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Citation: 2025 FPSLREB 136

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

DAVID DINUCCI

Grievor

and

DEPUTY HEAD
(Correctional Service Canada)

Respondent

Indexed as
Dinucci v. Deputy Head (Correctional Service Canada)

In the matter of an individual grievance referred to adjudication

Before: Goretti Fukamusenge, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Christophe Haaby, union advisor

For the Respondent: Jean-Charles Gendron, counsel

Heard at Montréal, Quebec,
April 3 to 5 and October 15 to 17, 2024.
(FPSLREB Translation)

REASONS FOR DECISION **(FPSLREB TRANSLATION)**

I. Individual grievance referred to adjudication

[1] This decision concerns a grievance related to a three-day suspension imposed following the use of force against an inmate. The incident that led to the grievance occurred at Port-Cartier Institution, a maximum-security facility. The intervention was carried out by a correctional officer during an escort. The inmate in question is not a party to this proceeding and was not called to testify. Their identity will therefore not be mentioned in this decision.

[2] David Dinucci ("the grievor") worked for Correctional Service Canada ("the employer" or CSC) as a correctional officer. The employer determined that, during the intervention, the grievor had used force that was both unnecessary and disproportionate in response to the inmate's behaviour. It concluded that the grievor had not complied with several obligations, including the CSC Commissioner's Directives, namely CD 567-1 – Use of Force, CD 060 – Code of Discipline and CD 567 – Management of Incidents, which includes the Engagement and Intervention Model (EIM), as well as the *Values and Ethics for the Public Sector*, leading to a three-day suspension.

[3] The grievor maintained that he had followed all these rules and that he would act the same way in the same situation. According to him, the strategy he used with respect to the inmate was justified in the circumstances. He indicated that there was not a single correct intervention strategy. He also argued that the penalty was both unjustified and excessive.

[4] For the reasons put forth in this decision, the grievance is allowed. The evidence is based primarily on a short video without sound, open to various interpretations, and on observation reports whose authors, two other correctional officers present at the time of the incident, were not called to testify. It cannot be considered conclusive.

II. Contextual summary

[5] At the time of the incident, the grievor was a correctional officer at the CX-01 group and level at Port-Cartier Institution, a maximum-security institution. He was a member of the Emergency Response Team (ERT).

[6] On September 8, 2019, during his shift in the isolation sector, the grievor and two other officers had to escort an inmate to the shower. Upon leaving his isolation cell and before going to the shower, the inmate underwent a cursory search by the grievor. What followed is the incident captured on a video lasting a few seconds, without audio.

[7] Following the incident, the grievor and the two other correctional officers who were with him each prepared an observation report. The grievor also submitted an additional report.

[8] The content of the observation reports from the two other correctional officers is almost identical. They indicate that, following a search, while the correctional officers were directing the inmate to the shower, he turned toward them with an aggressive attitude. The reports use the pronoun “we/us.” Neither of the two correctional officers was called to testify.

III. Summary of the evidence

A. For the employer

[9] The employer presented its evidence through four witnesses: Martin Héroux, Assistant Warden, Operations, the person who imposed the disciplinary sanction; Jean-François Lamontagne, trainer; Steve Ross, Correctional Manager (Operations), the one who assessed the use of force; and Richard Wilkie, Acting Project Officer. The employer attempted to have Mr. Wilkie testify as an expert witness. I did not admit Mr. Wilkie as an expert witness. He testified about his knowledge of the assessment of the use of force. I will return to this later in the reasons for this decision.

1. Risk assessment and intervention strategy: Testimony by Mr. Lamontagne

[10] Mr. Lamontagne explained at length the EIM, the risk factors and the intervention strategies. He described three levels of risk: low, moderate and high. According to his testimony, when the risk is moderate, there is a potential for harm, and when it is high, the situation is said to be serious and harm is imminent. Establishing a risk level depends on several factors. A situation may be considered moderate by one correctional officer, but the same situation could be considered high by another. The level of risk depends on the interpretation.

[11] According to Mr. Lamontagne, when conducting a risk assessment, a strategy is chosen and there is continuous reassessment. Risk assessment is not a scale; intervention strategies do not necessarily follow a progression.

2. Assessment of the use of force in question: Testimony by Mr. Ross

[12] Mr. Ross described his role in assessing the use of force as a Correctional Manager, Operations. He also talked about the work of correctional officers and the meetings he had with the grievor.

[13] According to his testimony, Port-Cartier Institution is a facility where offenders are in maximum security. Correctional officers often face non-compliant attitudes and are constantly exposed to threats, insults and acts of violence every week. There are inevitably victims of physical or verbal abuse by inmates, who can, among other things, throw bodily fluids or commit other assaults.

[14] Mr. Ross also described how he became aware of the incident involving the use of force. He explained that he was on vacation when the incident occurred. When he returned, the employer asked him to prioritize the assessment of that use of force deemed excessive. He did not remember whether that request was from the Warden or the Assistant Warden.

[15] He indicated that, once he was informed of the incident, he took the following steps. He went to the hard drive room where the video footage is stored. He noticed that the videos had already been taken out. He retrieved all the observation reports and, a short time later, he invited the grievor to watch the videos with him so he could explain how it had unfolded. He then began to prepare his assessment report.

[16] According to his testimony, the grievor had the opportunity to explain his observation reports to him. He indicated that the first report lacked details and that its supplement provided more information. He added that, during their meeting, the conversation was friendly and the grievor explained to him how he had felt. He stated the following:

> [Translation]
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> *They are asked to explain the facts but not how they felt. It happened within seconds, and when it comes to explaining it, it's not easy, but he explained to me how things unfolded and how he felt.*

[17] He stated that he had watched the videos alone before watching them with the grievor. He added the following:

> [Translation]
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> *I watched the videos about ten times, there is no audio, there are videos, we rely on the reactions. I tried to understand the context, the inmate heading to the shower, the officers asking him to face the wall, Dinucci using force. It took me several days before I could take a position to come to the conclusion, it took me some time to position myself, there are some cases that are a bit more obvious, this one was a bit more subtle I would say.*

[18] Mr. Ross reviewed the justifications put forward by the grievor concerning the incident. He explained that, before the events, the inmate had threatened him. In the video, the inmate is seen leaving his cell and heading straight for the shower. The grievor indicated that he had perceived a risk to the safety of staff. However, according to Mr. Ross, the inmate's behaviour did not reflect such a threat; he did not seem aggressive and was not clenching his fists, contrary to what had been claimed.

[19] Even though the inmate had threatened to spit on the correctional officers several days before the incident, the strategic choice was not right. When inmates threaten to harm staff members, they are required to wear a spit mask or be handcuffed. Those measures should have been taken. The protective measure must be taken without delay. The inmate should not have been taken to the ground; he should have been handcuffed. The intervention strategy was not appropriate; he did not see the inmate attacking the grievor. He concluded that the level of force used was not necessary.

[20] With respect to the two observation reports prepared by the grievor, Mr. Ross explained that it was relatively common to present an initial report and a supplementary report. Sometimes, correctional officers write their reports during their shift. When things have just happened, you need to take a little time to step back and think about how things went. A supplementary report can be prepared on an officer's initiative or upon request.

[21] Mr. Ross stressed that the grievor took his job to heart. He described him as an intelligent and curious person who seeks to understand the source of regulations and their purpose. According to him, the grievor has great potential.

3. Disciplinary process: Testimony by Mr. Héroux

[22] The employer had Mr. Héroux testify about the process that led to the disciplinary action. At the time of the events, Mr. Héroux was the Assistant Warden, Operations. He was the one who issued the disciplinary measure. He outlined the procedure to follow to determine whether a disciplinary measure should be applied in the event of a breach of a directive.

[23] According to his testimony, when deciding on a disciplinary measure related to the use of force, an assessment is made, after viewing the videos, of whether the use was necessary and justified. The following questions are also asked: Would I be comfortable if this video were broadcast in the media? Does the employee understand that he made a mistake? Does the employee feel remorse?

[24] He explained that correctional officers are made aware of the restrictions that apply to an inmate at the start of each shift and that there is a document to that effect on a shared drive. He added that, when an inmate threatens to spit, they must be moved with a spit mask. You adapt to the inmate's behaviour. The manager will assess the measures used and decide whether the spit mask can be removed to modulate the restrictions.

a. Assessment of the incident

[25] According to Mr. Héroux, on watching the video, what was described in the information included in the observation reports is not seen. The use of force was less necessary. If the grievor believed that the inmate was going to spit on him, it does not make sense why he would approach him.

[26] Based on his viewing of the videos, the inmate was not threatening. The inmate's sudden movement, described by the grievor, cannot be seen in the video. The inmate's behaviour is not resistant. He added that, when watching the video from a different angle, a verbal exchange can be seen, but the inmate's arms were at his sides. Moreover, he found it hard to explain how the grievor could have gotten so close to the inmate, given that he had threatened him a few days earlier.

[27] With respect to the two observation reports presented by the grievor, Mr. Héroux indicated that the grievor prepared the first report on the day of the incident, and that he prepared a supplementary or second report after being informed

that he would face disciplinary measures. The second report includes more information than the initial report and is inconsistent with what is seen in the video.

[28] The video lasts only a few seconds. The grievor stated that he had time to assess the situation, but added the following: [Translation] "For us, it is impossible for an officer to *compute* [*sic*] all that in the time we see, it might have taken several minutes."

[29] When asked whether correctional officers are commonly insulted by inmates, he stated the following: [translation] "Unfortunately, it is something that happens very frequently, we are in maximum security." He stated that inmates' threats will not stop correctional officers from intervening with them.

[30] In terms of the importance attached to the fact that the grievor claimed the force used was justified, he disapproved of the fact that the grievor does not acknowledge the seriousness of his behaviour, refuses to correct it and is likely to continue working in that way. He stated that, during his meeting with him, the grievor was courteous and cooperative but showed no willingness to acknowledge that he should have acted differently.

[31] According to Mr. Héroux, even though the grievor believed he was in the right, he should have set aside his personal convictions in recognition of the organization's best interests. In addition, even though he believes he has nothing to be ashamed of, he must still be aware of the employer's expectations, regardless of his own perception of the situation.

[32] When referred to the disciplinary letter, Mr. Héroux stated that the grievor had not complied in particular with CD 567 – Management of Incidents (the EIM), CD 567-1 – Use of Force, and the Standards of Professional Conduct in CD 060 – Code of Discipline. According to him, the grievor neglected his duties as a peace officer. He should have taken the necessary measures.

[33] When asked to specify what those measures were, he explained that the grievor should have ensured the inmate's cooperation. In such a situation:

> [Translation]
>
> *The officer would be expected to step back and prepare the protective clothing if he thought he was going to be spat on. The*

> *level of force used was not the minimum required; for example, the inmate should have been redirected to the shower to encourage cooperation. There were plenty of other options available.*

[34] He did not elaborate on those options.

[35] With respect to the physical intervention, Mr. Héroux explained that, during an intervention, taking an inmate to the ground involves a controlled shove aimed at getting them on their stomach for handcuffing. In this case, the inmate should have been restrained in a way that he ended up on his stomach, rather than falling on his back. According to his assessment, the use of force in this situation was not necessary and the degree of force used could not be justified or considered proportional to the circumstances.

[36] According to Mr. Héroux, the grievor also breached the *Code of Values and Ethics for the Public Sector* that applies to all public sector employees in Canada. He added that employees are asked to collaborate. Since the grievor had received threats prior to the incident, he should have brought this to the attention of the supervisors.

b. Factors that motivated the suspension

[37] According to Mr. Héroux, it was a case of misconduct, exacerbated by the grievor's failure to acknowledge the facts, his assertion that he would act the same way in a similar situation and the fact that he had undergone training related to the intervention model. He also stressed that he took into account the fact that the grievor had no prior disciplinary record. According to him, the expectations for staff are high. He noted that correctional officers must exhibit exemplary behaviour, particularly as the institution regularly welcomes new recruits seeking guidance and role models.

[38] In terms of the duration of the suspension, he stated that he relied on the recommendations of Labour Relations, taking into account all similar cases. A suspension ranging from three to five days was suggested, so he opted for the minimum penalty.

[39] When asked if he had met with the other two correctional officers who were with the grievor at the time of the incident, he replied that he had not. He explained that the meetings only concerned the allegations against the grievor and that he had not met with the other correctional officers due to confidentiality. He stated:

[translation] “The grievor was the person concerned; he was the only person questioned.”

B. For the grievor

[40] The grievor testified on his own behalf. He maintained that the inmate was displaying verbal and non-verbal aggression toward him. He allegedly tried to intimidate him and made a sudden movement with his hands, which were tensed. He claimed that he saw the inmate clench his hands and thought he was going to attack him. According to him, that prompted him to act in self-defence by taking the inmate to the ground.

[41] He stated that, during the incident, the inmate kept staring at him intently, with bulging eyes and threatening him repeatedly without giving him a chance to speak. He added that the inmate had made threats of physical violence against him. According to the grievor, in the absence of security tools nearby, the risk of physical assault, particularly a punch, was real. According to his testimony, this type of situation is part of the daily life of correctional officers.

[42] The grievor also testified that the inmate had a history of threatening behaviour toward other correctional officers. He allegedly spat on a colleague and threw urine on him two days before the incident. He indicated that he perceived the inmate’s threats as serious. According to him, inmates often have homemade weapons hidden in bodily areas that are difficult to inspect, particularly the genital areas. Although no source has confirmed that the inmate was carrying a weapon at the time of the incident, the grievor stated that he acted based on the general context, in which weapon seizures are common.

[43] When asked about the reasons why he was working in the isolation sector on the day of the incident, despite the inmate having previously threatened him, the grievor stated that there were no particular reasons for this, adding that he liked working in that sector. He stated that it was not the first time he had received threats in the course of his duties.

[44] With respect to the protocol that was in place for the inmate on the day of the incident, he testified that there were no protocols or restrictions concerning the inmate. He explained that, in practice, the sector coordinator decides on the protocol

to follow with respect to an inmate. The role of the sector coordinator is to ensure the movement proceeded smoothly and the safety of staff members and inmates in the sector.

[45] As for the intervention strategy, the grievor stated that there was more than one intervention strategy. There can be several. There are good ones and bad ones. The intervention strategies are not integrated into the EIM. According to him, that model does not prescribe specific intervention strategies, but rather serves as a general guide. He stated that the EIM does not indicate how to act in a given situation and therefore cannot be considered an intervention strategy as such.

[46] The grievor acknowledged that, upon viewing the video, no sudden movements of the inmate's fists or hands can be clearly seen. He stated that, although the movement could not be clearly seen in the image, it was a small movement that he had interpreted as a potential threat. He nonetheless stated that the inmate had tensed up, which he believed had triggered a spontaneous intervention on his part.

[47] When asked whether he had ever been involved in another use of force, he replied that this was the only incident of this kind since the start of his career with CSC. According to him, this event was exceptional. He stated that it was a spontaneous response, in a context where neither time nor circumstances allowed him to step back to develop an intervention plan. He added that, as part of a planned response, such a plan is usually put in place, which was not possible in this case, as the event occurred unexpectedly. He added the following:

> [Translation]
>
> *To this day, I still believe that it was the best strategy; in the moment when I took the inmate to the ground, I was convinced he was going to attack me. Knowing his background, if I would have stepped back, he could have spat on me. When I took him to the ground, I was convinced he was going to attack me. Maybe if I had negotiated it would have worked, but nobody knows. The inmate knew that I was justified in doing what I did. The inmate was not complying with orders. The inmate went into a monologue, not letting me speak. I ordered him to return to the shower, but the inmate was clenching his fists.*

[48] When asked about the possibility that the inmate continued to make threats once subdued on the ground, the grievor replied that the risk of spitting remained. He stated that the use of a device like a spit mask could have been considered, but that no

mask had been brought to the scene at the time of the intervention. He added that the risk remained, even during the medical assessment, and that in the absence of a mandate, the use of a spit mask is generally not permitted.

IV. Summary of the arguments

A. For the employer

[49] According to the employer, the suspension letter adequately summarizes the reasons leading to the disciplinary action. The grievor is accused of having opted for inappropriate behaviour, of having committed breaches of the applicable codes and of failing to comply with the employer's directives, particularly those related to the use of force, as well as the Commissioner's Directives.

[50] The fact that the evidence of the incident relies on a video without audio, and that it is impossible to determine the comments exchanged, is not considered a relevant element in the analysis of the case. According to the employer, this is not an issue, particularly as no words of any kind can justify non-compliance with the clearly established guidelines and intervention framework. It stressed that the use of force must remain a measure of last resort and that the correctional officer is responsible for implementing all necessary means to prevent escalation.

[51] The employer continued its presentation by analyzing the various testimonies. Following is a summary of its argument.

1. Testimony by Mr. Héroux and Mr. Lamontagne

[52] Mr. Héroux outlined the process to follow during a disciplinary analysis, which is as follows: Was the use of force justified? If the public were to view this video, would the CSC be comfortable explaining it? Mr. Héroux also relied on the reports. Was the intervention necessary? Does the employee have a disciplinary history? He then considered all the aggravating and mitigating factors and the grievor's reaction to the situation. Does the grievor understand his behaviour?

[53] There is a gap between the reports and the video recordings. When the inmate turns around, his aggression is not visible. The grievor cannot be seen pointing toward the shower. The inmate was not given time to comply.

[54] Mr. Héroux also noted that, in his opinion, the intervention was not appropriate. He did not understand how there could be a fear of being spat on given the approach that was used.

[55] With respect to the observation reports, the grievor admitted to having completed the report when he learned that he would be subject to disciplinary action. That report can be called into question.

[56] The grievor is a member of the ERT. Correctional officers in that unit receive additional specialized training and are seen as role models within the institution. Given the example they are expected to set, even in the performance of their regular duties, a high level of thoroughness is expected of them. As a result, breaching the rules while being part of the ERT is considered an aggravating factor.

[57] Mr. Héroux noted that the grievor continued to believe he had acted appropriately, which he found concerning as he does not seem to recognize his breaches. The grievor stated that he had been a victim of threats. While knowing that such a type of escort normally requires the presence of two correctional officers, the employer questions the grievor's decision to join the escort under such conditions. In addition, when the inmate's isolation cell door was opened, the grievor was not in a strategic position, but nonetheless stepped between his two colleagues to search the inmate.

[58] Mr. Lamontagne presented the list of training courses that the grievor had taken, including on the EIM. He indicated that the content of the EIM had been discussed in depth. His testimony supports the basis of disciplinary measures taken, as it allowed for a detailed explanation of the principles taught to correctional officers during their training.

2. Testimony of Mr. Ross

[59] Mr. Ross explained the analysis that a manager must conduct when assessing the use of force. He watched the video tapes about ten times, reviewed the observation reports, thought long and hard and discussed it with the grievor more than once.

3. Testimony of the grievor

[60] In his testimony, the grievor seemed to stress the inmate's history. However, he did not provide any documents to support those claims. It was noted that the inmate

may have been involved in several uses of force but, once again, no evidence was provided to support that claim.

[61] The grievor's qualifications are not in question. He held a position with significant responsibilities. However, he was involved in an incident involving the use of force, during which he did not follow the EIM guidelines and committed several acts of misconduct. His behaviour is deemed unacceptable and cannot be tolerated.

[62] The employer took several factors into account in its assessment: the severity of the facts, the credibility of the grievor, his lack of acknowledgment of wrongdoing, his lack of remorse and his statement that he would act the same way in a similar situation. The fact that the grievor was a member of the ERT was also taken into consideration.

[63] The employer imposed a three-day suspension, whereas case law seems to suggest 20 days. The employer had no other choice but to impose a disciplinary measure on the grievor to encourage him to carefully consider his actions.

[64] To support its claim that excessive use of force is serious misconduct, the employer referred to *Hicks v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 99, at paragraphs 71, 75 and 76. It also referred to other decisions, including *Shaw v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 101, at paragraphs 103 to 108 and 111 to 115.

[65] The employer also cited the "rat code" and referred me to *Mackie v. Treasury Board (Solicitor General of Canada – Correctional Service)*, 2004 PSSRB 3, at paragraphs 78 to 80 to define its meaning. It did not elaborate on that point.

[66] In terms of mitigating factors, case law shows that being part of the ERT is an aggravating factor, not a mitigating one, when inappropriate force is used.

[67] The grievor insisted there was no one strategy that was better than another. The employer disagrees. That is where the problem lies. The employer is asking the grievor to change his approaches.

B. For the bargaining agent

[68] The bargaining agent structured its argument by first presenting a factual summary of the events, followed by arguments concerning the intervention strategy in question, the existence of mitigating factors, the "rat code," and the lack of remorse.

1. Factual summary

[69] In light of a possible escalation of violence, following his analysis of the EIM, the grievor decided to take the detainee to the ground in a controlled manner, managing the situation, and thereby preventing potential harm to himself and his colleagues. Following that intervention, there was no debriefing on the possible breach for four days after the intervention. Debriefings should take place immediately after an intervention.

[70] Upon his return from vacation, Mr. Ross was told (he could not remember who this supervisor was) to pay attention to the use of force. According to them, there were breaches. Mr. Héroux then conducted a disciplinary investigation based on the videos without audio.

2. "Rat code" and burden of proof

[71] The bargaining agent revisited the issue of the "rat code," arguing that each party is responsible for its own evidence. It asserted that it could not be reproached for not calling the other two correctional officers who were present at the time of the incident, arguing that it was up to the employer to do so if it deemed it relevant. The bargaining agent stated that it had offered the opportunity to hear these witnesses, an offer that the employer allegedly refused. The bargaining agent stated that the employer could also have called the inmate to testify, which it did not do.

3. Video evidence without sound and comments from the inmate

[72] The evidence presented by the employer is primarily based on a video without sound. Without sound, visual sequences are open to different interpretations. The employer attempted to introduce interpretations of this video by Mr. Héroux, Mr. Ross and Mr. Wilkie, witnesses who were not present at the time of the incident. None of them can attest to the verbal content of the exchange or the true intentions behind the gestures observed. Moreover, no expert witness was called to support those interpretations.

[73] What is clear is that an exchange took place between the inmate and the correctional officers, followed by the inmate being taken to the ground by the grievor. However, the remarks exchanged, the nature of the alleged threats and the context of the intervention remain open to various interpretations.

[74] The employer argued that the inmate's comments were not relevant. Yet, a verbal threat can significantly influence a correctional officer's analysis of the EIM. Without audio in the video, it is impossible to grasp the tone or the exact content of the exchanges.

[75] The only available eyewitness and earwitness in this case is the grievor. Without direct testimonies from the other two correctional officers present, their written reports must be relied upon, all of which describe an aggressive attitude on the part of the inmate.

[76] To support its arguments concerning the value of videos without audio, the bargaining agent referred in particular to *King v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 45 and to *Carignan v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 86, at paragraphs 146, 152, 153, 163 and 170 to 174.

4. Intervention strategy and situational factors

[77] According to the bargaining agent, the assessment of an intervention strategy must take into account all situational factors. However, a video without sound does not allow for a full assessment of such elements. Without sound, it is impossible to fully reconstruct the context of the intervention, particularly the verbal exchanges and the tone used. These elements are essential for a thorough analysis of the use of force.

[78] Unlike the grievor, who had to make a decision within seconds, Mr. Héroux and Mr. Ross had four years to assess the situation, review the videos, enlarge them and examine them in detail. Despite this, they do not agree on the strategy that should have been used, which demonstrates the complexity of an assessment after the fact and the importance of the immediate context in which the correctional officer acted.

[79] Indeed, Mr. Héroux indicated that he would have expected the officer to step back, while Mr. Ross believed that the inmate should have been ordered to turn around to be handcuffed. He also testified that he had watched the video about ten times to determine whether there had been a breach.

[80] The employer's witnesses considered that the intervention strategy adopted was inappropriate. The grievor, for his part, maintained that his decision was justified under the circumstances. He noted that the EIM was not strictly progressive. The proposed measures did not necessarily apply in a gradual order. A correctional officer must constantly assess the risk and adjust the response based on the immediate situation.

[81] The bargaining agent also stressed that the inmate's unpredictability had to be taken into account. According to the bargaining agent, Mr. Ross's testimony noted that the inmates at Port-Cartier Institution were the most dangerous in Canada. He also noted that correctional officers were constantly victims of assaults by inmates. According to the bargaining agent, the inmate had the intent, means and ability to commit assaults.

5. Lack of remorse

[82] In the disciplinary letter, the lack of remorse is cited as an aggravating factor. However, an employee cannot be reproached for not acknowledging a fault when no fault has been demonstrated. The employer relied on the testimonies of three people, each offering a different interpretation of the appropriate intervention strategy.

[83] The EIM is not an exact science that applies uniformly to all situations. It is based on a dynamic and contextual assessment. In that context, the lack of remorse cannot be considered an aggravating factor when the legitimacy of the intervention remains open to interpretation.

[84] To support its arguments, the bargaining agent referred to *Scott v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLREB 104.

6. Mitigating factors in the grievor's favour

[85] The employer did not take into account the mitigating factors in the grievor's favour, including his clean disciplinary record, his membership in the ERT, his extensive training, his expertise, the significant number of interventions he has participated in and his in-depth knowledge of the EIM. In a context where several strategies were possible, the grievor was in the best position to assess the situation and choose the appropriate intervention.

[86] Moreover, according to the bargaining agent, certain circumstances are not the grievor's responsibility: the number of correctional officers assigned to the sector is a decision made by the employer; the absence of a spit mask on the inmate is not within his authority; and his assignment to that sector was not up to him, as he was neither a manager nor a coordinator.

V. Reasons

[87] Before addressing the substantive analysis of the grievance, it is important to revisit two issues that were the subject of interlocutory decisions: a request for confidentiality measures with respect to certain documents submitted to the record and an objection related to an expert witness. The first was decided by a written decision, while the second was the subject of an oral decision issued during the hearing.

A. Qualification of a witness as an expert

[88] On the first day of the hearing, the employer announced that it was considering presenting Mr. Wilkie as an expert witness. The employer submitted into evidence a document analyzing the use of force (exhibit E-15) titled [translation] "Review of the use of force FOR20193680000327-01 at Port-Cartier Institution on September 8, 2019, Involving Inmate [redacted]" ("report dated July 13, 2023"). The document is not signed, is dated July 13, 2023, and states that it was prepared by [translation] "National Headquarters, Security Operations."

[89] The employer argued that Mr. Wilkie had the academic training and knowledge needed to be qualified as an expert witness and that he had experience in assessing the use of force. It referred to the test established by the Supreme Court of Canada in *R v. Mohan*, [1994] 2 S.C.R. 9, namely relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule and a properly qualified expert. It also cited *Coupal v. Canadian Food Inspection Agency*, 2021 FPSLREB 124, at paragraphs 48 to 57.

[90] I asked the employer to provide a copy of Mr. Wilkie's résumé. The bargaining agent then objected to the idea of having Mr. Wilkie heard as an expert witness on two grounds. On the one hand, it argued that Mr. Wilkie did not provide the necessary guarantees of impartiality and independence, as he was employed by CSC's National Headquarters. On the other hand, it challenged the relevance of his testimony, noting that Mr. Wilkie had not taken part in the process related to the use of force or in the

drafting of the report dated July 13, 2023 (exhibit E-15). The bargaining agent also noted that Mr. Wilkie had been designated as an expert witness late.

[91] To support its arguments, the bargaining agent also referred to *Coupal*, at paragraphs 52 to 54, and *Barr v. Treasury Board (National Defence)*, 2004 PSSRB 169, at paragraphs 9 to 11.

1. The legal framework of expert testimony

[92] The leading cases with respect to expert testimony are *Mohan* and *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 CSC 23 (*White Burgess*). According to the legal framework established in these decisions, the admission of expert witness evidence occurs in two stages. First, the party wishing to present such a witness must establish that the witness meets the four tests set out in *Mohan*. Second, exercising its discretion, the decision-maker examines the relationship between the risks and benefits of admitting such testimony to decide whether the benefits outweigh the risks (see *White Burgess*, at paragraphs 23 and 24).

2. Lack of sufficient expert qualification

[93] The employer argued that Mr. Wilkie's résumé demonstrated that he had academic knowledge and some experience in the analysis of the use of force, primarily gained within CSC. However, although Mr. Wilkie's résumé indicated that he had accumulated over 16 years of service with CSC, it did not demonstrate that he had expertise in the analysis of the use of force. On the hearing date in October 2024, his résumé indicated that he had been serving as an acting project officer since July 2023 and that he had performed the following tasks during that period:

> - *Review and analyze use of force incidents across all institutions, to ensure that incidents comply with policy.*
> - *Highlight deficiencies within use of force incidents relating to the management of the incident, correctional officer response, health services guidelines, and provide feedback to each site to address the noted deficiencies.*
> - *Analyze use of force incidents and prepare documented comments to Offender Redress in relation to proposed grievance responses.*
> - *Review and provide comments on proposed training curriculum and implementation plans relating to use of force policies, management of incidents, and security equipment.*

> • *Prepare briefing notes, Power Point presentations, and analytical documentation as required for Senior Mangers within Security Operations.*

[94] Mr. Wilkie's résumé indicates that he has been working at CSC since 2006. However, the positions he held between 2006 and July 2023 do not support a conclusion that he was specifically assigned to the assessments of incidents related to the use of force. This lack of a direct nexus to the field of the use of force raises concerns about the sufficiency of his qualification as an expert witness in this case.

[95] Moreover, Mr. Wilkie is not the author of the report dated July 13, 2023 (exhibit E-15), presented as an expert report. In addition, the document merely summarizes the reports prepared by the other officers and cites the principles of the EIM before adopting a reasoning that the use of force was neither necessary nor appropriate for the situation. Both the résumé and the expert report are essential elements for establishing the competency of an expert witness, as they demonstrate their practical experience and analytical ability in the relevant field.

[96] Mr. Wilkie's résumé does not support a conclusion of sufficient expertise in the use of force. In addition, Mr. Wilkie is not the author of the report dated July 13, 2023. He therefore could not be recognized as an expert witness in this case.

[97] However, Mr. Wilkie testified about his general knowledge related to reviews and the general principles governing the use of force, but not about the use of force applied in this case. He stated that the report dated July 13, 2023, was presented to him after it was completed and that he did not know why it was not signed.

[98] Moreover, according to the general rule of evidence law, it was up to the employer who sought to qualify Mr. Wilkie as an expert to establish his admissibility (*White Burgess,* at paragraph 48). Although the employer referred to the tests set out in *Mohan*, it did not explain how Mr. Wilkie's testimony met each of those tests.

[99] Since I concluded that the witness did not have the qualifications to be recognized as an expert witness, in terms of "sufficient qualification," there was no need to continue the analysis of the other admissibility tests.

B. Sealing and redaction order

[100] Prior to the hearing, the employer requested a sealing order concerning the identity of the inmate to protect his identity, as there is a serious risk of an infringement on his privacy. The Board followed the employer's numbering of the documents in a decision letter dated April 2, 2024, which eventually became the following exhibits:

E-1 (document 1): Daily briefing

E-2 (document 5b): Report by Officer Dinucci

E-3 (document 8): Second Dinucci report

E-6 (document 5a): Report by Officer (L)

E-9 (document 7): Incident Report

E-15 (document 17): Review of the use of force FOR20193680000327-01 at Port-Cartier Institution on September 8, 2019, involving the inmate

E-22 (document 2): Inmate profile

E-23 (document 4): Video usage report

E-24 (document 9): Use of force report

E-25 (document 5g): Report by Officer (N)

[101] The employer also requested a sealing order concerning the following exhibits to ensure the safety of the community in the correctional environment, as the video footage could reveal the layout of the facility:

E-5: Surveillance camera – C142 – Detention – End of range – 2019-09-08 – 09:03

E-7: Surveillance camera – C187 – Start of range – 2019-09-08 – 09:03

E-8: Camcorder – Offer of medical assessment

E-27: Surveillance camera – C187 – Start of range – 2019-09-08 – 09:15

[102] With respect to Exhibit E-19, which was initially numbered as document 21 titled [translation] "Engagement and Intervention Model and Debriefing Process," the employer argued that it is a training document containing information that could be misused by inmates to counter a future intervention by a correctional officer regarding them. The bargaining agent did not object to the employer's requests.

[103] The employer's requests were allowed based on the test commonly referred to as the "*Dagenais/Mentuck* test," established by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 CSC 76, and reformulated in *Sherman Estate v. Donovan*, 2021 CSC 25.

[104] In the decision letter dated April 2, 2024, I concluded that it was in the public interest to avoid the risk of compromising the security of the institution and the safety and privacy of the Port-Cartier Institution community.

[105] I am of the view that the order for redaction and the order to seal these documents are justified exceptions to the principle of judicial transparency.

C. Ruling on the merits: Lack of justification for the disciplinary measure

[106] The burden of proof was on the employer, who had to demonstrate on a balance of probabilities that the allegations of misconduct had merit. The evidence must always be sufficiently clear and convincing (see, for example, *F.H. v. McDougall,* [2008] 3 S.C.R. 41, 2008 CSC 53). However, the employer has not discharged that burden. In the absence of sufficient and convincing evidence, the disciplinary measure imposed cannot be justified.

[107] It is well established in case law that the assessment of a disciplinary measure is carried out using the test generally known as the "*Wm. Scott* test" (see *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 Can LRBR 1, at para. 13 and *Basra v. Canada (Attorney General)*, 2010 FCA 24).

[108] This test has three successive components:

1. Has the employee given just and reasonable cause for some form of discipline by the employer?

2. If so, was the employer's sanction an excessive response in all of the circumstances of the case?

3. If the sanction is excessive, what other disciplinary measure would be fair and just, considering all the circumstances?

[109] The first question is whether there was misconduct by the grievor that justifies the imposition of a disciplinary measure. The evidence presented is not clear and convincing. It is primarily based on a video without sound, observation reports and

testimonies concerning the reasons stated in the disciplinary letter. I will examine each of these elements separately.

1. Video evidence and observation reports

[110] Since the video has been sealed to preserve the confidentiality of the location, the purpose of this summary of the interactions involving the use of force is to provide an understanding of the incident without revealing the layout of the location.

[111] The video evidence (without sound) shows an intervention while an inmate was being escorted to the shower, involving three correctional officers, one of whom is the grievor. The sequence shows an inmate coming out of his isolation cell, assuming a cooperative posture and raising his hands against the wall for a search. An officer, identified as the grievor, conducts a quick frisk search.

[112] The inmate, who seems to be moving forward, then turns toward the grievor. The two face each other. Although the video has no sound, the body language suggests a verbal exchange. The officer then pushes the inmate to the ground; he falls on his back. The other two officers intervene to subdue him on the ground.

[113] The lack of sound in the video detracts from the clarity of this evidence and limits its probative value. Without sound, it is impossible to grasp the verbal exchanges, the intentions or the precise context of the incident. This shortcoming makes the video difficult to interpret reliably and does not allow for establishing the facts convincingly. The testimonies related to the incident are primarily subjective interpretations of the video. Although the other two officers who participated in the intervention provided observation reports, they were not called to testify, which further undermines the strength of the employer's evidence from this video.

[114] Before the grievor submitted his report, the two correctional officers described the scene in official observation reports that are countersigned by a supervisor. Those reports corroborate the grievor's account. They all describe an aggressive attitude on the part of the inmate. During his testimony, Mr. Ross stated that he had not met with them to gather their accounts of the events. The testimony of these correctional officers could have provided useful insight into the events and allowed for cross-examination. In the absence of their testimonies, I considered the reports signed by these correctional officers, also recognized as peace officers, to be authentic. It is

important to note that the only witness who directly experienced the incident is the grievor. His testimony appeared credible, consistent and not contradicted by the other evidence presented.

[115] The facts in this case are comparable to those described in *King v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 84. In that case, the grievor had also been suspended for the use of force. The employer's evidence consisted of a video without sound. At paragraphs 103 and 104 of the decision, the Board concluded that the surveillance footage without audio was unreliable because it could be interpreted differently, depending on the viewer. I agree with that conclusion.

2. The reasons cited in the disciplinary letter were not demonstrated.

[116] The disciplinary letter states that the employee was sanctioned on the grounds that he had not followed directives and rules of conduct, including CD 567 – Management of Incidents, CD 567-1 – Use of Force, the Values and Ethics Code for the Public Sector and CD 060: Code of Discipline. The letter also lists the aggravating and mitigating factors that were considered, including the nature and severity of the misconduct, the failure to acknowledge the breaches, the lack of remorse, credibility, being part of the ERT, the lack of a disciplinary record and CSC's mission. Not only have these breaches not been demonstrated, but the employer has also not established a clear nexus between the alleged infractions and the rules or directives cited.

[117] The disciplinary letter outlines certain principles and rules that are said to have been breached but does not specify what the alleged breaches actually consisted of. It is primarily the testimonies and analysis reports that describe the allegations against the grievor, primarily based on his intervention while escorting the inmate and his application of the EIM. However, as already noted, those testimonies are primarily based on the interpretation of a video without sound.

[118] Mr. Ross, who assessed the use of force, testified that he had watched the video about ten times before concluding that disciplinary action was warranted. He indicated that he had thought long and hard and spoken several times with the grievor. He described the case as "subtle". Thus, the bargaining agent's argument rightly notes that the grievor had to make a decision in a matter of seconds, while Mr. Héroux and Mr. Ross had four years to assess the situation, rewatch the videos and examine them in detail. Despite this, they did not reach a unanimous view on the strategy that should

have been adopted. This demonstrates not only the complexity of assessment after the fact, but also the importance of the immediate context in which the grievor acted.

[119] The decision to impose a disciplinary measure should have been based on an objective and comprehensive assessment of the facts. It is difficult to assess the grievor's actions during the incident without having a complete picture, which could include, among other things, the alleged provocative remarks by the inmate and/or the eyewitness accounts of the officers who were present.

[120] Moreover, Mr. Ross and Mr. Héroux criticize the officer for not giving the inmate time to cooperate before intervening physically. However, without fully knowing what was happening at that moment due to the lack of sound in the video, it seems that the judgment on the rapidity of the intervention is inadequate.

[121] These witnesses also criticized the grievor for not taking certain measures, particularly for not having put a spit mask on the inmate. However, it was established by testimony that this decision did not fall within the grievor's authority.

[122] The employer argued that correctional officers who are members of the ERT are seen as role models within the institution. Due to the example they are expected to set, including in the performance of their regular duties, a high level of thoroughness is expected of them. It reproaches the official for being involved in an incident that required the use of force, during which he allegedly breached the EIM directives, thus constituting misconduct. According to the employer, [translation] "where the problem lies" is in the grievor's refusal to acknowledge the employer's expectations and adjust his practices accordingly. However, it should be noted that the grievor was not sanctioned for insubordination.

[123] The employer sanctioned the employee because he allegedly did not follow the EIM directives. The grievor explained that the intervention strategies were not listed in a prescriptive manner in the EIM. According to him, this model serves as a general framework for assessment, rather than a protocol dictating specific interventions. This interpretation was confirmed by the employer's witnesses, all of whom acknowledged that the EIM requires ongoing and contextual assessment of the situation.

[124] Mr. Lamontagne testified that the assessment of the level of risk relies on subjective interpretation. According to his testimony, the same situation can be

perceived as moderate by one correctional officer, while another might consider it to present a high risk.

[125] Every witness agreed that the incident happened quickly. As already noted, Mr. Ross indicated that he had to watch the video about ten times before forming an opinion on the use of force. Clear, obvious and convincing evidence should not require such repetition to be understood. This need for multiple reviews instead reflects an ambiguity in the interpretation of the facts.

[126] It should be noted that no expertise has been submitted to assess the force that would have been necessary or to determine whether the grievor's intervention was excessive. However, the assessment of the use of force involves technical considerations that require specialized knowledge. In the absence of an expert opinion, the basis for the disciplinary measure relies solely on subjective interpretations, which significantly undermine the strength and probative value of the evidence.

[127] Every witness agreed that correctional officers in this maximum-security institution are regularly exposed to situations of violence and assaults. They perform a job that is sometimes dangerous, requiring them to react quickly to urgent, evolving and often unpredictable situations.

[128] Moreover, it is particularly concerning that the disciplinary process was conducted before the assessment of the use of force was completed. Such a sequence calls into question the thoroughness of the disciplinary process, which should be based on a complete, objective and prior assessment of the facts. The report dated July 13, 2023, Exhibit E-15, indicates that the assessment was conducted approximately four years after the incident on September 8, 2019. Mr. Ross conducted an assessment of the use of force. The evidence revealed that that assessment process was not completed within the prescribed timelines. Moreover, the employer did not specify the date on which the assessment process started or ended.

[129] For all these reasons, I cannot conclude that the allegations against the grievor have been established to demonstrate misconduct on the balance of probabilities that would justify the imposition of a disciplinary measure. It was the employer's responsibility to demonstrate the alleged misconduct through clear and convincing evidence. However, no sufficiently direct and reliable evidence was presented.

[130] In the absence of evidence to demonstrate the alleged misconduct, the application of the other tests set out in *Wm. Scott* becomes irrelevant.

[131] In his grievance, the employee requested several corrective measures, including compensation for pain and suffering caused by the abusive nature and excessive delays of the disciplinary process. The mere allegation of harm is not sufficient to justify a claim for compensation. It was up to the grievor to demonstrate the existence of the alleged harm and its connection to the compensation sought. However, no evidence was presented in this respect. As a result, the request is dismissed.

[132] The Board makes the following order:

(The Order appears on the next page)

VI. Order

[133] The grievance is allowed.

[134] The grievor shall be entitled to his salary and benefits at the rate in effect at the time of the suspension.

[135] The grievor shall be entitled to interest from the date of the suspension until the date on which payment is made, calculated at the annual rate based on the Bank of Canada Rate – Monthly Series.

[136] I order the removal of all documents related to the suspension from any file concerning the grievor.

[137] I will remain seized of the matter for a period of 90 days if the parties experience difficulties implementing this order.

October 15, 2025.

FPSLREB Translation

Goretti Fukamusenge,
a panel of the Federal Public Sector
Labour Relations and Employment Board