles, values, and expected behaviours were the subjects of Lieutenant-Colonel Lagacé's testimony.

[120] In turn, the *DND Code* describes the expected behaviours and values of integrity and stewardship of public property set out in the *Values and Ethics Code*. However, additional values, ethical principles, and expected behaviours are added, particularly because of DND's mandate and the specific issues arising from its military assets and facilities. DND employees are required not to condone any unethical behaviour. They must discuss and resolve ethical issues with the appropriate authorities. Among the ethical principles unique to DND is the one of "serving Canada before self", which requires that DND employees at all times must perform their duties in a manner that best serves Canada, its people, and DND by making decisions and acting at all times in the public interest.

[121] Since at least 2012, DND has also had a *Statement of Ethics* that describes the applicable ethical principles and expected behaviours of DND employees, including making decisions and acting at all times in the public interest, never using one's official role to inappropriately gain an advantage for oneself, avoiding situations that may give rise to personal conflicts of interest, and ensuring the effective and efficient use of the assets, resources, and public funds for which they are responsible.

[122] The *Standards of Conduct* are set out in "Defence Administrative Order and Directive 5016-0" ("DAOD 5016-0). It includes among other things a directive for civilian employees that defines "misconduct" as including conduct that "deliberately, recklessly, or through negligence" breaches a standard of conduct or ethics.

[123] Now for the grievor's explanation that he apparently had followed a practice that existed in the private sector and that he believed was accepted at DND. His explanation is convenient, but it also has many shortcomings.

[124] First, the grievor's description of the widespread practice in the private sector set out that although sometimes, plumbers were authorized to take scrap for personal purposes and to resell it, nevertheless, it was recognized that the scrap belonged to the client. A plumber was entitled to it only if the client consented to the plumber taking ownership of it. The testimonies of the grievor, Mr. Hurtubise, and Mr. Sigouin confirmed that in private construction, the client was asked before scrap was taken. The issue of who owned the scrap after an industrial construction project would be discussed and could become the subject of an agreement between the client and the construction service provider. It was not an accepted fact that clients considered scrap worthless waste and that a plumber could take it for personal purposes.

[125] When the grievor became a DND employee, it became both his employer and client; that is, the one that paid for the copper and brass pipes, parts, and wire that the grievor used in his pipefitter-plumber duties. However, during his seven years of DND employment, he never asked a DND representative whether he could take the scrap for personal purposes or whether DND wanted to keep it. Thus, he did not follow a significant part of the practice that he relied on to explain his belief that he was allowed to take and resell copper and brass scrap.

[126] In addition, in his testimony about his previous work experience on major construction sites, the grievor stated that he inquired with his foreman as to whether he was allowed to recover and resell the copper and brass scrap. He asked no such question when he was a DND employee. He did not attempt to inquire as to the existence of departmental directives or those issued by the Engineering Branch. He accepted, without really questioning, what G.G. told him. However, G.G. was not a foreman or supervisor. He was a colleague without decision-making authority.

[127] In addition to relying on his private-sector experience as a source of a reasonable belief that he was allowed to take the scrap, the grievor submits that he was unaware that there were directives on managing residual materials because the employer had poorly trained and misinformed him.

[128] The Board's case law instructs on certain principles relevant to this proceeding. The first is that ignorance is not and has never been a defence for misconduct (see *Rahim*, at para. 79). The second is that an employer is not required to instill in its employees the basics of good conduct or to adopt a common-sense policy (see *Gannon*, at paras. 127 to 129).

[129] While an employer must share its expectations of its employees and their expected behaviours, it is not required to provide them with a comprehensive list of behaviours that are not condoned or acceptable. The fact that a rule of conduct, such as a prohibition against taking a specific action, has not been expressly shared with an employee does not mean that the employee can take the prohibited action without consequence (see *Gannon*, at paras. 128 and 129). A public servant also has a duty to inquire, ask questions, or seek advice from the appropriate officials when situations arise that are not specifically addressed by the employer's policies and directives and the circumstances result in a reasonable person looking objectively at the situation finding that there is doubt with respect to the behaviour expected by the employer.

[130] Nothing indicates that AOD 9200-9 and DAOD 3013 were specifically shared with the grievor and the electrical-mechanical shop employees before the shops were merged. Had they been expressly shared, it is unlikely that in 2014, Mr. Boily and Major Marcotte would have thought it necessary to adopt procedures to strengthen and make more explicit the departmental directives' application. The employer failed its duty to communicate its instructions expressly; that is, by bringing a written text about that subject to the grievor's attention. However, this is not a fatal blow to the employer's position that the grievor committed misconduct that warranted imposing a disciplinary measure.

[131] I accept the testimonies of Mr. Boily and Mr. Picard that AOD 9200-9 and DAOD 3013 were readily available to employees who wanted to learn about the scrap recovery policies and procedures. They were posted on the intranet. AOD 9200-9 was also posted on the Internet. The grievor could have read them. He had access to a computer and stated that he used it every day. Both directives were also included in guidance and procedure binders available in the electrical-mechanical shop as well as on the shop bulletin board.

[132] Other than the grievor, the only production shop employees who testified, Ms. Lacroix and Mr. Sigouin, stated that they learned the instructions to follow by observing their colleagues by observing standard practice. They learned that the copper and brass scrap did not belong to them and that it had to be placed in the IWM containers. The facts that they did not know the details of what DND did with the scrap once it was deposited at the IWM and that they were unaware of AOD 9200-9 and DAOD 3013 are not determinative in themselves.

[133] Corporal Plourde also stated that with the exception of the grievor, all the plumbers and electricians subjected to the criminal investigation acknowledged that DND prohibited their actions. They had sufficient knowledge of the waste-material-management directives to know that the scrap belonged to DND and that they were prohibited from taking and reselling it.

[134] I also find unconvincing the grievor's argument that as DND did not inform him that waste-material-management directives were in place, it was reasonable for him to rely on G.G.'s statements, who was a colleague. The grievor did not state that G.G. had told him that all shop employees collected and resold the copper scrap and that they shared the profits from the sales. Rather, he stated that G.G. had told him that "[translation] here, we recover and resell" scrap. Furthermore, G.G. apparently did not tell the grievor that DND allowed its employees to recover and resell scrap. G.G. supposedly also did not tell him that the shop superintendent was aware and approved of the recovery and resale practice. These are important nuances that can be used to contradict the grievor's claim that it was reasonable for him to have no doubt in his mind that he was entitled to take and resell scrap.

[135] Despite the fact that he said that he was unaware of DND's scrap-recovery directives, the grievor knew that the IWM was the Garrison building designated for recovering and recycling surplus material. He worked in the IWM's vicinity for seven years. Large containers were clearly identified as where Garrison employees were to deposit metal, wood, and dry waste.

[136] The grievor testified that during his employment, he had dumped different types of waste into the containers, including porcelain, plastic, gypsum, and metal scrap other than copper and brass. Therefore, he had learned that if not by reading a directive then by watching and learning from his colleagues, DND had certain

expectations and requirements with respect to asset and materials management. He testified that he did not bring the copper and brass scrap to the IWM because it had significant monetary value and could be resold. Thus, he chose to deposit in the IWM containers the scrap that had no resale value and to keep for his personal use the scrap that could be resold at a profit.

[137] I find unconvincing the grievor's argument at the hearing that the posters outside the IWM, as described in paragraphs 55 and 56 of this decision, were ambiguous and could reasonably have been interpreted as indicating that DND treated all materials deposited in the containers as having no value or as garbage. That argument was based on a selective reading of the posters' text that highlighted only two words, "[translation] dispose" and "[translation] waste", and that ignored the rest of the text. Rather, the posters indicated the employer's instructions that employees should consult the IWM before placing the waste in the containers, use the ramp to access the containers, and place the materials and waste only in the containers designated for that purpose instead of leaving it elsewhere near the IWM.

[138] After his March 2013 transaction with the scrap-metal dealer, the grievor stated that he questioned why DND did not resell the scrap, as it was public property with significant resale value. However, he stated that that questioning did not stop or decrease his participation in the scrap recovery and resale activities. He also did not attempt to validate his understanding of what DND permitted and authorized. He did not consult a manager or IWM staff. He did not conduct research to confirm whether DND had a directive or policy on the treatment of residual materials, specifically metals of significant monetary value.

[139] The grievor stated that he stopped recovering copper and brass only in March 2014, when Mr. Boily prepared and forwarded the Procedure. He did not immediately admit his misconduct; he did it only after being charged with a criminal offence and being subjected to the employer's administrative investigation.

[140] When the facts of this case are analyzed in the context of the grievor's work environment, it seems to me even more unlikely that he was unaware of, or of the need to inquire about, the expectations of him.

[141] He worked in a military environment in which the security of DND sites and assets was prioritized. Like all Garrison employees, his personal vehicle was inspected

at the gate at the end of his shifts, which was an approach aimed at, among other things, ensuring the security of DND assets. The expected behaviours of the Garrison's civilian employees were described in many directives, and respect for the chain of command was integral to the expectations of employees. The grievor testified that he attended mandatory annual ethics training. Although the training did not specifically mention that it was prohibited for an employee to take and resell scrap, the principles of integrity and stewardship of Crown assets were discussed. In addition, DND made several tools and resources available to employees facing potential conflicts of interest or ethical dilemmas.

[142] Based on all the evidence, I find that the electrical-mechanical shop superintendent's failure to explicitly share the requirements of AOD 9200-9 and DAOD 3013 or to forward them directly to the grievor is clearly insufficient to explain or excuse the grievor's behaviour.

[143] The evidence that the grievor adduced does not explain how he could have been the only one who did not know that it was not permitted at DND to take the copper and brass scrap for personal use. His testimony on this matter seems improbable to me.

[144] The grievor stated that he is a man of principle. It is difficult for me to reconcile his testimony about the importance he attaches to complying with the organization's rules, such as the prohibition against stealing, with his behaviour and his lack of thought in the face of many indications that DND employees recovering and reselling scrap was not allowed. I find it hard to believe that he could have been so naive as to believe that he had the right to profit from the sale of DND-owned assets. The naivety argument is all the more implausible when it is examined in the light of the grievor's private-sector experience, specifically his evidence demonstrating that it was recognized that the scrap belonged to the client and that he was not entitled to profit from selling it without the client's consent.

[145] The test to be used to assess a witness's credibility is the harmony of their testimony "… with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (see *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BC CA)). The grievor's evidence

of his knowledge of the employer's expectations of him does not meet the test set out in *Faryna*.

[146] I find that were the grievor to claim that he did not know the standards that had to be met, it would be only because he was wilfully blind (see *Briscoe*; *Pagé v. Deputy Head (Service Canada)*, 2009 PSLRB 26 at para. 184; and *Onasanya*, at paras. 23 and 24).

[147] Regardless of whether he intended to steal from his employer, the grievor's behaviour constituted misconduct within the meaning of the *Standards of Conduct*. In addition to breaching the *Values and Ethics Code*, he breached DND's ethical principles set out in the *DND Code* and the *Statement of Ethics*. He was responsible for goods that DND purchased using public funds. Instead of using them effectively and efficiently in the public interest, he took them for personal use, resold them, and made a personal profit from them. He favoured his personal interests over those of DND.

[148] I find that on a balance of probabilities, the grievor committed misconduct that warranted imposing a disciplinary measure.

C. The disciplinary measure that was imposed, the termination, was not excessive in the circumstances

[149] When analyzing the proportionality of the penalty imposed on the grievor, I must consider the mitigating and aggravating factors.

[150] The grievor presented many mitigating factors that according to him warranted reducing the disciplinary measure imposed on him. He argues that among other things, his termination was an excessive disciplinary measure because he was unaware that he was prohibited from taking and reselling copper and brass scrap and therefore did not intend to steal from his employer. He contends that DND did not explain to him the guidelines for recovering and recycling surplus material, such as copper and brass, and that because of his work experience, it was reasonable for him to believe that he was allowed to take and resell the scrap for personal purposes. He also submits that the employer was aware of, and condoned, his misconduct and that of his colleagues, which should mitigate the disciplinary measure imposed on him.

[151] I have already discussed the grievor's intention and knowledge of the employer's expectations. I did not find his arguments on this matter credible or

persuasive in my analysis under the first *Wm. Scott* criterion. My conclusion is the same when those arguments are considered in my analysis of the second *Wm. Scott* criterion. I find that they are not factors that should mitigate the disciplinary measure imposed.

[152] As I stated earlier, nothing indicates that AOD 9200-9 and DAOD 3013 were explicitly explained to the grievor and the electrical-mechanical shop employees before the shops were merged. That was a failure on the employer's part. However, its expectations were communicated in another way, and the grievor was the only one who claimed to have been unaware of the nature of the expectations. If he could claim that he did not know the standards that had to be met, it would only be because he was wilfully blind.

[153] The grievor also argues that the Engineering Branch had a laissez-faire culture under which employees recovering and reselling DND assets was condoned. He argues that that factor weighs in favour of a less-severe disciplinary measure.

[154] Despite the deficiencies in the electrical-mechanical shop's management described in the summary of the evidence, the evidence presented to me at the hearing was insufficient to enable me to find that there was a culture of "laissez-faire" in which the employer knew of and condoned the actions of the grievor and his colleagues (see *Chopra v. Canada (Attorney General)*, 2014 FC 246). Contrary to the evidence adduced before the Board in *Leadbetter v. Treasury Board (Solicitor General Canada - Correctional Service)*, [1999] C.P.S.S.R.B. No. 59 (QL), and *Melcher*, both of which the grievor cited, at the hearing, I was presented only with allegations, hearsay, and his testimony that he presumed that the superintendent was aware of and approved the employees in his shop recovering and reselling the scrap.

[155] The grievor had the onus of proving his allegation that the employer condoned his behaviour. He could have called as witnesses electrical-mechanical shop employees, who could have corroborated his allegations that the employer was aware of, and condoned, his actions and those of his colleagues. He did not. No direct or convincing evidence was presented to me that could support a conclusion that the electrical-mechanical shop's superintendent was involved in or aware of the scrap recovery and resale activities that led to the disciplinary measure being imposed on the grievor.

[156] The grievor mentioned these other mitigating factors: his years of service, his positive performance evaluations, and his clean disciplinary record. He had seven years of service with DND. He had no disciplinary history, and his performance was good. I agree that they are relevant mitigating factors in the circumstances of this case. I would add to the list the fact that he admitted that he recovered and resold the scrap in the context of the criminal investigation, acknowledged his wrongdoing by pleading guilty to a criminal offence, and admitted his actions during the administrative investigation.

[157] The grievor also submits that his cooperation in a subsequent phase of the criminal investigation is a significant mitigating factor. The Board has repeatedly accepted a grievor cooperating in an investigation as a mitigating factor that may influence the disciplinary measure imposed. I am of the opinion that it is appropriate for me to consider it.

[158] To determine whether the termination was an excessive disciplinary measure in the circumstances of this case, the mitigating factors described earlier must be considered in light of the aggravating factors and the nature of the grievor's misconduct.

[159] I accept the following aggravating factors. The grievor recovered and resold the employer's assets during working hours, using a DND truck. His misconduct took place over several years and was not an isolated incident. He made a significant profit from it. He also colluded with his colleagues. I find that the accomplices' involvement in the scrap recovery and resale activities made the grievor's misconduct even more reprehensible (see *Lynch*).

[160] I also accept as an aggravating factor the grievor's failure to immediately admit his misconduct. As I noted earlier, he made certain admissions in the criminal and administrative investigations. However, he did not immediately admit to his misconduct. In March 2014, Mr. Boily adopted the Procedure. It clearly set out that recovery and resale activities were prohibited at DND. W.L. then informed the grievor that recovery and resale had always been prohibited at DND. Although he complied with the Procedure, the grievor did not inform his employer of his misconduct. Only after his arrest in January 2015 did he admit to recovering and reselling scrap.

[161] As for the nature of the grievor's misconduct, it is well established in law that stealing from one's employer is a significant lack of honesty that usually results in termination, unless there are mitigating circumstances (see, among others, *Rahim*, at para. 52, *King*, and *Shandera*, at para. 351). A significant barrier to mitigating a disciplinary measure that led to termination exists when the theft is not limited to an isolated incident and therefore is premeditated (see, for example, *Tyco Thermal Controls (Canada) Ltd. v. Communications, Energy and Paperworkers Union of Canada and its Local 537*, 2009 CanLII 1132 (ON LA) at para. 18, in which the arbitrator denied a grievance challenging an employee's termination for stealing small amounts of copper scrap over approximately one month).

[162] This is not the first case in which an employee was terminated for taking and selling DND-owned metals (see *Fleet v. Treasury Board (Department of National Defence)*, [1988] C.P.S.S.R.B. No. 155 (QL); *Lynch*; and *Anctil v. Treasury Board (National Defence)*, [1999] C.P.S.S.R.B. No. 36 (QL)).

[163] In *Fleet*, the Board denied grievances challenging the terminations of two DND employees who had taken and resold — during working hours — significant amounts of aluminum that the department owned. The Board maintained the terminations in the absence of admissions and on the basis of circumstantial evidence that the employees had stolen the metals.

[164] That contrasts with *Johnston Packers Ltd. v. United Food and Commercial Workers Union, Local 1518 (Parker)*, [2007] B.C.C.A.A. No. 53 (QL), which the grievor relied on. In *Johnston Packers Ltd.*, the arbitrator allowed a grievance challenging Mr. Parker's termination. He was an employee and had been charged with, among other things, copper theft, and a one-month unpaid suspension was substituted. He was unaware that his employer was recovering and reselling the copper scrap created during the work. His colleagues had informed Mr. Parker that the scrap was being thrown in the garbage. However, it is important to point out that Mr. Parker had requested permission from a manager to take a small amount of copper. The manager had granted him permission as long as the scrap that Mr. Parker took could not be reused. According to the arbitrator, Mr. Parker had been opportunistic and had interpreted the permission granted to him more freely than was reasonable. It was a significant lack of judgment, but it was not theft.

[165] Although *Fleet* and *Johnston Packers Ltd.* dealt specifically with situations in which an employee appropriated copper that their employer owned, I find that *Lynch* is the decision most relevant to this case because of the similarity of the facts.

[166] In *Lynch*, the Board maintained the termination of a civilian DND employee who had taken assets from his employer, including padlocks, a computer, a typewriter, furniture, and a safe. Mr. Lynch admitted that he had taken many DND assets for personal use or for a third party's benefit. Many of the goods he took were surplus material that he had taken from containers similar to those at the Garrison's IWM. Like the grievor in this case, Mr. Lynch carried the goods in a DND vehicle during working hours and with his co-workers' help. He had pleaded guilty to an offence of possession of property obtained by crime but alleged before the Board that he had not committed theft. He claimed that he had been authorized to take the goods because he had never been informed of DND's asset management directives, including the DND asset disposal policy and the standing orders for removing surplus material from DND premises. He also argued that his behaviour was known to, and condoned by, the employer because his supervisor was aware of his actions and did not intervene.

[167] The Board did not find Mr. Lynch's argument, who was a former military police member, credible that he was unaware that the disposal of Crown assets was governed by a specific procedure and that he was prohibited from taking the assets and moving them using DND trucks. The Board also found that the grievor's argument that the employer condoned his behaviour was "… shallow at best and an attempt to lay the blame elsewhere at worst …" (see *Lynch*, at para. 89). The Board found that the involvement of accomplices did not demonstrate that the grievor's misconduct was condoned but rather that it made his actions even more reprehensible.

[168] In all the circumstances of this case, I find that the aggravating factors and the nature of the misconduct outweigh the mitigating factors and that the grievor's termination was not an excessive disciplinary measure.

[169] Honesty is the cornerstone of the employer-employee relationship. The grievor sought to make a profit by selling Crown assets without authorization. It was a significant lack of honesty, integrity, and judgment by a DND employee who had a high degree of autonomy in the workplace and who had under his control Crown assets of

significant value. In light of all the evidence, I find that the relationship of trust between the grievor and his employer was irreparably broken.

[170] The grievor's suspension without pay and termination were two separate disciplinary measures based on the same rationale. The employer used the date of the suspension without pay as the effective date of the termination, which the case law recognizes it was entitled to do (see *Canada (Attorney General) v. Bétournay*, 2018 FCA 230 at para. 50). Since I have found that the grievor committed misconduct warranting his termination and that the grounds for it existed when it took effect, I find that to the extent that he challenges the suspension as such, the grievor's grievance is now moot.

[171] Now for the grievor's argument that the length of his suspension was excessive and therefore apparently became disciplinary.

[172] Approximately 19 months elapsed between his suspension without pay and his termination.

[173] The chronology of events that took place during those 19 months follows.

[174] The grievor was suspended with pay on January 15, 2015, the day after his arrest. In February 2015, the CFNIS requested that DND suspend its administrative investigation to prevent it from interfering with the ongoing criminal investigation. In April 2015, DND restarted the administrative investigation, and one month later, on May 27, 2015, the grievor was suspended without pay pending the results of the administrative investigation. In late June 2016, a few weeks after pleading guilty to the charge against him, the grievor met with the administrative investigators. The interim investigation report was sent to him in late August 2016, and the final report was sent at the end of September 2016. A week later, a meeting was held at which he was asked to present any mitigating clarifications or circumstances that he felt were not considered in the investigation. On December 8, 2016, he was informed of his termination.

[175] The grievor's suspension without pay was long. The length of the investigation resulted in him having to live in uncertainty for many months. However, the length of the suspension was not, in my view, excessive when it is assessed in light of the nature of the administrative investigation that was conducted; that is, it involved 6 DND

employees and included 22 witnesses, and among other things, it involved allegations of theft, resale, and collusion. It was a large-scale investigation. In addition, part of the delay was because the employer waited for the outcome of the criminal charge against the grievor before initiating the part of the investigation that required his active participation. In my view, doing that was reasonable. In all the circumstances of this case, I find that the investigation's length was not excessive to the point that it became disciplinary or punitive.

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

(The Order appears on the next page)

V. Order

[177] The grievances are denied.

December 18, 2023.

FPSLREB Translation

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