

Ref:

Insubordination  
Suspension

**FINDINGS AND DECISION**  
IN DISPUTES

between

**HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AS  
REPRESENTED BY TREASURY BOARD**

**(Forestry and Agrifoods Agency)**

(the Employer)

and

**NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC &  
PRIVATE EMPLOYEES**

(the Union)

**Grievors:** Mr. Chuck Porter & Mr. William Duffett

**APPEARANCES:**

Union Presenter: Mr. Fred Oates, ERO, NAPE

Witnesses: Mr. Chuck Porter, Conservation Officer  
Mr. William Duffett, Conservation Officer

Employer Presenter: Ms. Sarah Anthony, Staff Relations Specialist

Advisor: Mr. Colin Carroll, Regional Ecosystem Director

Witnesses: Mr. Craig Coady, District Ecosystem Manager  
Mr. Colin Carroll, Regional Ecosystem Director  
Mr. Keith Deering, ADM, Dept. of Natural Resources

Arbitrator: John A. Scott, Ph.D.

**The Grievances** were heard on Sept. 27 & 28, 2011 in Happy Valley-Goose Bay.

**The Two Statements of Grievance** are identical and read: Violation of Articles 41 & 42 & all other related articles of the General Service Agreement.

**The Requested Adjustment in both Grievances** reads: Full Redress.

**The Union and the Employer** requested that the determination of both grievances be addressed in a single consolidated award.

**THE PARTIES AGREED THAT:**

- the Arbitrator was properly appointed and had authority to hear the case;
- the Arbitrator's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict;
- parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the Collective Agreement, were properly observed or are waived;
- there are no points to be raised as to arbitrability or other preliminary objections;
- all witnesses were excluded until all their testimony had been heard;
- issues of quantum, if any, would be considered separately and if the parties do not reach agreement within sixty (60) calendar days they will be referred to the Board, within the same sixty (60) calendar days, for resolution;
- the Board will remain seised of the matter for sixty (60) calendar days after publication of the award to deal with matters of interpretation should they arise.

**Documents taken into evidence:**

- Consent #1 General Service Collective Agreement expiring March 31, 2012
- " #2 Grievance of Mr. Porter
- " #3 Grievance of Mr. Duffett
- " #4 Letter of Discipline: Mr. Deering to Mr. Porter Dec 16, 2009
- " #5 Letter of Discipline: Mr. Deering to Mr. Duffett Dec 16, 2009
- CC #1 Enforcement Policy and Procedure Manual, Procedure # B9
- CGC #1 Dec 14, 2009 e-mail: Mr. Carroll to Mr. Duffett & Mr. Porter
- " #2 Dec 16 Memo: Conservation Officers to Mr. Carroll
- " #3 Nov 2009 Operational Enforcement Plan Aboriginal Protest Hunts
- " #4 Series of e-mails: Mr. Deering to Mr. Carroll with forwarded messages
- Exhibit #1 Enforcement Policy and Procedure Manual, Procedure # C1

**Consent #s 4 & 5** are identical in content, and read:

...This letter is in relation to an incident that occurred December 16, 2009.

On December 16, 2009 you were directed by Colin Carroll, Regional Director, Forestry Services Branch, Department of Natural Resources to release to the owner a vehicle that was seized on December 14, 2009 during an intervention into a potential illegal hunt. Rather than comply with this direction you unreasonably questioned this action and refused to carry out the direction.

Accordingly you are suspended for a period of five (5) days without pay commencing on December 24, 2009, you will return to work on December 31, 2009. A copy of this letter will be placed in your personal file. Any future infractions will be dealt with through progressive disciplinary action, up to and including dismissal.

Sincerely ... (signed by Mr. Keith Deering)

Assistant Deputy Minister

c.c. Personal File ...

**CGC #4** reads:

Carroll, Colin

From: Deering, Keith

Sent: Wednesday, December 16, 2009 9:25 AM

To: Carroll, Colin

Subject: Fw: [Potential Junk/Spam] Fw: DNR Vehicle Seizure

Please see attached

0 Sent Via BlackBerry

----- Original Message -----

From: Moores, Len

To: Deering, Keith

Sent: Wed Dec 16 09:39:36 2009

Subject: Fw: [Potential Junk/Spam] Fw: DNR Vehicle Seizure

Sent Via BlackBerry

----- Original Message -----

From: Moores, Len

To: Burrage, Don

Sent: Wed Dec 16 09:29:07 2009

Subject: Re: [Potential Junk/Spam] Fw: DNR Vehicle Seizure

Hi don

The truck can be returned

Len

Sent Via BlackBerry

----- Original Message -----

From: Burrage, Don

To: Moores, Len

Sent: Wed Dec 16 07:37:57 2009

Subject: Fw: [Potential Junk/Spam] Fw: DNR Vehicle Seizure

Len,

As discussed. If the truck is not required by NR for prosecution (and this seems unlikely) I would return it early this morning. It may ward off a larger problem. Can you let me know so that I might advise Peter.

Don

Department of Justice

Government of Newfoundland and Labrador P.O.Box 8700

St.John's, NL Canada A1B 4J6

Sent Via BlackBerry

----- Original Message -----

From: Reg Reeves <reg.reeves@rcmp-grc.gc.ca>

To: Burrage, Don

Cc: Noble, Paul; Bill Smith <Bill.Smith@rcmp-grc.gc.ca> Sent: Wed Dec 16 06:17:00 2009

Subject: [Potential Junk/Spam] Fw: DNR Vehicle Seizure

Hi Don

As per comments below. We have no issues with returning the vehicle seized by DNR.

Regards Reg

**COLLECTIVE AGREEMENT PROVISIONS DIRECTLY ADDRESSED  
ARTICLE 3**

**EMPLOYER RULES, REGULATIONS AND POLICIES**

- 3.01 In the event that there is a conflict between the context of this Agreement and any rule, regulation or policy made by the Employer, this Agreement shall take precedence over the said rule, regulation or policy.

**ARTICLE 7**

**MANAGEMENT RIGHTS**

- 7.01 All functions, rights, powers and authority which are not specifically abridged, delegated or modified by this Agreement are recognized by the Union as being retained by the Employer.

**ARTICLE 13**

**ARBITRATION**

- 13.01 Where a difference arises between the parties to or persons bound by this Agreement or on whose behalf it has been entered into and where that difference arises out of the interpretation, application, administration or alleged violation of this Agreement and including any question as to whether a matter is arbitrable, either of the parties may within fourteen (14) calendar days after exhausting the grievance procedure notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the person appointed to be an arbitrator by the party giving notice. Notice in accordance with Clause 13.01 shall be sent to the Collective Bargaining Division as well as the applicable Department.
- 13.11 The parties and the employees bound by this Agreement shall comply with these provisions for final settlement of a grievance and they shall comply with the decisions of an arbitration board appointed in accordance with these provisions and do or, as the case may be, abstain from doing anything required by that decision.

13.16 An arbitration board may not alter, modify or amend any provisions to this Agreement but shall have the power to dispose of a grievance by any arrangement which it deems just and equitable.

### **PERSONAL FILES**

41.01 There shall be one official personal file, the location of which shall be designated by the permanent head. An employee shall at any reasonable time, be allowed to inspect his/her personal file and may be accompanied by a representative of the Union if he/she so desires.

41.02 A copy of any document placed on an employee's official personal file which might at anytime be the basis of disciplinary action, shall be supplied concurrently to the employee who shall acknowledge having received such document by signing the file copy.

41.03 Any such document shall be removed and disregarded after the expiration of two (2) years from the date it was placed in the employee's file provided there has not been a recurrence of a similar incident during that period. The employee shall be responsible to see that any such document is removed.

41.04 When a formal assessment of an employee's performance is made, the employee concerned must be given an opportunity to acknowledge receipt of the assessment form in question. When as a result of this assessment, the performance of an employee is judged to have been unsatisfactory, the employee may present a grievance in accordance with Article 12.

### **DISCIPLINE**

42.01 Any employee who is suspended or dismissed shall within five (5) days of such suspension or dismissal, be provided with written notification which shall state the reasons for the suspension or dismissal.

42.02 All dismissals, suspensions and other disciplinary action, shall be subject to formal grievance procedure as outlined in Article 12, if the employee so desires.

42.03 The Employer shall notify an employee in writing of any dissatisfaction concerning his/her work within five (5) working days of the occurrence or discovery of the incident giving rise to the complaint. This notification shall include particulars of work performance which led to such dissatisfaction. If this procedure is not

followed, such expression of dissatisfaction shall not become a part of his/her record for use against him/her at any time. This Clause shall apply in respect of any expression of dissatisfaction relating to his/her work or otherwise which may be detrimental to an employee's advancement or standing with the Employer.

42.04 When employees are required to attend a meeting where a disciplinary decision concerning them is to be taken by the Employer, or a representative of the Employer, the employees are entitled to have, at their request, a representative of the Union attend the meeting.

42.05 (a) Employees shall have the right, at any time, to have the assistance of a full-time representative(s) of the Union on all matters relating to employer/employee relations. Union representatives shall have access to the Employer's premises in order to provide the required assistance. Employees involved in such discussion or investigation of grievance shall not absent themselves from work except with permission from their supervisor and such permission will not be unreasonably withheld.

(b) Employees shall have the right to have a Shop Steward present on all matters relating to employer/employee relations.

42.06 If, upon investigation, the Employer feels that disciplinary action is necessary, such action shall be taken based on the Collective Agreement . In situations where the Employer is unable to investigate the matter to its satisfaction, but feels the employee should be removed from his/her place of employment, it shall be with pay.

### **OPENING STATEMENTS**

**FOR THE EMPLOYER,** Ms. Anthony described the disciplines as having been imposed for insubordinate behaviour in that both Grievors refused to obey a management order on December 16, 2009. The Grievors had seized a local resident's truck, which precipitated threats to local government offices. The truck was deemed no longer needed for evidence, and it was decided to order the return of the vehicle to its owner. The Grievors were told three times to return it by Mr. Colin Carroll, the Regional Ecosystem Director, and by Mr. Craig Coady, District

Ecosystem Manager. The Grievors never did carry out the order. There was no misunderstanding of the order . The Grievor's instead rallied with other Officers and disobeyed the order. Their actions clearly deserve discipline.

Evidence will be provided by senior officials . The disciplines were carefully considered. Mitigating and aggravating circumstances were considered, including recognition that the Grievors are well respected employees. Their actions were serious, deliberate and prolonged. There has been no admission of wrongdoing.

The Union recognizes the management's right to manage and to impose discipline for just cause. The Employer carries the onus to show just cause in accordance with the Collective Agreement. Once that has been established, the onus shifts to the Union to show grounds for mitigation if any.

In the Employer's submission the Grievors' actions meet the tests for just cause discipline, and the discipline imposed were proportionate in the circumstances. The Employer also urges the Arbitrator not to modify the penalties, since to do so would suggest that the employer had not considered all appropriate circumstances . The Employer also noted that, should the Union prevail in this matter, it would have an impact on discipline with serious consequences.

**FOR THE UNION,** Mr. Oates confirmed that the Grievors were disciplined with a one-week suspension and a letter on their files for two years. He also accepted that, in this type of situation, the Union carries a double duty in respect first, of the justice of disciplines, and second, of addressing what, if any, any discipline is appropriate in the circumstances.

The grievances were filed after an incident on the Trans-Labrador Highway between the Innu and the Government represented by Conservation Officers, the

two Grievors among them. As a result of that incident and subsequent events, managers decided to discipline the Grievor's. The grievances were filed under Articles 41 and 42. In the Union's view, the discipline was unjust.

The letters of discipline issued on December 23 state that the Grievors did not comply with direction given by Mr. Colin Carrol, Regional Director, Forestry Services Branch for the Labrador Region. We understand that the direction given was that a truck, previously seized on the Trans-Labrador Highway, be returned to the Innu in question.

In her opening statement, the Ms. Anthony indicated that the two Grievors seized the truck. That is not correct, as will come out in evidence. The problem, in returning the truck, was that the truck in question was not fully processed per the regulations laid down by the Department . They had a procedure to follow, and they were trying to comply with that process before returning the truck. That is what got the Grievors in trouble. The Grievors and Management were following a process that required they check with the Crown Prosecutor and the RCMP, who were also trying to control the illegal activities of the Innu.

The direction given by Management on December 16, 2009 was to release the truck if it was not required for evidence. Other direction given was to release the truck as soon as possible. Both Grievors did exactly that. As the evidence will show, there were all kinds of discussion going on; and that is where the confusion lies. The Innu involved were illegally hunting the Red Wine herd. That herd is almost extinct, and protected by the government. It is a highly contentious issue between the Government and the Innu Nation.

The Grievors are Conservation Officers, and are at risk all the time. The decision to return the truck, wherever that decision was made, put these Officers,

and other Officers with the Department with similar duties, at risk. By returning the truck, the Innu would feel they had won the battle with the government. When it was indicated that the truck may have to be turned over to the Innu, these Officers' role was to ensure, as was directed, that the vehicle was not needed for evidence. What would happen if the truck was not released properly? Who's head would roll, if suddenly it were found that the truck was needed for prosecution?

On the morning of December 16 all direction had been verbal up until 11 or 12 o'clock. To protect their own interests, therefore, sometime in the morning of the 16th they called for something in writing to verify what they had to do. They did not want any mistakes. On December 15, the Managers were telling them what a good job they had done in the events that took place on the 14<sup>th</sup>.

It appears that every Manager, from the local level on up, was involved in this event. The two Grievors are senior Officers, both with 20 years experience in dealing with illegal activities that end up in court. In all those years there has never been equipment returned without a court order to individuals involved with possible illegal activity. That is a policy of the Department and of Government. The Grievors do not decide on guilt or innocence. It is strange that, in this case, Government decided to return the truck, but held on to all other material seized at the time. If the truck was not needed, why did they need anything else?

Three conditions are required if the discipline is to stand. First, the order must be clear, and understood by the employee. Second the order must be given by someone in authority. Third, the order must be disobeyed. The only thing that is clear in this situation is that the Manager who gave the direction gave two different directions. It was not clear, and it was not understood. And the direction was never disobeyed. The evidence will show that these disciplines cannot stand.

The grievances must be upheld and the letters removed from the Grievors' files. They have unblemished records, as the Employer noted in the opening statement. These disciplines have blemished their records with the Employer and with the Innu Nation. The five-day suspensions must also be eliminated, along with any benefits lost as a result of this incident, including service, seniority *etc.*. The Union notes that, under Article 13.16, an Arbitration Board has "the power to dispose of a grievance by any arrangement which it deems just and equitable."

### EVIDENCE

**The First Employer Witness** was Mr. Craig Coady, District Ecosystem Manager.

Mr. Coady testified that he had been given ...

direction from Colin that the truck had to be returned to Mr. Nuna, and I passed that along to the Officers verbally... in a group of anywhere from 7 to 12 Officers... Mr. Duffett was not present at the time. I reiterated Colin's order that the truck had to be returned. I was sitting down in the kitchen area with a group, and probably 5 or 10 minutes later, Bill Duffett came into the area and asked what was going on... I told him the truck had to go back to Mr. Nuna, and there was a discussion about where the order came from, and when the order was made, and then they requested a meeting with Colin... I believe Chuck Porter was present, and then, minutes later, Bill Buffett arrived. I reiterated the direction that was given... The order was first given at about 10:15, when I got a call from Colin. Then I immediately spoke to the group...

Asked how the Grievors responded when informed of the order, Mr. Coady testified that:

There was a general discussion and the request to meet with Colin, the Regional Ecosystem Director, to provide additional information. I was operating on limited information and they wanted more.

Asked if the order given to the Officers was clear, and whether he had participated in the requested meeting with Mr. Carroll, Mr. Coady said:

Yes (it was clear)... That meeting was done in a group setting as well. All the Officers were present, as I recall, including Mr. Duffett and Mr. Porter... Basically, Colin informed the Officers that the Executive had consulted with the Department of Justice and the opinion ... I guess the Department of Justice's opinion... was that the truck was not needed, and the Executive gave direction that the truck was to be returned ... I don't know exactly when that meeting took place. It was very shortly after. It did not take a long time. I called him after the questions were asked, and it was no more than 15 or 20 minutes before he got up to the tree nursery where we were stationed.

Asked If he was aware of the protests that had occurred as a result of the seizure of the truck, Mr. Coady said:

Yes, there were rumours that some members of the community had made threats about "burning your vehicles". They'd come over to our offices that morning. Several vehicles with Innu passengers, and basically occupied our office in Northwest River. Their basic demand was the truck back, so far as I understood... because it was near Christmas, and they needed the truck... just hearsay. I was not there... I recall the protest was on December 16, 2009, just before Christmas. The two meetings, with the Officers and with Mr. Carroll, were on the 16<sup>th</sup> too.

**ON CROSS EXAMINATION**, Mr. Coady was asked whether Innu protest hunts were normal events. He answered:

That was the first time when I was there. There were other protest hunts as well... not all the time, but they do have to deal with it.

He also testified that the direction had come from the Department's Executive, Mr. Len Moores, and that:

On the day of the protest hunt, I was in charge operationally ... On the road, it was an illegal incident situation. Someone is designated to be in charge or the senior Officer takes charge... Bill was the senior Officer, but he was not up on the road... He did not sign any seizure report that I know of. Chuck was up on the road and involved in the attempt to stop the vehicle, and proceeded with normal operation.

Asked how many Officers he had sent up to the incident on the road, and whether Bill Duffett was there, Mr. Coady said:

It's difficult to say. I don't have my notes... There were a number up there. I'll take responsibility for sending them up, but I didn't assign individuals. We had a lot of guys up from Newfoundland who are not normally in charge of doing an intervention or an Innu incident. We attempt to stop vehicles some times... I understood that, when word came down they were trying to stop a vehicle, Bill and Bruce attempted to get there. They didn't get there until it was stopped, but arrived while it was still ongoing...

Asked to describe what he understood happened on the Trans-Labrador Highway, he said:

The incident started about 150 km up from Goose Bay. It was December 14<sup>th</sup>. I was at the tree nursery. The Officers are often patrolling the Highway. Some Officers were at the Nursery and around Town. The incident involved an individual, Mr. Nuna. An illegal Caribou hunt was detected by Officers patrolling the Trans-Labrador Highway. They communicated back the fact of the incident. Mr. Nuna was heading back to Goose Bay with caribou on the truck that had been taken illegally. The incident occurred about 100 to 150 km up the highway in an area closed caribou hunting. Several attempts were made to stop Mr. Nuna when he got closer to town. Mr. Nuna ignored the attempts, and did not pull over or co-operate. He went around the roadblocks. At least twice, if not three times, he avoided the Officers... The truck was stopped fairly close to town. Mr. Nuna was still quite uncooperative, until the RCMP arrived on the scene. They got him to turn the vehicle off, and at that point the vehicle was seized as well as the caribou and these types of things.

Asked who was in charge on the scene, and whether Mr. Duffett was assigned to seize the vehicle, Mr. Coady answered:

No. Often they call back to me, but, obviously, not for every little thing. Bill was there voluntarily.

Asked if a Conservation Officer IV would normally take charge, and whether there was a Conservation Officer IV on the road that day, Mr. Coady said, "Yes. Bruce Hope was there." He confirmed that one vehicle was stopped, and that was done as a joint effort of the Department and the RCMP. Asked whether the RCMP would have a say if the truck were to be returned, Mr. Coady said: "No. It was seized by the Department of Natural Resources." Mr. Coady could not recall if the RCMP had arrested Mr. Nuna.

Asked what, precisely, Mr. Carroll had said to him on December 16, when he passed on the direction, and where Mr. Carroll was at the time, Mr. Coady said:

Mr. Carroll was at the Goudie Building. He said that the direction had come down from Len Moores that the truck had to be returned to Mr. Nuna as soon as possible. I had some questions: How? Why? That sort of thing. He said the Department of Justice had been consulted, and, in their opinion, the truck was not needed for prosecution, and our Executive then decided the truck was to be returned to Mr. Nuna... It had to be done as quickly as possible..

Mr. Coady also testified that he had never been involved in a vehicle return, and did not know the procedure. "No, I'd not say I knew it step by step." Asked which Officers normally advised him, Mr. Coady said:

Bill, Chuck, Bruce Hope... There may be others. If clarification were needed we'd consult with Derek Leboubon, the Regional Compliance Officer.

Asked again if he had consulted with Mr. Porter and Mr. Duffett he said:

There was some discussion. Bill requested that Bruce Hope go to the Provincial Court here in town and obtain a "release" form to secure with a bid bond / cash deposit. This is what we went to Court to get. I tagged along with Bruce to facilitate the process as best I could. We talked with the Clerk of the Court. There was no such form readily available for us to use to do it... I had some discussion with Derek. I can't recall exactly what was said.

Mr. Coady was asked whether "these Officers could just return the truck?" He paused for some time, and then answered, "Well... I don't know." Asked if he is familiar with the Policy on returning vehicles, Mr. Coady said:

There is a Policy. Yes. I'm generally familiar with it... If there is to be a release to someone, then there is a bid bond or a cash deposit in lieu of their... for instance a snowmobile... a bond is needed to be written so a judge would give that order. That's my understanding.

Asked how he could return the vehicle, Mr. Coady said: "I was following the direction of the Executive who directed to return the vehicle immediately." Mr. Coady confirmed that he recognized Policy (CC # 1) he had just described, according to which a "Provincial Court judge ... may order redelivery" under the *Wild Life Act* Section 15(9). Asked if he had asked Mr. Carroll, or anyone else, about the process for making the release, Mr. Coady said:

There was certainly some discussion, yes, among everyone ... about how to do this, yes. The Officers' questions were reasonable, about 'How do we do this?'

He confirmed that Mr. Duffett and Mr. Porter were at the meeting with Mr. Carroll.

Reviewing his earlier evidence about his initial meeting with Conservation Officers at the Nursery, Mr. Coady confirmed he had passed on the direction he'd been given exactly as he had received it from Mr. Carroll, and said:

My belief is that Chuck Porter was present. I believe he was. There was no private meeting. It was in a larger group. I met with the all the Officers in the garage area and reiterated the direction. Some discussion ensued. A few minutes later we're around the kitchen table, about ten Officers. We're discussing the direction, and Bill Duffett came in and was standing in the doorway.

Asked why he had told the whole group of the direction, but only Mr. Duffett and Mr. Porter were held responsible for it, Mr. Coady answered:

The Director gave me the direction. I immediately passed it to the group. We were discussing the direction, and all were involved one way or another. It was significant that we'd seized the vehicle, and I felt it was in everyone's interest to know of the direction.

Asked why he had not returned the vehicle himself, he answered:

At no point did I have possession of the truck or the keys. I believe it was at the DFO building. It is not normal procedure as a Manager. Officers normally handled that, whether it is through the Court or not. It is the duty of the Officer to retain evidence. It is in their specs.

Asked how the two Grievors were singled out, Mr. Coady answered:

I did not single anyone out to return it. Immediately after I said that, the request to meet with Colin came, and he got involved, and he took it further. I can't speak to that.

Asked if he had objected to the questions Mr. Porter asked at meeting, or regarded them as a refusal, Mr. Coady said:

No, I did not take it as a refusal there and then. Everything happened quickly: Colin's call, then the garage meeting & the meeting in the kitchen: all within 30 minutes. I'd say, no, not a refusal... but a clarification... The whole situation was abnormal. It was not routine.

Noting his testimony on direct examination, Mr. Coady was asked how he could describe the directive he had passed on as "clear" when he had simply told the group that the truck was to be returned as soon as possible. Mr. Coady said:

The direction to me was definitely clear. And, in my view, it was made clear to the group that it had to be returned, and that it was the Executive's decision. The discussion showed that it was well understood that the truck had to go back.

Asked if, therefore, they had to figure out how, Mr. Coady answered, "Yes. To discover the correct procedure."

Mr. Coady then described a debriefing meeting held on December 15 at the Goudie building. The subject of the meeting was illegal hunt of the Red Wine herd

and the seizure. Asked if there had been any discussion at that meeting about returning the truck, the witness said:

I think I recall what you are saying. There was a discussion about returning the truck. It was decided that, in the past, the weight of evidence was greater if we retained the vehicle... Yes, Mr. Duffett and Mr. Porter were there.

**ON REDIRECT EXAMINATION**, Mr. Coady was asked about the "Incident Command System", (ICS) and he described its function as a ...

template used to organize responses to any number of incidents, small to very large; for example, wildfires or the BP oil spill. We use it as a tool in suppressing wildfires and in our operational plan.

Mr. Coady confirmed he had used the ICS for the illegal caribou hunt, and that the system helps in assigning roles...

It basically lays out roles for each position in the command structure. It would not contain specific names, but is a general plan for dealing with ... Aboriginal protest hunts, which was basically what we were dealing with here ... not specifically for those Officers who were on the road...

Asked whether Mr. Porter and Mr. Duffett had been identified as Lead Officers in this case, Mr. Coady paused and asked for clarification of the term "Lead Officer". Once it was clarified, he said: "My understanding is that Chuck had the file."

Mr. Coady confirmed his earlier testimony that he had consulted Conservation Officers about how to return the truck.

Yes, there was discussion about how to do it... but also about the decision itself, and the legality of the disposition of evidence, *etc.*

Asked whether there are any officials, other than a judge, empowered to order the release of items such as a vehicle Mr. Coady answered, "Not that I'm aware of, but my experience is very limited in terms of returning vehicles."

Asked If he could return a single item if it were not needed for evidence, Mr. Coady said, "Yes, if it's not needed for evidence. That's my understanding."

Asked who had attended the December 15 debriefing meeting, Mr. Coady said:

Mr. Duffett and Mr. Porter and myself were there. Mr. Carroll and Mr. Deering, the Assistant Deputy Minister, were there and Derick Lebou-bon, the Regional Compliance Manager, and an RCMP Officer, whose name I can't recall, and probably 10 or 15 Conservation Officers. The purpose was to gather facts or for Conservation Officers to add their concerns. On December 15<sup>th</sup> the truck had been seized the day before, and situation had become complicated and potentially volatile. It was basically a debriefing on what happened the day before and a discus-sion on how were going to move forward... I wouldn't say decisions were made, but opinions were expressed and many gave their opinion not to return or release the vehicle. We aired reasons and others gave opinions about whether to return or not.

Asked whether there was any indication at that meeting that the truck would probably be returned, Mr. Coady testified:

It's possible. I can't be sure. Everyone in the room knew that those in the room – Conservation Officers and the Managers there too – did not have the final say on the decision.

**THE SECOND EMPLOYER WITNESS** was Mr. Colin Carroll, Regional Ecosystem Director for the Labrador Region since September 2008. Asked who had advised him to inform the Grievors to return the vehicle, and to whom he had delegated the task, Mr. Carroll testified:

I received an e-mail (CGC #4) from Keith Deering at 10:11 AM on December 16<sup>th</sup> to return the vehicle. He is the Assistant Deputy Minister and my immediate Supervisor... I called Craig (Coady) and provided the direction verbally. I described to him what I saw in the e-mail. The e-mail said " please see below ", so I scrolled down and saw the direction from Len Moores, and I read out that direction. The words were "The truck can be returned". The previous e-mails were all about that; but that's from Len Moores or whom he'd consulted... So

immediately I called Craig Coady to inform the staff, the Conservation Officers involved, that the truck can be returned. I made the call to Mr. Coady at about 10:12 or 10:15. At 10:15 I was on the phone with Craig. So about 20 minutes after the e-mail, I got a call back from Craig Coady saying that the Officers wanted to meet with me to discuss the situation. I went downstairs and got in the truck and drove to the nursery. That took 5 or 6 minutes. I walked into the command centre at the nursery. There were some Officers – a small group of two or three – there in the large open area. I said loudly – and they all looked at me – and I said, "The truck has to be returned."... I can't say for sure (whether Officers Duffett and Porter were there). I walked up to an office, the Nursery Manager's office ... up three steps to that office ... and there I saw Chuck Porter at a computer and Bill Duffett standing up in that office as well. Mr. Duffett asked who the direction had come from. I said it came from Len Moores to me in an email. I also reiterated that I'd read the chain of emails that Len had received... some emails from Department of Justice. I relayed that to Mr. Duffett and Mr. Porter. I had my BlackBerry. It had the email. Mr. Duffett asked to see it. I tried to get it so he could read it from the BlackBerry screen. He said it was not addressed to him, and he needed to see it in writing to him.

Asked if a request for a written order is normal after a verbal direction has been given, and whether he had complied with the request, Mr. Carroll said it was not normal, and...

I felt it was quicker to email, and then I signed the printed email (CGC #1). And I reiterated that the instruction came from the Deputy Minister. That was at 11:52 am. It was not a forward of Mr. Deering's email (CGC #4), but Mr. Deering's email was shown to Mr. Porter on the BlackBerry.

Asked whether there was a volatility in the community resulting from the seizure, Mr. Carroll answered:

Mr. Deering and I met with Peter Penashue about the Department's interests in Forest Management... After that meeting ended, Mr. Penashue said that we needed to think about the truck. He wanted the truck

returned immediately, and could not be responsible to control his people if it were not returned... He knew about our office and vehicles in Northwest River.

On the 15<sup>th</sup>, I also heard from our office there that there were at least one or two Innu vehicles parked in our lot in Northwest River – not doing anything. But their presence warned them of their intentions, because they heard they wanted their truck back.

Asked whether he had taken Mr. Penashue's comment as a threat, Mr. Carroll said:

Absolutely. We did send two Officers to Northwest River. Our Clerk is from there, and we did not want her there... Those two Officers represented the Province in the parking lot.

Asked if he had spoken with the two Officers that had been sent over, he said:

More than once... I asked what was happening, and how they were feeling, and did they call the RCMP. They said they were quite comfortable. That was in the first part of the morning; but as the morning progressed, they called and said that their comfort was reducing. They were not comfortable any more. That was between 12 and 1 PM. I advised that they could close the office, and did not have to come back in the afternoon. I did that because they told me they did not feel as safe any more, and felt they wanted to leave the building. When I reported that closure decision to the Deputy Minister, he told me the building was not to be closed but kept open. So myself and Keith Deering went down after lunch, and kept the building open for the afternoon, and we did not have any incident... It's a public building for providing permits for Forestry, wood cutting, and wildlife. So it had to stay open for the public; and if we close it, we need to give the public ample notice through the media.

Asked when the truck did get returned to Mr. Nuna, Mr. Carroll said:

Officers Porter and Duffett arrived at my office on the 16<sup>th</sup> at about 1:30 PM. They gave me a response in writing (CGC #2) to my 11:52 AM direction (CGC #1). I read it, and asked them ... I felt the truck needed to go back. I understood what they gave me in writing, but I asked them: 'I need to get the truck back. How can I do that as soon as possible?' I was just feeling the urgency to get the truck back ASAP. I understood their position. I asked how either he or I ... They suggested

they could sign the item over to another Officer or Staff Member, and I could ask that Staff Member to return the truck.

Asked if this was the normal process, Mr. Carroll said, "No." Asked what the normal process is, he said:

To organize the paperwork I guess, and get it signed, and get it returned. They left the office.

Asked who the Lead Officer was in this matter, and whether Mr. Duffett or Mr. Porter had said they were not the Lead Officers, and not responsible for the evidence, Mr. Carroll answered:

Not to me... When I went to the building to verbally convey the direction, and went up to the office that morning, Officer Duffett asked me to provide him the order in writing. I was led to the conclusion that Duffett and Porter were the Lead Officers, and dealt with them the rest of the day... Also, more than Officers Duffett and Porter signed CGC #2 ... The truck was signed over to Derrick LeBoubon, our Regional Compliance Manager, about 10 minutes later, at 1:40 - 1:45 PM... Derek LeBoubon signed a document, and the keys were handed to Derek, who proceeded to return the vehicle to Mr. Nuna immediately. Mr. Nuna picked up the keys to his vehicle at about 3:00 PM. I assume Mr. Nuna is from Sheshatsui. I don't know why it took him an hour.

Asked if he considered the Grievors' actions serious, failing to return the vehicle to Mr. Nuna, and failing to obey an order, Mr. Carroll answered:

Well, they gave me a note (CGC #2) saying they were looking for legal advice. I believe that when any staff member does not follow direction it can be serious, yes. The Innu people were very indignant, and demanding it be returned immediately. I responded to calls from Peter Penachue... that we were trying to get the vehicle returned as soon as possible... I believe they were consulting with the RCMP and the Crown here locally in Goose Bay... No, none of them were the Grievors' Supervisors.

Asked whether the Executive had consulted with the RCMP, Mr. Carroll answered:

In the chain of e-mails (CGC #4) - the first in the chain - there was an

e-mail from a RCMP Officer, and the Department of Justice. So, yes, they were consulted ... between our Deputy Minister and the Department of Justice and the RCMP. I saw that in the chain of e-mails there.

Asked what he knows about the meeting that had taken place on December 15, Mr. Carroll said:

Keith Deering and I were there. There was a general discussion about the seizure of the vehicle, and potential issues arising from the seizure ... We left the meeting with the understanding we may be directed to return it. We'd just seized the truck from an Innu Nation member. But, at the time, there was no such direction, so we remained status quo.

Asked if he understood the Executive was discussing it further, Mr. Carroll said:

No. I had no information. But we discussed it on the assumption that the Innu Nation would be calling the higher levels of Government in St. John's. We felt it would escalate fairly quickly.

Mr. Carroll said he wanted to clarify the "Incident Command System", and said.

It is in place to support Officers in carrying out their duties. Officers were assigned specific roles under that system. Mr. Coady was in the Command Post, as operational Section Chief, not at the incident site. I don't know who was placed in these roles at the time, but there was a plan governing that action going up the road... We try to systematically develop an approach for who does what and when, and that's developed in our operational plan.

Asked if he knows whether keeping or returning the seized vehicle would put Conservation Officers at risk, Mr. Carroll said:

No, I don't believe so. In this situation, given the information from the Officers in the parking lot, it could reduce risk to Officers and buildings and trucks.

Asked if he thinks the orders given to Mr. Duffett and Mr. Porter were clear, Mr. Carroll answered, "Yes, I do." Asked whether he feels that Mr. Duffett and Mr. Porter refused to comply with the order, Mr. Carroll said:

I did not ever hear them saying 'No, I'm not carrying out that order. I

did hear them say 'We want more time.' Once I understood how a vehicle or equipment could be returned if it was not needed for evidence, I concluded it could be done.

Asked whether it was done, he answered:

No, it wasn't... Because it was identified in my direction that the truck wasn't needed for evidence and prosecution in my direction, so it could...

**ON CROSS EXAMINATION,** Mr. Carroll confirmed that the truck had been seized on December 14, and that he had received an e-mail on the 16<sup>th</sup> confirming the truck was to be returned, which he passed on to Mr. Craig Coady. Asked if he had explained to Mr. Coady that he was to inform the employees about the return of the truck, Mr. Carroll answered: "... that the truck was to be returned as quickly as possible." Asked if it was he who had determined the truck was not required for prosecution, Mr. Carroll said:

It was Len Moore's who decided that it was not required for prosecution, based on his contact with Don Burrage.

Asked if Mr. Moores had contacted him directly, Mr. Carroll said: "No. He contacted the RCMP and his counterpart at Justice." Asked if he had ever been involved in returning a piece of equipment, Mr. Carroll answered:

No. We passed the information on the Officers. They'd know how to return it. They took courses on that sort of thing. They're Enforcement Officers.

Asked if, in his discussion with them, he had established that the Enforcement Officers did know how to do it, Mr. Carroll answered: "No, I did not... They were the Lead Officers." Asked how he knew they were the Lead Officers, he said:

I had a meeting with them in the Nursery Manager's office, and Mr. Duffett asked for the order to be given to him. They did not say "It's not us".

Asked if a written order is not normal for purpose of the file, Mr. Carroll answered:

It is not a common situation, and the receipt would be normal. I don't know if the order is required for the file... Yes, I did give them the written order.

Asked whether the Grievors refused the order, Mr. Carroll answered:

Not in words... They just said 'We need more time to assess'. That's in their letter (CGC #2)... It was not needed for evidence, so it had to be done. The direction to turn it over as soon as possible was given to them in writing.

Mr. Carroll confirmed that, in his view, the time from 12 noon until 1:30, when the Grievors came to his office, was a ...

reasonable period. It included a break for lunch, and they had to get the keys... they gave them to Derek Leboubon in my presence. They met with the Crown locally. They set up the meeting, and myself and Craig Coady and the two Officers met with the Crown Prosecutor, John Noseworthy. Yes, I was there. I wanted to make it happen as soon as possible... He said, 'If it is needed for prosecution, keep it. If not, you can release it.' ... Craig and I were asked to leave, so I went back to the office and prepared the written order (CGC # 1).

Asked if he had voiced any concern to the Officers about the speed with which the order was being carried out, or about it being carried out properly, Mr. Carroll said:

I can't recall. I voiced concern, when I walked into the nursery, that this had to be done fast or I'd be held accountable.

Asked if he had any concerns during the 15<sup>th</sup> and the 16<sup>th</sup> about the truck being seized on the first day and then returned on the next day, Mr. Carroll said, "I don't think they were surprised. The return was a possibility."

Asked if he had received a call from Peter Penashue during the debriefing meeting on the 15<sup>th</sup>, Mr. Carroll answered:

I really can't remember. I get a lot of calls from Peter. It is probably highly likely. He had my cell number.... yes, I called the office in

Northwest River, because of Peter Penashue and the presence of the members of the Innu community. It was not to challenge the Innu, but because of the request to close the building. But there was a protocol. He told me to do it, so I did it myself.

Asked who was assigned to the various tasks according to the plan during the seizure of the truck on December 14<sup>th</sup>, Mr. Carroll answered:

I don't know who was filling the roles. I only know that Craig Coady was the Incident Commander, and he reports to me... No, I don't know what roles Mr. Porter and Mr. Duffett had on the 14<sup>th</sup>... If there was a plan in place, I'd assume Mr. Coady would know that as the Incident Commander... Yes, I wanted to connect with someone who could get it done. The Conservation Officers in the office were asking questions ... Because of their request, I made the assumption they were Leads. They were asking the questions, and said they wanted it in writing.

Asked if he knows who actually seized the truck, Mr. Carroll answered, "I don't know. They signed it over to Mr. Leboubon." Asked if, in his view, the person who seized the vehicle would be the one to return it, he said, "Yes." He also confirmed he'd told Mr. Penashue, on the 15<sup>th</sup>, that he was working on the matter.

I knew there were papers to be signed and legal requests to be put in writing... At no point did I ever learn they were uncertain what to do. I did not reiterate what they were to do. They were familiar with the Crown and aboriginal matters. They knew how to give the vehicle back. But they wanted information on whether it was needed for evidence... Craig Coady and I accompanied them to the Courthouse to get the Crown's advice.

Asked why he had not returned the truck himself, and whether he had the authority to do so, Mr. Carroll said:

I did not have the keys. They signed it over to Derek Leboubon. It was at DFO, where the truck could not be easily found.

Asked why Mr. Porter and Mr. Duffett would have the keys if they had not seized the truck, Mr. Carroll answered:

I didn't know. They asked me for information, and for a written order, so I assumed... If it's not needed for evidence, it's easier and quicker to give it back. But if it is needed for evidence, that takes more time.

Mr. Carroll acknowledged that the Policy (CC #1), at B9, says that a "Provincial Court judge ... may order redelivery...", and does not raise an issue being needed for evidence or not.

Yes, they were asking if it were needed for evidence... I do not know why we could keep it, if it were not needed for evidence.

Asked whether the Department, had followed its own Policy (CC #1), and if in his view, the two Officers would violate policy by giving the truck back, Mr. Carroll, "It could appear so, and to them also..." Asked if he had considered his direction clear, Mr. Carroll answered:

It was clear when I gave it to Mr. Duffett and Mr. Porter in the office. It was clear. They asked for it in writing. I tried to show them on the BlackBerry... There was paperwork, yes. That was not unreasonable. But the urgency was clear to me, and it was indicated they still wanted more time.... Yes. Mr. Leboubon had the keys by 1:45.

Asked if either Grievor had ever said "I'm refusing to give the truck back", Mr. Carroll said, "No, they did not. No."

**ON REDIRECT EXAMINATION**, Mr. Carroll was asked whether there is leeway to interpret and alter the wording of policy manuals, he answered:

First of all, I have just spent a year on largely on updating policy manuals. We need to do it. Interpreting the program for employees means, in operational terms, that they can be applied differently... Sometimes we can take pictures instead of seizing them.... CC #1 is from the *Wildlife Act*. Where there is no impact on evidence, the Innu are treated differently in respect of seizures *etc.*. We treat them differently in respect of their ability to hunt.

Mr. Carroll also confirmed that Mr. Leboubon had taken delivery of the keys after signing Mr. Duffett's notebook.

**THE ARBITRATOR** asked the witness to explain his understanding of the message conveyed by the email chain (CGC #4) and, specifically, to explain how he reads Mr. Burrage's message to Mr. Moores at 07:37:57. That message reads...

From: Burrage, Don  
To: Moores, Len  
Sent: Wed Dec 16 07:37:57 2009  
Subject: Fw: [Potential Junk/Spam] Fw: DNR Vehicle Seizure

Len,  
As discussed. If the truck is not required by NR for prosecution (and this seems unlikely) I would return it early this morning. It may ward off a larger problem. Can you let me know so that I might advise Peter.  
Don  
Department of Justice....

Mr. Carroll said:

It was understood, based on CGC #4, that the Department had determined the truck was not required for evidence, and Mr. Noseworthy's advice was consistent on this point.

The Arbitrator asked Mr. Carroll if Mr. Burrage's sentence about "the truck", as it appears in CGC #4, does not, in fact, contradict the "truck is not needed" meaning put on it by the Employer. That is, does Mr. Burrage's sentence not actually say that it "seems unlikely" that "the truck is not required by NR for prosecution ... "?

Mr. Carroll noted the possible alternate reading offered by the Arbitrator, but said:

The order came from Len. He's my boss. Between 9:39 and 10:11 I'm on the phone with Don and Keith. At 9:39 the order gets to me: 'return the truck ASAP.'

There were no questions from either Party arising from the Arbitrator's question.

**THE THIRD EMPLOYER WITNESS**, was Mr. Keith Deering, Assistant Deputy Minister for Forestry & the Agrifoods Agency. After providing a brief summary of his career with the Department, Mr. Deering confirmed he was the author of the two letters of discipline (Consent #<sup>s</sup> 4 & 5), and described their background.

We had an incident that took place on December 16<sup>th</sup>. There was a fairly serious series of events on the Trans-Labrador Highway: illegal caribou hunting. A vehicle was seized, and, after that there was dialogue through Government about whether we needed to retain the truck. On the morning of December 16<sup>th</sup>, the decision was made that the vehicle was not required. That was based on our assessment, and it was decided that the vehicle was to be returned... Anything not needed should be immediately returned... On December 15 Mr. Carroll and I were in conversation over the Innu Nation's resentment out in Northwest River about the... protest. On December 15<sup>th</sup>, there was an overt threat. The Innu Nation leadership had no confidence it could control it. This was communicated to others in Government. We were worried for the safety of our staff and also for those in government facilities in Northwest River.

I was in Goose, and had to extend my stay to stay engaged on the unfolding situation. At one point Mr. Carroll and I had to go down to Northwest River to keep the building open. From our perspective, and in the interest of all staff involved, the vehicle was not required for successful prosecution. So release it to defuse the situation.

On the evening of December 15, I flew to St. John's. I met with the Deputy Minister early in the AM of the 16<sup>th</sup>. He said he'd been dealing with folks that morning. It was not required, so it was to be returned. He emailed me a synopsis of that exchange by email. I relayed that to Mr. Carroll, and immediately followed up by phone. Based on that, Mr. Carroll had to initiate several measures to ensure folks were fully informed. My impression was... some felt it was necessary to keep it despite advice that it was not from the Deputy Attorney General. Mr. Carroll had to get somebody else to return it.

From my perspective, it was a very serious situation. We had concerns for staff up on the road, but also there were worries over local... Despite advice provided by our local legal experts, there was some discussion. We decided to discipline. On my understanding, Mr. Porter and Mr. Duffett were the ones co-ordinating matters on this file, and so discipline was directed to them.

In respect of the internal discussion that he understood took place, Mr. Deering was asked how he interpreted the exchange of e-mails (CGC #4). He answered:

That was pretty clear. Mr. Burrage was communicating. My interpretation was that it was unlikely we would require the truck for prosecution. I should add that this list includes this and other departments. There was quite a regular dialogue on this with the RCMP, Justice, and us. I met with Mr. Burrage and others more than this.

Asked if he had met with Human Resources following the incident of the 16<sup>th</sup>, and how the five days suspensions had been decided, Mr. Deering said:

Between the 16<sup>th</sup> and the 23<sup>rd</sup> I'd say, yes, there were discussions. I can't recall any one discussion. There was one on the morning of December 23... Discussions took place on the 17<sup>th</sup>; and perhaps after that there were some I was not party to leading up to the 23<sup>rd</sup>. There was discussion between me and HR... I guess there would have been conversation on the matter of the five days. Five days is a fairly ... it reflects the seriousness... Safety of employees is at issue. I consider it critical. And when there is evidence of direction not being followed ... it becomes critical.

Asked if, in setting the five-day suspensions, he had considered the Grievors' work records and long service Mr. Deering said:

Yes that certainly was considered. I talked about that myself, in the context of a broader range of disciplines that was considered. At one point, discipline well beyond five days was being contemplated.

**CROSS EXAMINATION**, Mr. Deering testified he had not himself been involved at all in the seizure of the vehicle on December 14, and did not know who actually seized it. Asked about his understanding that Mr. Porter and Mr. Duffett were Lead Hands in the matter, Mr. Deering said:

It's been a long time. It was fairly clear in my mind at the time that they were the Lead Hands. I'd had discussion with them at the time. How I arrived at that conclusion I can't say. When direction was provided on the 16<sup>th</sup>, it was given directly to Mr. Duffett at the time.

Mr. Deering said he had not spoken directly with Mr. Duffett or Mr. Porter on December 16 in giving the direction. Asked what words had been used when he gave the direction to his Managers, Mr. Deering said:

I transmitted the e-mail (CGC #4), Mr. Moores' e-mail of 9:29 from the Deputy Attorney General. It was clear, and gives the direction. And then Len gives the direction.

Asked why he had not directed the Managers to return the truck, Mr. Deering said:

That's what did happen. I understand the truck was in the possession of the Officers. As I indicated, it was in a service compound in the Nursery that belongs to the Department.

Mr. Deering was asked whether the observation set out in the letters of discipline (Consent #s 4 & 5) that "Rather than comply with this direction you unreasonably questioned this action and refused to carry out the direction" meant that both Officers refused? He answered:

Both Managers testified that neither Officer expressed a refusal. My assessment as of December 16 was fairly clear. Direction was given between 10 AM and 10:30 AM by Mr. Carroll to Mr. Coady that the truck had to be returned. The Officers involved wanted to speak with Mr. Carroll. He went and spoke to them, and he communicated it. It was requested to be put in writing, even though he showed them the e-mail string... and this was provided in CGC #1. And after that there was consultation with the Crown and the letter from the Officers that they do not think it should be done, or it was needed for prosecution. The direction was 'as soon as possible'. Yes, it was a direct order.

Asked to explain what "as soon as possible" means to him, and whether there was a procedure involved or was it just a matter of "give it back", Mr. Deering said:

I'd suggest that the processes discussed, for example a court order, ... once the Deputy Attorney General advises, then that is clear.

Asked how the Department, based in St. Johns, had determined that the truck, located in Goose Bay, was not required for prosecution, Mr. Deering said:

The details of events on December 14 and afterwards were discussed with the Department of Justice and the RCMP. There was constant advice on the dynamics of this... The initial message in the string was from Mr. Reeves of the RCMP to Mr. Burrage of the Department of

Justice timed at 6:17 AM. I was not involved in the discussion at 6:17 AM. We take their advice all the time. If they tell us it is not required, we take that advice... As I say, there was lots of discussion. The determination was made in discussion with Mr. Burrage and the RCMP ... The RCMP did not seized the truck, but their view is important. They were involved in this file, not for the caribou, but because of threats to safety and to transportation. And we did not want to compromise those other concerns because of holding a piece of equipment.

Asked whether the Enforcement Policy and Procedure Manual (CC #1) provides direction about the return of equipment to those participating in illegal actions, Mr. Deering said: "It may. Once it is submitted to the courts, this is what is done." Asked whether there is a procedure to be observed by the Department's Officers, Mr. Deering said, "They might be expected to follow the direct indications from the Deputy Attorney General." Asked if it would be "unreasonable" for the Officers to try to find a way to do it, and to ask how to do it, since they had not done it before and were trying to find a legal way to do it, Mr. Deering said:

Direction was given at a very high level. It had to be done. They ought to have taken comfort from that, and handed the keys over. We had not engaged the court process... We had direction from the Deputy Attorney General. This was to be done... Yes, I knew that the Officers had consulted the Crown. My understanding was they were seeking comfort from the Crown. But they had the ... Deputy Attorney General. But I do not know what the Crown said... The Managers attended the meeting the Officers were requesting, but we did not go to the meeting to get the Crown's position. We already had that.

When it was pointed out that the Employer had assumed the Grievors were leading on this file, but that this had not been established, Mr. Deering said:

There was an evolution on this from December 14<sup>th</sup> to the 23<sup>rd</sup>. It was clear to me who was leading, and I acted on that.

Asked whether the Department of Justice had considered the Conservation

Officers' safety when it had offered its advice, Mr. Deering said:

The safety of Officers and the interests of the Staff ... and we had that in mind. We understand the return of the truck to the road might be a problem. The Aboriginal policy is also relevant. It speaks to conservation issues, threats to public safety, and evidence subject to seizure. That was done, yes.

Asked what the end result of the December 15 debriefing meeting had been, and if there had been any comments or decision about returning the truck, he said:

It was just a debriefing. I don't recall the details... I don't recall getting a call from Peter Penashue. We had regular dialogue with Peter that day. In the morning of the 15<sup>th</sup>, to the extent we could, we assured him legal action was proceeding.

Asked if he'd expected the direction to be executed as soon as he had given it to Mr. Carroll, Mr. Deering said, "I expected it to be started. I saw steps that impeded it's being implemented." Asked how long he estimated it would take to carry out the direction, Mr. Deering referred to the email string (CGC #4) where Mr. Burrage says '... I'd return it early this morning.' When it was noted that the truck was returned after lunch, he said:

At that point it was returned through a different avenue than originally provided ... I concluded the interactions and extra steps were to try to avoid it being implemented ... as confirmed in the letter (CGC #2) that it shouldn't go back.

Mr. Deering could not recall whether he had seen the the Conservation Officers' letter "that day or the next". He also testified he was not aware the letter was given to the Manager on December 16, with the keys. Asked if he considered this to be a refusal, he said: "I considered it an insubordination of sorts, given the direction."

Asked how it was that only the two Grievors were disciplined, despite the fact that Mr. Carroll conveyed the message to all those in the garage at the Nursery,

and that all the Conservation Officers had signed the letter (CGC #2), Mr. Deering answered:

That was one of the options; but we found they were co-ordinating it... No, I have no evidence they were co-ordinators here with me. At the time it was unfolding, it was pretty clear. We had an Incident Command System, and I believe the two Officers were co-ordinating... No, I have no evidence.

Asked whether he and the Department had taken into consideration the possibility that the Officers were attempting to return it legally, he answered:

I'd consider it came from the Deputy Minister's direction, and they got it from the RCMP and the Department of Justice. CGC#4 says the truck can be returned. We'd all been in conversation and knew what it meant.

**ON REDIRECT EXAMINATION**, Mr. Deering testified that conversations between the Department and the Department of Justice had been ongoing, but that he had not, himself, spoken directly with Mr. Burrage.

**THE ARBITRATOR** posed the same question he had posed at the close of Mr. Carroll's testimony, about the meaning of the opening portion of Mr. Burrage's message as it appears in CGC #4. Mr. Deering answered that extensive conversation between the Departments had been ongoing between Mr. Burrage and Mr. Moores. Mr. Deering had not discussed the question directly with Mr. Burrage.

There were no questions from either Party arising from this question.

**FOR THE UNION, THE FIRST WITNESS** was Mr. Chuck Porter, an employee of the Department of Natural Resources for approximately 20 years. He has "never" had any trouble with the Employer. As a Conservation Officer III, his duties are largely enforcement, related to forestry and wildlife issues under the respective *Acts*. He confirmed he is required to work under the *Wild Life Act*

including Section 15(9) as quoted in the Policy (CC #1). He has twice received awards for Conservation Officer of the year and the Public Service Award of Excellence for his work. He sketched background issues to the Government's interest in the Red Wine herd.

The issue for both Labrador and Quebec were the protest hunts. The hunts are illegal. As an endangered special herd, it is not open to hunting. Over the last few years hunts have been happening in the excluded area south of here. We've been monitoring the herd and enforcing the *Act* accordingly, patrolling the highway by vehicle, snowmobile or helicopter. Generally, it takes place in November, December, and January each year.

Asked if he'd been on patrol on December 14, when the truck was seized, he said:

Not immediately, no. I was at the Nursery area, not actually on patrol that day, until I was called on the office number. We were stationed there in case people were needed to handle a situation... It was communicated to us that there was a person illegally hunting on the road, and was attempted to be stopped by Officers at least twice, and had bypassed the Officers. The wanted to try a third time to stop him, before he got into Town... We responded. It was around the noon hour, I think, we became aware of the problem: just told that illegal hunting was observed, and he'd blown the two roadblocks... Yes, it was very serious. Myself and a bunch of others responded, and set up a roadblock, along with the RCMP, 2 or 3 km. from town on the Trans-Labrador Highway. There were 2 RCMP Officers...

We set up a roadblock on this side. There were the Officers behind them who had set up the first two roadblocks. When he first stopped, he tried to reverse. The other Officers trapped him, and eventually he stopped. He did not have a big range to manoeuvre. There was a bunch of Officers, myself and two or three other Conservation Officers there, and at least one RCMP. One of them asked Mr. Nuna – I recognized him – to get out of the vehicle. He refused. He put his window down about 3 inches and stared ahead. He was in park, but the truck was still running at first. The Officers started taking off the caribou.

We were still talking to Mr. Nuna. I guess they thought he might blow the roadblock again. When he observed the Caribou being taken out of the truck and laid on the road behind him, he reversed toward the Officers who were behind the truck. He actually drove over the caribou in reverse. This caused the Officers to scatter: a bit of a panic, I guess. Myself and the RCMP were yelling at him 'stop, stop'. He put the truck in park again, and the RCMP asked him to leave the truck, and he would not. They asked him to pass out his registration and driver's license. When he reached for his wallet the RCMP Officer reached his arm in and opened the truck door. Then, once the door was opened, the Officer grabbed the driver. I helped him take the driver, and other Officers and the RCMP successfully arrested the other two individuals.

Once arrested, the individuals were put in the RCMP Officer's car, and myself and the Officer went to the holding cells at the RCMP to properly process the occupants of the vehicle.

Asked if he had been involved in the seizure of the truck, Mr. Porter said:

No... I don't know who, but we were not involved in that process at all. Other Officers on the road were responsible for seizing the truck. After we finished at the holding cells we just went back to work. There were other bits of information coming in, and we went on about our work... I never saw the truck. I have no knowledge of what happened to the vehicle at all.

Asked if he had been in charge, or been asked by Mr. Coady to take charge, that day, Mr. Porter said:

No. I am one of the senior Officers, yes; but there are probably five, six, seven, or eight more senior. Officer Bruce Hope is the one most responsible for compliance matters. I was not at all involved with the truck or evidence. I went to the cells for identification... Mr. Duffett was with me, yes.

Asked if there had been any other equipment confiscated, Mr. Porter said:

I know there was the caribou. I don't know, other than that, anything else about the evidence.

Asked to describe events on December 15<sup>th</sup>, Mr. Porter said:

First thing in the morning was a regular day. There was a meeting at the Goudie Building. Everyone was told to come. It turned out to be a debriefing meeting dealing with the whole hunt plus the December 14<sup>th</sup> incident. Mr. Deering was in the chair, I believe. Colin Carroll and Craig Coady were there, and the RCMP were there – maybe a couple – and a number of us Conservation Officers. Bill Duffett was there, yes, and I was there.

Asked if there had been any discussion about the truck and the possibility of it being returned Mr. Porter said:

Yes, that ... was brought up and dismissed. At least a portion of the meeting was held to receive a consensus of opinion whether we should give the truck back because the Innu requested it back. It was unanimous... The Officers, the RCMP & Management. It was unanimous that the truck was to be kept. We were applauded for the work we did on December 14.

Asked if there had been any objections from the RCMP or Management about returning the truck, he said:

No, absolutely not. Everyone was on the same page. Everyone was given an opportunity to speak. I'm pretty sure we all spoke, and the RCMP weighed heavily on that opinion. It was a collective opinion. It was just a normal day: not taken as a big thing at all.

Asked if there was talk of a call from Peter Penashue to Mr. Deering, he said:

Yes, he described to us a call from Peter Penashue. A conversation ensued in front of all of us in the room. Peter was requesting the truck back. It was not a real long conversation, but Keith expressed he'd get back to him at a later time. He indicated – I'm paraphrasing – we'll get back to you later on. He put his BlackBerry in his pocket and said, 'That will delay him from using the truck... It will stop him from using that truck.' He said it with a grin or a grimace... We left the room and went back... The applause was not necessary for doing our work. It was a very unanimous, consensual meeting.

Asked to describe events on December 16<sup>th</sup>, Mr. Porter said:

Again, we just reported to the Nursery as usual. Our District Manager, Craig Coady was there... He was boss for the day for this operation... I remember walking into the kitchen. Craig was there with his head down talking about the 'Innu wanting their truck back', and it 'looks like we have to give it back...' That was 10:00-ish, mid-morning... The kitchen is small. There may have been 4 or 5 Officers there. I don't remember if Bill Duffett was there. Everybody was in disbelief, I guess. They were asking, "... but that's impossible!" That's what we thought anyway. Everyone started just talking... 'Can't do that...' Craig was devastated: a very young Manager. I remember consoling him: "Now boy, we'll get to the bottom of it... People often claim 'We'll get it back.'"

Asked if Mr. Coady had instructed him to return the truck, Mr. Porter answered:

No, he was just sitting there looking very distraught. We went back to work. I had no involvement in this. I personally did not take it seriously at all (Witness' emphasis). I thought it was just like other times ... Then someone told me – I don't know who – that Colin was on his way down to clarify the issue of the Innu wanting their truck back. I'm not sure if I was there initially. I remember him standing, with his coat on, talking to the guys in the nursery. He was talking about the Innu wanting their truck back. 'Boys, we got to give the truck back.' And he said he's 'hoping not to get fired over this.'

Asked if Mr. Carroll had directed these comments specifically to him or to the group, Mr. Porter answered:

No. He was saying... I could see disaster in his face. I'd often seen people want stuff back, and I felt he was distressed at having to give it back. I did not take it seriously (Witness' emphasis) at the time, but he was very serious: 'I hope I don't lose my job over this.' Colin and Bill Duffett were talking over in the office area. So I asked him, along with Bill, – they were talking before I got there – and I asked, 'What's this all about? What was the basis for it?' To me, it made no sense. Colin was after showing Bill an e-mail on his BlackBerry. I still thought it was a bump in the road to be cleared up. I'd been here before. Colin

explained to me that the truck had to be given back if it wasn't needed for evidence in prosecution. Then it would be needed.

We discussed this. It was obvious that it was evidence. The truck was a key piece of evidence, used to commit, to transport, and to run over the caribou. I was helping Colin: giving him the information he needed to tell them we do need it. I genuinely thought – honestly thought – this is where it would end... Colin would not tell me who, higher up, this decision was coming from. I just thought that, when responding, to show them it was required (Witness' emphasis). I was trying to give him the facts to send it back up that it was needed. That was the basis we met on. So we said we'd just go talk to John Noseworthy, the Crown Prosecutor. We meet with him all the time... So myself and Colin, and Bill Duffett went to meet him. I don't remember Craig being there, as someone testified. Colin was there for sure. But I think it was Derek, not Craig... We went there under the assumption that we wanted to clear things up on whether it was needed. Now we were going the next natural step, the Crown office. They went with us.

The Crown Attorney was very busy. He said, "Boys, I've got a few minutes." He was not aware of what Colin had told us. He said he had never been there before. He said he'd meet with us later in the day to discuss it further, but advised us to go to the RCMP building to find out the process to legally expedite releasing the truck to Mr. Nuna and the community.

Asked if, in his many years experience, he had ever returned a vehicle to a person involved in illegal activity without a court document, he answered:

Never. I had to follow legal process. A vehicle... has to be processed further... There has to be a vehicle condition report, because if you give back a seized vehicle – if it's evidence or not – it's been in the Department' possession. You have to review its condition before you can return it. That is step one. If we took the truck, who is to say we did not do something to it? You have to cover yourself legally. That's step one. In order to return a vehicle we've confiscated it needs to be asked in court and you need a release signed by a judge... We knew Colin was worried and getting pressure. We were trying to expedite the process legally. That's why he suggested strongly that we go to the RCMP to see how to do it without going to a judge. He was looking for options.

Asked if they had spoken with Mr. Deering, Mr. Porter said:

No. Mr. Noseworthy said to talk with the RCMP. Bill and I left the Crown Attorney's office. (Mr. Noseworthy) had to go back to court. I called Colin and told him we had to see the RCMP on the advice of the Crown Attorney, and we met with the RCMP.

Asked if Mr. Carroll had objected to their talking with the RCMP, or made any comment, Mr. Porter said:

No. I just told him. We spoke to Sergeant Sandy Goudie. We were very happy to, since he is actually the RCMP Officer who deals with Aborigines. He is very experienced for the kind of thing we wanted. I told him we were trying to give the truck back legally as quickly as possible. He never heard of it before. He told us to do nothing until he checked further, and he would get back to us later in the day... I called Colin again and told him we were finished with the RCMP and were going to the office in the Goudie building... Yes, I did (keep Colin in the loop). I was going to advise him about what the RCMP said.

Asked if he had seen Mr. Carroll, Mr. Porter said:

He and Bill had gone to (deal with something) that I was not part of. Then he came out and handed at least one of us a letter (CGC #1).

Asked for his understanding of the decision to return the truck, Mr. Porter said:

My understanding was he was telling us to hurry up. I was more concerned for Colin. I could see the concern on his face.

Asked if they had returned the keys to the office as soon as possible, he said:

Yes, but we were not asked for them at that time. The Crown and the RCMP both offered to meet with us later that day... We left and we went back to the Nursery. The Officers there were anxious. They knew we were with the Managers to meet with... We told them what had transpired, and said we don't know how to impress that this was key evidence. Colin was under pressure for his job. Someone – I don't know who – suggested we sign a letter (CGC #2). People signed it without hesitation. These are seasoned Officers, some with twenty years experience... Yes, it was drafted over the lunch hour. I was still

under the impression that the message was not getting back up. The men were saying it was wrong.

Asked whether he had seen any urgency in the phrase "as soon as possible" as it appears in Mr. Carroll's written direction (CGC #1) , Mr. Porter said:

I saw it as 'Hurry up', but did not see it as 'Do it now.' We were already jumping hurdles to make it happen, but we could not... Absolutely, we had to (follow the law). I am a Peace Officer with powers. I am sworn to uphold the law. I knew anyone who gave back the truck without following the law would pay for it...

We returned after lunch, just shortly after 1:00 as I recall. I don't know if Colin called, but we ended up in his office. Myself, Bill Duffett, Colin Carroll, and Derek Leboubon. Either Bill or I gave him the letter (CGC #2) signed by the Conservation Officers. Bill Duffett gave the keys to Derek Leboubon, the District Compliance Officer.

Asked if anyone had got back to them from the Crown or the RCMP, he said:

No... Bill asked if he could give the keys to Derek. Bill asked because he did not think it was legal. He passed the keys to Derek, and I'm pretty sure he passed him his notebook. But Derek would not take the keys and sign off until he went to the truck and saw it with his own eyes. Bill offered immediately... That was it for me. We went back to work on other incidents.

Asked if he had ever refused any order from Mr. Carroll or Mr. Coady, he said:

No... I felt I was working with the Managers to do it as quickly as possible... No I did not "unreasonably question" or "refuse to carry out the direction" (Consent #4). I acted that day the same as I acted at any other time in my career. It was the same as any other day. I honestly thought that I was doing the right thing for the whole position. I was never aware of that stuff happening up top. From my perspective, from Colin on down, we were working as a team to do what was requested. In my humble opinion, I still think I did something wrong because we gave the vehicle back without the power. I've not been able to function properly since. My career has been based on my judgement, and that day my judgement was found to be absolutely wrong, and I don't exercise that judgement any more.

**ON CROSS EXAMINATION, Mr. Porter testified:**

I can't remember who called me December 14 to respond to the incident on the Trans-Labrador Highway. In this case I guess Craig was there. If he was there, he'd normally make the phone call, but I don't remember... At the scene, I was just adjacent to the truck.

Asked if he has been upset by Mr. Nuna's reaction to the Officers at the scene, including his reversing the truck, Mr. Porter said:

I'm used to it, but I still feared for the Officers' safety... At the holding cells, I was one of the first there... I'd assisted the RCMP many, many times, so I volunteered to go with him to the holding centre. Bill was not actually with me at the time. He showed up later.

Asked how Officers get assigned to cases or files such as this event or any illegal hunt incident, and his understanding of what developed, Mr. Porter said:

These are really two separate things. First there is an unfolding event; and then you can be assigned to a file later. Files can be shared among Officers for various reasons. That's up to the Supervisor. There was no one in charge on the 14<sup>th</sup>. Everyone was equally responsible to handle the event. Picking up a caribou or taking part in a seizure, all are equally important...

If the truck was not needed for prosecution, it could be returned. Colin would not tell me who the email was from He did not clarify – all the stuff that came out in previous testimony: consultation with the RCMP and the Deputy Attorney General. I knew none of that. Just 'upper levels of Government' is all I was told. Colin usually reports to Keith Deering who reports to Len Moores.

Asked if he would describe the December 14<sup>th</sup> case as unique, Mr. Porter said:

We deal with lots of Aboriginal cases, but the outcome (Witness' emphasis) of this one was unique.

Asked if he had had the keys to the truck in his possession at any time, he said:

The only time I saw the keys was in Colin's office, just shortly after 1:00 on December 16<sup>th</sup> at the time he passed the keys over to Derek Leboubon. I did not know where they were.

Asked who drafted the letter signed by Conservation Officers, and whether all Conservation Officers had signed it, Mr. Porter said:

It was suggested to be drafted by the Officers. I know I actually typed the letter up on behalf of the Officers. I think everyone there did sign it. I can't attest for all... I think one said he would not. I don't know if he was there. I wasn't talking to him, so I don't know his reasons.

Asked to explain his testimony to the effect that he is a "Peace Officer, sworn to uphold the law" and that he was stressed out knowing that we're going "to pay for it", Mr. Porter said:

I'd just been advised by the Crown Attorney and a long-time, experienced RCMP Sergeant that they had never seen this before. I'm more aware that I'm to be involved in returning a key piece of evidence for our court. Due to the gravity if someone... Mr. Nuna, for instance... came back and put the blame on me or others for possibly doing something wrong with his truck. Then I could be liable.

Asked if he had damaged Mr. Nuna's truck, Mr. Porter said: "No, but I was still scared that the other person would say that we did... Asked the basis for his view that the truck was a key piece of evidence, he said:

Just twenty years of work doing this work. In every other case the truck would have been kept. I was basing it on that.

Asked if he had told his Supervisor this, Mr. Porter said:

Yes, that was why the letter was necessary, as a part of our role, we thought, in impressing to "upper levels of Government" that the truck was needed as evidence... And I did not know if they did receive that information.

Asked if they are normally told of decisions made in "upper levels", he said:

Sure. Sometimes we have meetings with the Minister. It's common we get clarification on issues. Sure it is.

It was pointed out that, despite these concerns, it remains a fact that Mr. Carroll

had given the direction to return the truck. Mr. Porter responded:

He was worried for his job. So were we. I feel he was in turmoil. He had to get the truck back or he would lose his job. He said that more than once. We weren't going to make anyone lose their job over this.

Asked why he had requested the direction to return the vehicle be put in writing, Mr. Porter said, "I did not make the request.... I believe Bill Duffett did." Asked if anyone had met with the Clerk of the Court prior to meeting with Mr. Noseworthy, Mr. Porter said:

Bill sent Craig Coady to speak with the Clerk to expedite the process. That's all I'm aware of. I don't know if it was Bill or Bruce Hope. I don't really remember.

Asked if, at any time, he had informed any Manager that he was not responsible, and should not be singled out, Mr. Porter said:

I did not know I was to be disciplined, or who was getting disciplined, or if there was to be discipline. I did not know before December 23<sup>rd</sup>. I received the letter, and it was read out to my Union Rep, being on the line, and he just took over... No, I never (voiced any concerns or objected to being disciplined.)

Asked why Mr. Carroll's written instruction (CGC #1) wasn't sent to other Conservation Officers, and whether he had told Mr. Carroll that others should be aware of that as well, Mr. Porter said:

I don't know why... I don't think that is my responsibility. He may have sent it to a hundred others. No. Why would I? I can't tell Colin what to do with that kind of stuff.

**ON REDIRECT EXAMINATION**, Mr. Porter confirmed he had never been put in charge on December 14<sup>th</sup>, and the operation on the Trans-Labrador Highway was a "group effort".

It was not "unique"... It is the sort of thing we do all the time; but the return of the truck without any legal process was.

Asked why the truck was not returned by one of the Managers, Mr. Porter said, "I don't know." Asked about the letter signed by the Conservation Officers (CGC #2), he said: "I had no initial part in the letter. It was probably because I can type fast."

Mr. Porter said he had not seen the truck again "after we left the road", but that if he was to return the truck it would have meant that he would have to look at it and process the information.

The Department had the truck in its possession. I don't know if the Managers knew it or not. Except that we were doing the whole thing, and getting the paperwork. It was the Department's responsibility to get the paperwork done. It's the law.

Asked why he'd said nothing when he'd received the discipline, Mr. Porter said:

I was shocked. I could not say anything. I was actually speechless... I do not know why I got the email (CGC #1) from Colin. I did not request it. I don't know if he forwarded it to anyone else.

**THE SECOND UNION WITNESS** was Mr. Bill Duffett, Conservation Officer III. He has been employed with the Department for 21 years. In December 2009, his duties included care of forestry and wildlife matters. "Primarily , I am an Enforcement Officer." Asked to describe the December 14, 2009 incident on the Trans-Labrador Highway, he said:

The Innu were illegally hunting the Red Wine herd. That morning I was in the office in Northwest River. I got a call from Bruce Hope, my immediate Supervisor, requesting help up on the road. There as some activity with some Aborigines from Sheshatshiu. Fred Taylor, another Conservation Officer, was in office. We proceeded to Goose Bay – Fred had to go home to get his duty belt – and proceeded directly to the site on the Churchill Road, I think... about 3 km. up.

When we got there, a roadblock was half set up by the Officers. There must have been a dozen of our Officers, and a couple of others were backed up behind our Officers. I arrived there soon after the truck. Others were around the truck. Chuck was there on the driver's

side. The RCMP arrived shortly after I got there... I got along side of Chuck on the side of the vehicle. I can't recall where Fred went. Chuck was making attempts to talk to the driver of the truck... The window was down (a little). Chuck asked him to step out. He would not co-operate. Most everyone was standing around. There were a couple on the side of the vehicle... there were caribou in the truck. The driver made a couple of attempts to drive ahead and back... five feet or so... No big distance. I suggested we grab the caribou and throw them under the wheels to stop the truck... My concern was to try to stop the truck, to get some caribou to put under the tyres.

Mark Blanchard of the RCMP came up to the vehicle. Mark got his arm in the window and got the door open. The three individuals in the truck were then asked to exit. I am not sure if they exited on their own or we took them out. They were handcuffed and put in the RCMP vehicle. Chuck went with one of the Officers in the RCMP vehicle. The vehicle was seized at that time, along with the caribou and firearms, anything on the site. I proceeded down to the RCMP also.

Asked if he had been responsible for seizing the truck, Mr. Duffett said:

No. I went on in my own truck, and followed down to the RCMP. I did handcuff one of the hunters there. I can't recall if the truck went ahead of us. Ford Taylor did drive the seized truck back. Fred seized the truck. He was in possession of the truck. I'm not sure if the firearms were in the truck. I never had possession of the firearms or the caribou. At the lockup ... we tried to ID them. Secured identities was the main objective. Then we released them.

Asked what directions he'd been given for monitoring illegal activity on the Red Wine herd, Mr. Duffett said:

Actually to engage in patrolling the area of the Red Wine herd for possible illegal hunting. If found, engage in the investigation on that. Depending on the number of hunters, we'd determine the enforcement action we'd take. If the numbers were safe, we'd proceed. If they were huge, we'd gather evidence from a distance. After the frequency of the protests, they developed an Operational Plan, with a couple of levels of action, to focus in... If there were a small number, there would be full enforcement. Officer-to-hunter ratio determined it. If the ratio was

too high, you gather what you could... Yes, the Department brought in extra Officers from the Island, about ten, and a couple of rotations, and our own fellows from the Coast... I've been dealing with this for about ten years. Over the last few years, it's increased... On December 14, yes, there were Island Officers there on the road.... maybe a few from the Island on the road, and some at the greenhouse.

Asked if dealing with the Red Wine herd and the Innu was always volatile, he said:

Oh there is always a problem when you go up on the road... For me it was a normal day, yes. I'd not say it was normal for those from the Island. That day was easy. There were only three hunters.

Asked if he knows where the truck ended up, Mr. Duffett said:

Initially she went to the tree nursery and then to the Federal Fisheries building, locked in the Garage.

Asked if, as a Conservation Officer, he needed the truck, and who takes responsibility for processing a truck, Mr. Duffett said:

Yes. It was part of the evidence. The caribou were in the truck. Normally, it can be held for three months until charges are laid... Ultimately, if you seize a truck, you are responsible for processing it. I handcuffed a hunter, so I proceeded to the RCMP jail with him... Later that day I photographed the truck.

Asked who else had been involved in processing the truck, Mr. Duffett said:

Conrad Smith and Lorena, a Conservation Officer II – I forget her last name – both from Clarenville, also processed it that day or the next.

Asked how he expected the Innu community to respond to this incident, he said:

Guaranteed, like every time. They would want their vehicle, caribou, and firearms.

Asked if it is normal that they get these things returned, Mr. Duffett said,

No. Typically, I'd meet with the Crown Prosecutor and determine what was needed to build a case – whatever evidence was required. Sometimes someone else owns the vehicle, so they have to provide documentation.

Asked to describe events on December 15<sup>th</sup>, Mr. Duffett said:

I know we had a meeting scheduled either that morning or the previous evening. I can't remember who called it... I didn't. It was about the vehicle and what happened the day before. Many Officers from Northwest River were there. The Labrador Officers were there, excluding the Island Officers. Fred was there, and myself, Chuck, Colin, Craig, Keith Deering, an RCMP Sergeant Cains and the other RCMP Officer. Yes, Bruce Hope was there: everyone, just about, from the day before. The general consensus was that the vehicle needed to be kept and the implications of giving it back – everyone expressed a view on that, including the two RCMP Officers and including the Manager and the Director... My understanding of the consensus was that the truck had to be kept. The RCMP were adamant that was not good practice to give in on the evidence.

Asked if they were made aware of who was seeking the return of the truck, he said:

It was brought up that Peter Penashue... Keith Deering was at the head table on the phone a couple of times speaking to Peter Penashue, and clearly stating his name. He promised to get word back to Peter about the vehicle. We clearly realised Keith was using stalling tactics: to 'keep that vehicle another day from hunting.' The vehicle was being requested, but we did not have time to speak to the Crown Prosecutor by that time. So the consensus was to 'Keep the truck.'

Asked if he understood from that meeting that the truck would not go back, he said:

That day, no. That position was strongly argued by the RCMP. I'm not saying they said it was needed for the court, but it was their advice.

Asked what he thought would happen, Mr. Duffett said:

I knew it was not a closed issue. They would not take 'no' for an answer. I knew that. I just went back to work. People probably went back to the tree nursery... I went and photographed the truck that day.

Asked about what happened on the morning of December 16<sup>th</sup>, and when he learned of the probability that the truck would be returned, Mr. Duffett said:

I was in the Goose Bay area, I think. I learned about it mid-morning, when I went to the Nursery. I was dealing with other issues. It could have been 9 or 10 in the morning. A fellow employee told me first about the need to return it. I phoned Colin. I'm not sure if I talked to Craig or not. One other fellow Officer was Mark Lawlor. He had concerns... so I phoned Colin and asked him to come back to the Nursery to get clarification. (I assumed he'd been there before)... Craig may have told me, or Bruce Hope, my immediate Supervisor.

Asked who had been assigned the file, Mr. Duffett said:

The file had been assigned to no one at that time. We had half a dozen cases on the go. We normally got given the information and divvied up the jobs. I think Murray was file co-ordinator at the time. I can't remember at that time. You have three months to gather information and lay the charge. After that, what is seized is given back if you do not lay a charge... Colin came up. I can't tell you the times. I took no notes. It was just a normal day. We met on the steps up to the Nursery Director's office.

Asked if Mr. Carroll had shown him the email (CGC #4), Mr. Duffett said:

Yes. I can't say for sure if that's the exact e-mail. I got the gist of what the e-mail was, standing on the steps. My interpretation was that it was from Don Burrage and Len Moores: 'if Officers felt it was needed – unlikely – not required'. I felt the decision was up to us if we needed the truck or not. It was left up to us.

Asked if Mr. Carroll had ever directed or ordered him to return the truck, he said:

No, he never ordered me. Yes, he said the truck had to go back.... I probably said, 'This truck is required for as evidence. It's part of the case... haven't even met with the Crown Prosecutor yet.' I told Colin or Craig, there is a process. We can't just give back evidence. There is a process... Not trying to delay anything. Colin was stressed big time. I talked to Bruce Hope. I wanted Bruce to go to the Crown, to go down to see the Clerk of the Court and check on the paperwork to return the vehicle in question on a bond. I never told Bruce we were releasing it, but just to speed things up in case we'd have to release it in the next few hours.

Asked if he was aware that the truck might have to go back, Mr. Duffett said:

Yes ... We went to speak to John Noseworthy. Colin came to the meeting with us. I'm not sure if Colin knew then that I'd got Bruce moving on the paperwork. I said we need to check with the Crown. Colin and Craig Coady went with Bruce to the Clerk, and then came upstairs when he was finished speaking to the Clerk... I met with John Noseworthy. Colin was present, and Craig came up during... At that time the Crown advised us to check with the RCMP. He'd never released anything on bond.

Asked if the Crown Prosecutor had, at any time, said to release that truck and that it is not needed for evidence, Mr. Duffett said: "He was rushing into Court, and asked if we could meet later on this." Asked if, having heard what the Crown Prosecutor said, he now felt that it was legal to return the truck without documents he said:

No. You must understand that you have to do a condition report on it. You have to document the condition of the vehicle at the time of its seizure. You have to go through it on a 2 or 3 page form ... dents and scratches. You need to cover off... You have a process. This was the first time I'd ever had to do this. Before the discussion with the Crown it was unheard of. I had three months to build the case.

Asked if he was familiar with the *Wild Life Act* (CC #1), and if he was trying to follow Section 15(9), Mr. Duffett said: "If this was what was required, but I'd never done it before. I wanted to get it right." Asked if he had asked Mr. Carroll to put the direction in writing, and why, Mr. Duffett said:

I want something in writing if you are asking me to return something... He probably emailed it, but he gave me a copy (CGC #1). I had to give the truck back. I should say, 'We had to give the truck back.' If it went to court, and if I or someone had to answer for the truck, paperwork was needed. You have to understand: if I'm in on the stand, I've got a defence attorney asking me, 'You seized a vehicle ... Who's it is? ... Oh, you gave it back!' You have to face cross examination. I want something to show a judge, a paper trail to back up what I'm saying.

Asked if it is normal to have a paper trail, Mr. Duffett said:

It's customary, Yes. I don't ask for all duties in writing, but I've got to have a paper trail to keep credibility. I've got a job to do.

Asked if it was the case that, if he were to give it back without the paper trail, his action might be held against him as illegal, he said: "That's not my concern."

Asked if he had also sought the advice of the RCMP, and if he'd received any direction from them, he said:

We talked with Sandy Goudie, not because of the evidence. I wasn't asking if they needed it for evidence. My main reason was if they ever returned a truck on bond. It was the procedure... Sandy was not sure either. He would look into it. I'm not sure if Sandy phoned me or I went back. I can't remember what he found out. Me and Chuck had gone to the RCMP, then I went to Colin's office. Bruce and Craig finished at the Judge's office and Craig came upstairs. Me and Chuck went to the downstairs office at the Goudie building, and we got the written direction (CGC #1). I can't remember conversation about that.

Asked if he had ever said he was not going to return the truck, Mr. Duffett said:

I never said I was not returning the truck, and he never asked for the keys. This was around dinner time. We went to the tree nursery... I can't remember if I checked with Sandy at the RCMP or not, and I can't remember lunch. The letter was typed up while we were at the Goudie building. We showed the Conservation Officers Colin's letter – Chuck wrote the letter – and we had dinner at the Nursery. We were waiting for Sandy to get the RCMP response... I can't recall if we got an answer from the RCMP. I honestly can't recall, but I'd say he got back to me some time that day.

Yes we talked to the Officers at the tree nursery and explained it looked like the truck was going back. We explained we'd met with the Crown and the RCMP and were supposed to meet with John Noseworthy later that afternoon. We presented the letter to the boys, and Lorena was there too. I believe we all felt we should keep it except for one Officer, would not sign it. We were going to head back to Colin with the letter along with the keys to the vehicle. The main reason for

doing this was I was concerned for Colin at the time, his job. He was under a lot of heat.

At no time did I ever think it was right to give it back. We never had a chance to meet with the Crown. We arrived at Colin's office after lunch, after 1:00 or 1:30 I guess. We gave Colin the letter and laid the keys on the desk... or Chuck put the keys there, I don't know which... I'm sure I said something... I did not think we should be returning the vehicle ... along with all the other Officers. I must have had the keys, because I signed them over to Derek and gave Derek possession of the vehicle. I left the keys to them and went to get Derek to sign my notebook. I recall that was 1:25 in the office. Derek would not (Witness' emphasis) sign the notebook at the time until he went to the DFO building and got the truck himself, at which time he signed the notebook at 1:45. He took possession of the vehicle at that time.

Asked why Mr. Leboubon would not take the keys until then, Mr. Duffett said:

He had not seen the truck. He certainly (Witness' emphasis) wanted to be sure the truck was there and its condition. He did not want just the keys, but the keys with the truck. I could have had the truck hidden somewhere.

Asked if he had expressed a refusal to follow direction at any time, he said:

No, I never refused. I never thought this was as serious as it was. Just regular. Just trying to do the job, and do it right. At no time was I trying to delay. Just have to do it right (Witness' emphasis) to cover my job and everyone else's, if I had to get on the stand and say I just gave it back because someone told me to!

Asked if he had complied with the direction in Mr. Carroll's 11:52 AM email (CGC #1) written to himself and Chuck "as soon as possible", Mr. Duffett said:

Right from the morning when I first heard, I was trying to speed it up and check with the Crown Prosecutor. I knew Colin was under a lot of pressure. We were rushing. Chuck's truck needed gas. We got \$10 or \$15. We could have got an oil change, *etc.*

Asked why they were concerned about procedure, and whether he had anything else to say, Mr. Duffett said:

I don't know. To cover my arse ... Or just because it was what had to be done. You can't stand up in court without doing the job. You've got to meet with the Crown Prosecutor. I never saw this happen before. There was no interest to delay. I tried to make it as speedy as possible. I was not in charge (Witness' emphasis). This was a team approach. Some are more experienced, but everyone plays their role... Yes, I lead with most of the cases, it's true, but I am not assigned to be lead. This whole ordeal ... I'm glad to have Union protection, working for Government.

**ON CROSS EXAMINATION**, Mr. Duffett said he could not recall whether the RCMP had arrived at the scene on the Trans-Labrador Highway before or after the caribou had been put behind the truck's tyres. He confirmed details of the truck's seizure, and it had been held in a locked garage after seizure. He also confirmed that he had taken the photos of the truck on either the 14<sup>th</sup> or 15<sup>th</sup>. "I was dealing with other matters on the 16<sup>th</sup>." Asked if had requested a letter from Mr. Carroll about the return of the truck, he said:

I don't know if it was about the truck, but I needed something in writing. The verbal command about the truck being returned: I wanted him to give me something about that ... Not just me; all the Officers, I guess. Employees wanted something in writing as opposed to verbal. Like I said earlier, if I'm on the stand – or whoever is in charge – in this or other cases. If I'm asked for a vehicle, or any thing else, I have to show continuity. It is not going to look good to a defence attorney who is asking the one in charge, 'Why did you give it back?' You need something in writing... I understood it had to go back, Yes.

Asked if Mr. Carroll had given the direction (CGC #1) directly to him, he said:

I don't know if he gave it to me or to Chuck, or if I read it in the office or in the office we were in. But we did get it in the Goudie building. Colin's office is upstairs. Chuck and me were waiting downstairs in the office for Sandy to get back to us.

Asked if he had ever wondered why he and Chuck were the only two copied on the letter, Mr. Duffett said, "No." Asked if he ever thought he might be reprimanded by

the Employer for returning the vehicle, he said, "I never dreamed I'd be reprimanded for anything." Noting that some Officers may have felt they could be reprimanded for failing to follow protocol, the witness was asked if he ever thought that might happen. He said:

At that time, no. My main concern then was to speed up the process to have a paper trail if a vehicle is to be returned... I knew there was a process in place for return, and a bond or something, That's why I asked the Conservation Officer IV to check it out. I knew about rifles and firearms, *etc.*, but I wanted to double check on a protocol with vehicles. I knew you just can't give it back... No I had never been asked to return a truck on a bond.

Asked to review his earlier testimony about the meeting with the Conservation Officers at the tree nursery while waiting for the response from the RCMP, and specifically, who was present, Mr. Duffett said:

Everyone there signed the letter except for (one), who did not sign it. Loreena was there, yes. It was after the letter (CGC #2) was drafted. That was drafted when we left talking with Sandy at the RCMP. We came over waiting for Sandy at the Goudie Building... After speaking to the RCMP, we went to the Goudie Building and Colin gave us the written direction (CGC #1) and then we went to the tree nursery.

Asked if they had the keys in their possession, Mr. Duffett said:

At some time I did, but I don't recall when I got them. I had to go the other day and ask the boys who had the keys. I could not recall where I got them... Bruce Hope claims he gave them to me. I have nothing in my notes to confirm that.

**ON REDIRECT EXAMINATION**, Mr. Duffett testified he had understood he was acting under the Policy in CC #1 to ensure the return was done legally.

**The Arbitrator** asked the Grievor for clarification on drafting of the letter signed by the Conservation Officers (CGC #2) and in responding to questions arising, Mr. Duffett testified that it was not drafted in response to Mr. Carroll's written direc-

tion (CGC #1). It was drafted to show that "Everyone was on the same wavelength, as a team. It was required as evidence."

## **ARGUMENT**

**FOR THE EMPLOYER,** Ms. Anthony reviewed Employer evidence. In the Employer's view, the email from Mr. Deering (CGC #4) freed the Grievors from pursuing other routes, once they were told that the truck had to be returned. Mr. Deering's email forwarded the message of Mr. Burrage, Deputy Minister of Justice, who confirmed that there was no need. The Grievors' actions caused delay, adding to the increasingly volatile situation.

The Employer acknowledges that the Grievors have previously unblemished work records, and that their efforts during the December 14<sup>th</sup> vehicle seizure were recognised. The Employer is not questioning the events of December 14. But the Employer does not applaud the Grievors for the undue delay in returning the truck or for the fact that the order was never followed through as directed.

As Mr. Deering's email (CGC #4) proves, all levels had been involved in the decision at a level far above Officers Porter and Duffett, including the Departments of Justice and Natural Resources and the RCMP. The evidence shows there were detailed discussions on this issue. The Crown Prosecutor, Mr. Noseworthy, who, according to the testimony, was in Court. He had no discussion with his Deputy Minister. But the Grievors did not inform him that the direction had actually come from Mr. Burrage.

Clearly, the issue was the situation's volatility. The Employer was trying to defuse an already tense situation. Regardless of any need there may have been as evidence, there was a direct order made from the Executive of the Department of Natural Resources, and it was clearly passed down the line to the Grievors. Mr.

Duffett testified that he saw the email, and stated it was not directed to him, questioning Mr. Carroll's authority.

As regards the return of the vehicle, the process was different from previous seizure releases. However, these were not normal circumstances. What is normal is to follow orders from Supervisors, Managers, and the Executive.

Furthermore, it is the Executive that creates the Department's policy. The Executive would be in the best position to interpret it. In fact, the Policy on Cash Deposits for Seized Items: Wildlife Act (CC #1) actually quotes Section 15(9) of the *Act* to the effect that "... a Provincial Court judge *may* (Ms. Anthony's emphasis) order redelivery..." Clearly the *Act* itself provides, in its use of the word "may" that a Court order is not mandatory.

On numerous occasions in their testimony, the Grievors referred to their participation in the Nuna file, and their involvement. Mr. Duffett specifically asked for the direction in writing, which would lead one to assume he was taking charge of the case. The Grievors never once voiced any concern that they were not responsible or that other Conservation Officers should be involved.

The specific act of returning the vehicle took seconds: a mere handover of the keys. They should not have prolonged that through the morning and afternoon. Mr. Duffett's testimony that he passed over the keys leads to the conclusion that he had taken charge. The two Grievors are highly experienced Conservation Officers, who had been involved in seizures in the past. Their claim that they did not know how to return a vehicle is questionable.

The Arbitral authorities, in particular Brown and Beatty, *Canadian Labour Arbitration* (4th ed.) show that the Jurisprudence sets certain essential ingredients in establishing failure to follow management direction. The Union repeatedly

argued that neither Grievor said, at any point "I refuse." However, it is clear that they did refuse to comply or acknowledge the direction, and never did return the truck to Mr. Nuna.

Ms. Anthony pointed out that the issue of interpretation raised by the Arbitrator about the actual meaning of Mr. Burrage's 07:37:57 message to Mr. Moores (CGC #4) is not pertinent in the instant matter since neither of the parties who received that message actually interpreted it in the alternate sense posed by the Arbitrator. What was understood was that the truck was not required for a successful prosecution. The fact that Mr. Burrage says "It may ward off a larger problem" suggests that the Employer's interpretation is correct. The whole message opens with "As Discussed." This too makes it clear that there is a context to this email, as Mr. Deering and Mr. Carroll both testified.

Both Mr. Carroll and Mr. Deering testified that safety is of the highest importance, and one of the main reasons for returning that vehicle that morning.

Ms. Anthony pointed out that the Employer had assessed all mitigating factors, and all relevant facts, as described in Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para 7:4400. Aggravating factors were also considered, such as insubordination and safety issues. Other employees were put at risk. Ms. Anthony cited *USWA, Local 3257 v. Steel Equipment Co. (Unjustified Discharge Grievance)* 14 LAC. 356 R.W. Reville, 1964 as also bearing on these issues.

At no time did Mr. Carroll ever think that anyone other than Conservation Officers Duffett and Porter were Leads on this. They had a number of conversations with Mr. Carroll, and both Grievors spoke of "Colin" being afraid for "his job", which clearly shows the seriousness of the issue. Mr. Coady testified that the Grievors wanted to speak with Colin, suggesting they were taking charge of it.

It appears that the Employer was careful to provide the Grievors an opportunity to adjust their conduct to accord with the requests. Mr. Porter testified that during the discipline meeting he never voiced concern over being singled out, just that he was nonplussed. It is hard to believe they would not speak up if they were not responsible. They did not ask Mr. Carroll to forward the written direction (CGC #1) to other Conservation Officers, nor did they address the fact that the letter was addressed only to them.

Mr. Duffett said that he knew Mr. Carroll was speaking with some one at a more senior level. Mr. Duffett said he could not testify whether Mr. Coady told him to return the truck, but Mr. Coady's testimony was quite clear that he did. The Managers did not have to agree with the order, but they followed through with it.

Mr. Duffett testified that he understood the email (CGC #4) to say that it was up to us to decide if the truck was needed for evidence. But the Deputy Minister, Mr. Moores, replies to the effect that "The truck can be returned." That is quite clear, in the Employer's view. Why would Mr. Duffett worry about taking the stand in court about giving the truck back, if he were not responsible?

Mr. Deering had taken part in the debriefing meeting on December 15, and understood the Conservation Officers' issues. That was the purpose of the meeting. The following day, when the direction was sent down from Headquarters, Mr. Duffett and Mr. Porter knew that Mr. Deering was aware of their concerns. There was no misunderstanding of the order.

The Grievors' testimony makes it clear that there were detailed discussions after Mr. Coady's first order to return the vehicle. Instead of following through with the order, the Grievors deliberately rallied other Conservation Officers to get their support. They felt the truck was needed. This undermines Management's auth-

ority, is clearly insubordinate, and warrants discipline. Not only was this incredibly serious, but strikes at Management's right to manage, and the impact on others in the workplace. Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para 5:000 dealing with the "Organization and Direction of the Workplace" speaks to this, as does Palmer & Palmer *Collective Agreement Arbitration in Canada* in various places. Insubordination is one of the most common grounds of discipline, and one of the most serious. The right to order action without debate is crucial.

As it had the onus to do, the Employer has established that, based on the balance of probabilities, it had the right to discipline in the instant circumstances. There remains the question of whether the penalty was reasonable. Ms. Anthony again directed attention to Brown and Beatty and to Palmer & Palmer for direction on this question.

The Grievors, aware of the communication passed on to the Deputy Minister, showed blatant disregard, and attempted to circumvent the order by seeking other authority, the RCMP and the Crown Prosecutor. All this could have been avoided if the Grievors had simply returned the vehicle as ordered. It was not until later in the afternoon that the owners got the vehicle, and not from Mr. Porter and Mr. Duffett. Instead they passed it over to a Manager, who then had to notify Mr. Nuna that the vehicle could be picked up.

Employees do not enjoy the luxury of choosing what work to do, but are required to do the work assigned by Supervisors. The rule is "Work first, and then grieve" as Brown and Beatty and Palmer & Palmer make clear. This is relevant and necessary, if there is to be order in the workplace. The Employer is concerned that a direction is not followed, but it is worse when a Manager and a Deputy Minister is openly defied. The evidence is clear that the order was given by persons of

authority, it was communicated and understood, and the Grievors refused to comply with the order.

The decision to discipline is not taken lightly by the Department. In this case, the Employer examined it carefully and fully before imposing discipline. The Collective Agreement allows five days for imposing discipline, and the Employer took their time to assess all facts. The arbitral jurisprudence constantly upholds the Employer's right to manage without interruption. There is no issue in the instant situation to justify any exception, as is made clear in considering *Brown and Beatty Canadian Labour Arbitration* (4th ed.) at para. 7:3612.

The Employer has discharged its onus to prove insubordination. The onus now lies with the Union to demonstrate why mitigation might be appropriate. The Union has failed to do so, and has attempted only to cloud the issue with irrelevant facts. The discipline is reasonable and appropriate in its own right, and as a legitimate exercise of deterrence.

The Grievors are good employees with long service and the respect of their peers. But insubordination is serious and gives rise to discipline. Clearly too, insubordination can not be tolerated in Enforcement Officers where the safety of others is paramount. The Employer has clear authority and must have the last word and have it respected, as *Brown and Beatty* make clear at para 7:4500.

The Employer also introduced a series of cases drawn from the local and national arbitral jurisprudence. Noting *The Department of Works, Services & Transportation, Marine Services Division and The Newfoundland Association of Public & Private Employees, Local 1321 Grievor, Mr. Brian Dicks, Arbitrator John A. Scott* 2003, Ms. Anthony pointed out that the Arbitrator there denied the grievance, and chose not to disturb the discipline in view of the Grievor's insubordination for failing to acknowledge the direction.

In the Employer's view, *re Mueller Ltd. And United Automobile Workers, Local 456, K. A. Hinnegan 1974, 7 L.A.C. (2d) 282* is precisely on point with the instant matter, in the relatively light, five day, suspension of a good employee. Alternate discipline was considered, but the grievance was dismissed, since the Arbitrator could not "find that a one or two day suspension would be a more just and equitable penalty than that imposed."

*Re Nova Scotia Textiles Ltd. And United Textile Workers, Local 159 D. M. Nunn, Q.C., A. B. MacGillivray, Q.C., J. T. MacQuarrie, Q.C. 1981, 5 L.A.C. (3d) 97* stands squarely for the principle that employees should comply with management direction first, and grieve later.

In *Newfoundland Association of Public and Private Employees & Department of Works, Services and Transportation, Grievor, Raymond Brenton, 2002*, Arbitrator Buffett found reasons to modify the quantum of discipline, but only by finding defects in the Employer's assessment of the Grievor's work record, which is not an issue in this matter.

*Re Levi Strauss Canada & Amalgamated Clothing and Textile Workers Union H.W. Arthurs 1980, 26 L.A.C. (2d) 91*, stands for the principle that there must be good reason to interfere with the quantum of discipline imposed.

The Employer pointed to *USWA, Local 3257 v. Steel Equipment Co. (Unjustified Discharge Grievance) 14 LAC. 356 R.W. Reville, 1964* as notable for setting out the 10 factors which must be considered in this sort of case. In the instant case, it should be noted that the Grievors did not accept responsibility for their actions or apologise. Thus, the Employer was not in a position to mitigate. They never did accept that their actions were inappropriate, so the grounds for a reduced penalty do not exist.

It should also be noted that there has been no subsequent insubordination, and the Employer feels that the discipline was effective in bringing Conservation Officers Porter and Duffett back into line.

In fact, in the Employer's view, deterrence is a key factor, as shown in *Philips Cables Ltd. v. International Union of Electrical Radio & Machine Workers, Local 510 (Cox Grievance) [1974] G.W. Adams (Chair), G. Pattinson, J.R. Philips*, 6 L.A.C. (2d) 35, it is essential to deter others from similar behaviour. In the Employer's view, the Grievors were suspended for just cause, and there is no ground for modification of the penalty.

In considering any modification of the penalty one might also keep in mind that other Conservation Officers were involved as indicated by the letter (CGC #2). No one was taking sole responsibility, but as Mr. Duffett testified there was a solidarity. Perhaps the Employer did make a mistake in not disciplining all the Conservation Officers. Mr. Deering said that was a possibility.

The Employer would respectfully request no modification to the penalty, since such a decision would suggest that the Employer had not considered all the relevant factors. It did do so, and it came to a reasonable determination. If the Union were to be successful in this grievance, the Employer fears further acts of defiance and insubordination will take place again.

For this and other reasons, the Employer asks that the Arbitrator deny the grievance and rule in the Employer's favour.

**FOR THE UNION**, Mr. Oates pointed out that none of the jurisprudence provided by the Employer deals with the legality of following a direction or an order. None of it dealt with the Conservation Officers' obligation not to break the law. The legal basis for the Grievors' action is found in the Policy (CC #1). The Officers

were obligated to follow the legislation in implementing their orders. There is nothing in the Employer's jurisprudence that addresses this exception to the "work first, grieve later" rule.

The Employer argues there was undue delay. But this ignores Mr. Coady's and Mr. Carroll's evidence. Mr. Carroll didn't think there was undue delay.

Mr. Burrage's 7:37:57 email begins "As discussed." Mr. Deering and Mr. Carroll both testified there were ongoing background phone discussions, but there was no evidence of what was discussed.

The Employer assumed that Mr. Noseworthy, the Crown Prosecutor, had not been in contact with Mr. Burrage, but there was no evidence to support that claim. The Crown did not get back to either of the Grievors with a final answer.

The Employer tried to suggest that the December 14<sup>th</sup> incident was complicated, but the Grievors testified it was a "normal day" for them, and that the only unique aspect was that the truck was returned, which no one in the organization knew how to do. Mr. Coady, Mr. Carroll and Mr. Deering were all asked if they knew how to do the return. All said "No".

The Department and its Managers have to take responsibility for the situation they put these Officers in at the time. Neither Mr. Duffett, nor Mr. Porter, nor Mr. Hope, the Conservation Officer IV, had ever done it before. The Employer said it was a simple process. If so, then why did a Manager not ask for the keys and give it back? The reason is that it was not simple. Management knew that, and depended the Conservation Officers to follow through on that procedure.

The Employer argued that these were not normal circumstances. But these were normal for the Conservation Officers. For them the only abnormality was the return, and that had to be done legally.

The Employer suggests that Policies are set by the Executive and adjusted as necessary. But at the core of the Policy (CC #1) is Legislation that must be observed by Government officials. The Conservation Officers were unable to "simplify" that.

The Employer argued that because the Grievors were asking questions, they must have been taking the lead, and assumed they were taking charge of the file. There is no evidence anywhere in any of the testimony to show they were ever assigned the file, or assigned as Lead Hands on it, or had possession of the file.

The Employer complained that their actions had prolonged things through the morning and afternoon. Only Mr. Deering seems to think so. Neither Manager thinks so. Both Officers made it very clear that the order was to be carried out properly and legally. Both Managers actually participated in that process, and did so because neither Manager knew how to give the vehicle back either.

Mr. Duffett saw the email from Mr. Deering to Mr. Carroll, and what he understood was that it was for *them* (Mr. Oates' emphasis) to decide whether the vehicle was required for evidence in prosecution. The Grievors are being penalised for asking questions and trying to ensure that the right thing is done.

Why did the Managers not ask Mr. Hope for the keys? As the Conservation Officer IV, he was senior to the two Grievors. He had the keys, and he was on the Trans-Labrador Highway that day. But Mr. Porter and Mr. Duffett were targeted because they were trying to figure out how to return it legally.

It is noteworthy that Mr. Deering is only copied on the email (CGC #4), not shown as involved in the discussion in it, and the direction is very cryptic: "The truck can be returned."

The Employer has stressed the importance of safety in this whole situation, but did not offer any evidence as to the likely risks to safety associated with returning the vehicle.

The word "insubordination" has been used continually. But insubordination is normally matched with being immediately sent off the job site. That did not happen here. The Grievors remained on the job. The Employer's concern was not apparent during the period from December 16 to 23. Brown and Beatty make it abundantly clear that making any determination in a matter like this requires an arbitrator to look at how the Employer handled the situation. The Employer argued that the Grievors did not disclaim responsibility. But the Grievors could not believe they were being disciplined, and had no idea they had done anything wrong, other than help Management return the vehicle that day. It is still not established. There is no evidence they did anything wrong. Did Colin Carroll want the Grievors to turn the keys directly over to the Innu? That has never been answered. For these two Officers to turn the keys over to the Innu people who were handcuffed by them would be very dangerous. No one has explained how that was to be done.

The Employer seemed to take some issue with Mr. Duffett's request that Mr. Carroll put something in writing (CGC #1) to confirm the return of the truck. Mr. Duffett gave a very clear explanation. If it were to go to court, some paper trail would be needed. There was no other reason for the request. If the Manager had thought anything different, then the order should have been directly given: "Turn over the truck, Bill." But that order was never given. And there were no refusals.

All parties agree with the "Work now, grieve later" rule. Both Grievors know that orders must be followed. That is precisely what they were doing, to the best of their understanding of the orders as they were given. There was no defiance. The

Employer has not discharged its onus to show the Grievors did anything wrong. The Union has not "clouded" the issue. The Union has told the story. Two good employees are disciplined for trying to complete their job properly. It is not unreasonable to question a direction that goes against the Employer's own *Wildlife Act*.

The Arbitrator must look at the whole picture. The direction was coming from outside the area, and those giving the direction may not have understood they were putting the local Managers and the Grievors in a bind trying to figure out how to follow the direction and return the truck.

What is not clear is, when Mr. Coady gave an order to return the truck at the nursery at 9:30 or so on the 16<sup>th</sup>, to whom did he give it? He stood up in the Garage and yelled it out to all the employees. Then there was the kitchen meeting, where he was saying, "We have to return the truck." Mr. Duffett was not even there at the time. Mr. Coady did not single anyone out to be responsible for doing the return. When Mr. Duffett gets there and learns of the issue, he calls Mr. Carroll, who shows him the email (CGC #4). Mr. Duffett reads it quickly and understands that the truck is to be returned "... *if the truck is not required by NR for prosecution...*" (CGC #4, emphases added). That prompts discussion. Then Officers Duffett and Porter and Mr. Carroll go to the Crown's office to try to figure out what to do.

What would you think of your action if your Manager is participating in it? The Grievors thought it was a team effort to try to figure out how to do what had not been done before without a court document. In the meantime, Conservation Officer Hope goes to the Clerk to find the form to try to expedite the release. How can the Employer say that things were being delayed when it was ongoing at the time? Neither Mr. Coady nor Mr. Carroll expressed any concern to either Grievor. The Crown could not suggest a procedure and advised they ask the RCMP. The

Grievors then go to the RCMP. Mr. Carroll and Mr. Coady raise no objection. The Grievors were trying to comply with the direction as they were aware of it, and to ensure it was done legally and above board.

Both Grievors testified that, in their twenty plus years of experience as Conservation Officers, the trucks are needed in evidence, and Mr. Duffett was quite clear that he was trying to follow what the email said; that is, to let the truck go back, *if* (Mr. Oates' emphasis) it was not needed for prosecution.

There was no evidence provided of any clear order. Mr. Carroll's email to the Grievors (CGC #1) is not an order to return the truck. It is a statement that the Director had been instructed to "pass the word on to release the truck" and a "request that the direction of this activity take place as soon as possible". It asks that the Conservation Officers "advise on your actions". Nothing was clear on the 16<sup>th</sup>. If there had been any insubordination, the Managers would have sent the Grievors home immediately. Insubordination is serious. The fact that they were not sent home shows that the Managers never looked at it as insubordination. Both Grievors testified they were moving as fast as they could to return the vehicle.

Mr. Carroll's email (CGC #1) covers the Grievors if there were a question or a court action on what happened to the vehicle. The letter signed by Conservation Officers (CGC #2) says the truck was needed for evidence and it should not be returned. Mr. Porter testified that he typed it. It was at the suggestion of the Conservation Officers, and they brought it to the nursery for their verification. Mr. Porter and Mr. Duffett gave it to Mr. Carroll. But it does not say "Here's what we think, and we're not returning the vehicle." Rather they put their understanding on paper, and the keys were turned over after lunch, without having received the expected advice from the Crown Prosecutor and the RCMP.

Mr. Oates introduced Arbitral Jurisprudence to support the Union's position that the discipline was unjust, and does not meet the test for discipline. The exception to the compliance rule applies in this case, in the Union's view. This is made clear at *Brown and Beatty*, particularly at para. 7:3620. The Employer's conduct invites careful examination, as is explored at *Brown and Beatty* para. 7:4400. The Employer's Managers both participated in the actions taken by the Grievors, in an attempt to get the truck returned "as soon as possible."

*Spendiff Transport* (1989) Ltd., Art Markewich 1993, C.L.A.D. No. 7 J. L Skitsko, Arbitrator at para 30 sets out the issues relating to insubordination, as does *Lilly Industries Inc. (Guardsman Products Limited)* and *United Steelworkers of America, Local 13292-02, Grievor Ed Derouchie, Arbitrator J.L. Dumoulin* 2000, 86 L.A.C. (4th) 397. Mr. Oates also directed the Arbitrator's attention to *Newfoundland and Labrador Association of Public and Private Employees and the Department of Works, Services and Transportation, Grievor James Wilcox, W. John Clarke, 2002; The Department of Works, Services & Transportation, Government of Newfoundland and Labrador and Newfoundland Association of Public Employees: Grievor Gordon Snow, Arbitrator Christine A. Fagan; The Newfoundland Association of Public Employees and the Government of Newfoundland Department of Public Works, Grievors: Maurice Philpott & Wayne Osmond, Arbitrator: Gordon G. Easton, 1982; The Newfoundland Association of Public Employees and the Government of Newfoundland Department of Social Services Grievors: Kathleen Dunderdale, Elizabeth Coady, Sukhie Reddy, Arbitrator, James Oakley, 1993.*

The Union seeks the reinstatement of all lost wages and benefits, and the discipline removed from the Grievors' files.

**IN REBUTTAL ARGUMENT**, Ms. Anthony pointed out that the wording of the *Act* as quoted in the Policy (CC #1) says that a judge "may" act. That shows it is not a mandatory situation.

She also pointed out that Mr. Oates had claimed that Mr. Deering had not been involved in discussions, but he testified that he had been.

Mr. Oates stressed that the Managers had not known how to make the return of the truck. But he neglected to note that Managers are not responsible for doing that. It is very hard to believe that the Grievors had not returned a vehicle before. The Union's concern that the Grievors might break the law also fails to note that the Section of the *Act* involved is not mandatory, and that the policy is a general one set by the Government, which is the Employer.

Mr. Duffett viewed the email (CGC #4) on a BlackBerry which is difficult to do. Mr. Oates focussed on his seeing the Don Burrage part of the email, but the fact is that the email is from Len Moores who is the Deputy Minister, and he makes the final decision, not Mr. Burrage. Mr. Deering also takes his direction from Mr. Moores, not Mr. Burrage.

Mr. Oates also fails to note Article 42.06 in his argument on insubordination. That article provides for a different approach, depending on circumstances.

Yes, the Managers did meet with the Crown Prosecutor and knew of the visit to the RCMP, but that was in an effort to effect the quick release of the vehicle.

Mr. Duffett's testimony concerning compliance with verbal instructions could be interpreted as a blanket policy that you just do not accept verbal direction. None of this was an attempt to find out how to do it. It was an attempt to cloud the issues, a delaying tactic. An employee's job is to obey management. Their duty was to return the vehicle, and they should have done so at the first opportunity.

Mr. Oates' interpretation of the Conservation Officers' letter (CGC #2) as not being a refusal, fails to take account of its content. The letter speaks for itself.

Ms. Anthony also noted where the Union's arbitral jurisprudence deals with fact situations distinct from those in evidence in the instant matter.

## CONSIDERATIONS

**At issue between** the Parties is the Union's complaint that the disciplines imposed on the Grievors were unjust.

**The Onus** lies with the Employer to show just cause for disciplines, on the balance of probabilities.

**The Arbitral context:** Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para 7:0000 dealing with "Discipline" observe, in part, that:

In the vast majority of grievances alleging that an employee has been disciplined improperly, a board of arbitration must make two independent decisions. First, it must determine whether the employee has actually done anything that justifies discipline and/or termination from employment. Then, if it answers that question in the affirmative, it must decide whether the behaviour in question warrants the particular action taken, including whether the nature of discipline imposed violates the collective agreement...

*Insubordination:* Ms. Anthony, for the Employer, described the disciplines as having been imposed for "insubordinate behaviour" in that both Grievors refused to obey a management order on December 16, 2009." I also note that Mr. Deering, who signed the letters of discipline, testified that he "considered it an insubordination of sorts..." The specific grounds set out in the discipline letters (Consent #<sup>s</sup> 4 & 5) are that the Grievors failed to "comply with... direction" and "unreasonably questioned this action and refused to carry out the direction."

Brown and Beatty treat insubordination as the category within which refusal to comply with an instruction falls, as at para...

### **7:3600 Insubordination**

#### **7:3610 Refusal to follow instructions**

One of the most basic and long-standing rules of arbitration law is that employees who dispute the propriety of their employers' orders must,

subject to the considerations that follow, comply with those orders and only subsequently, through the grievance procedure, challenge their validity. This general principle, which requires employees to "work first and grieve later", has been applied in industrial, educational and hospital settings, and to professional employees. Both professional employees and those who perform skilled trades may have legal obligations to occupational codes, and may be expected to exercise a degree of independent judgment in the performance of their duties. However, they too must "work first and grieve later" where others are better qualified to assess the reasonableness of an order, and certainly where superiors take responsibility for the consequences of complying with any directives.

The rationale for the rule is said to lie in the employer's need to be able to control and direct its operations, to ensure that they continue uninterrupted even when controversies arise, and in its concomitant authority to maintain such discipline as may be required to ensure the efficient operation of the enterprise. Recognition of the employer's right to maintain production and to preserve its symbolic authority is neither inconsistent with, nor prejudicial to, employees' legitimate contractual rights because, in the vast majority of circumstances, they can secure adequate redress for any abuse of authority by the employer through the grievance and arbitration process....

However, as a corollary of the premises on which the rule is based, arbitrators have also consistently held that employees are not bound by the principle when adequate redress cannot be secured through the grievance and arbitration process. As well, the logic of the rule means that employees who obey their employers and follow the rule must be allowed to challenge directives and policies they perceive as unreasonable and/or unsafe. Indeed, it has been recognized that they must be allowed to do so even in the absence of an actual order....

Employees may be found to have been insubordinate even when the refusal does not concern a work assignment... Indeed, an employee may even be found to have been insubordinate in cases in which he or she did not refuse to do anything the employer asked him or her to do...

This latter situation is spelled out more clearly at para...

### **7:3612 Essential ingredients**

In the standard case where an employee is disciplined for refusing to do what he or she has been told to do, arbitrators have required the employer to prove that an order was in fact given, that it was clearly communicated to the employee by someone with the proper authority, and that the employee either refused to acknowledge it or actually refused to comply. However, even if no specific order is given, an employee may be found to have been insubordinate if the arbitrator concluded that he or she must have been aware of the duties expected and refused to discharge them. As well, in order to justify disciplining someone for insubordination, it is typically not necessary for an employer to prove that the employee intended to defy management or had a blameworthy state of mind, or that it suffered any financial loss, although the absence of any of these factors will usually serve to lessen the seriousness of the misconduct.

But the "work now, grieve later" rule is not absolute. There are "exceptions", as described at para...

### **7:3620 Exceptions**

When the grievance and arbitration process cannot provide adequate relief to employees who obey orders that turn out to be unlawful or illegitimate in some way, the general principle of "obey now/grieve later" has no application. In these circumstances, arbitrators have consistently taken the view that the harm employees suffer in being required to comply with such orders is more compelling than the employer's interest in maintaining its production and its managerial authority. Employees who had reasonable grounds to believe that complying with their employer's instructions would endanger their health and safety, or require them to perform an illegal act and/or expose them to potential legal liability, were the first exceptions to be recognized....

To take advantage of any of these exceptions, however, employees bear the onus of proving that their circumstances fall within one of the exceptions, and that they communicated the reasons for their refusal to the supervisor involved.

Arbitrators have often cautioned against unduly extending these exceptions to the point where they would swallow the rule. The pre-

sumption is that employees who wish to challenge the propriety of a particular work assignment, and more generally the employer's right to manage its business, should do so directly through the grievance and arbitration process, rather than indirectly by way of a defence to a charge of insubordination.

Insubordination is, therefore, clearly a core concern in maintaining a safe, effective, and stable labour relations environment. In the dynamic context of an enforcement situation this is at least as vital a concern as in other workplaces.

**Review of the evidence:**

Therefore, it is clear that, based on a review of the foregoing extensive record of the evidence and arguments, I must determine whether the Employer had just cause to discipline the Grievors, or whether, as the Union argues, their actions were either blameless all together and/or fell within exceptions noted. Has the Employer discharged its onus by showing that the Grievors were insubordinate in that, as set out in the letters of discipline, they failed to "comply with" a management "direction", and "unreasonably questioned" it, and "refused to carry out the direction"?

**"Rather than comply with this direction...":**

The evidence is clear, and is common ground between the Parties in any case, that both Mr. Coady and Mr. Carroll, representing Management, informed various Conservation Officers who were in the garage of the nursery on the morning of Dec. 16<sup>th</sup> that the truck had to be returned. Both Grievors understood the fact that the Employer had decided that "The truck can be returned" (CGC #4). Mr. Coady, Mr. Carroll & Mr. Deering testified that their various communications of this decision were clearly framed as directions, or orders, that the return take place.

It is also clear from the evidence that both the Grievors, and almost all the Conservation Officers involved, were disturbed by this decision, and thought the Department's "request" (CGC #2) raised questions about the "legal requirements to ensure all aspects of the law were adhered to" (*idem*). It is also clear that the Grievors were, and remain, unhappy with the Department's decision, and continue to think that "the only thing" they did wrong was to help to return the truck.

The Assistant Deputy Minister, Mr. Keith Deering, who signed the letters of discipline, testified that the advice (in CGC #4) given by Mr. Burrage, Deputy Minister of Justice and Deputy Attorney General, to Mr. Moores, Deputy Minister of Natural Resources, should have allayed any discussion or legal concerns. He had expected to see initial steps taken to make the return happen "as soon as possible", not the delay he saw caused by the Grievors' pursuing these questions.

The Grievors testified that their concerns for due legal process were real and justified. I note that Mr. Porter testified that he is a "Peace Officer, sworn to uphold the law." I also note, in this context, that Mr. Coady testified that "It is the duty of the Officer to retain evidence. It is in their specs."

The Grievors also testified that their concerns were justified in light of their experience and were also prompted by the very same evidence that Mr. Deering points to; that is, by the advice given by Deputy Attorney General Burrage. That advice appears in the email string (CGC #4) which Mr. Carroll showed Mr. Duffett during their conversation in the nursery Manager's office on December 16<sup>th</sup>. Mr. Burrage's message to Mr. Moores, opens as follows: "As discussed. If the truck is not required by NR for prosecution ...."

Mr. Duffett's testimony was that based on his reading of this message on Mr. Carroll's BlackBerry he concluded that the question whether the truck was needed

as evidence for prosecution or not was still open in Mr. Burrage's mind. That view was based on Mr. Burrage's use of the word "If..." Mr. Duffett testified that the actual return of the truck was therefore conditional on settling that question. The Grievors' testimony was that they acted on that understanding throughout the approximately three and one half hours between first learning of the decision and turning the keys over to Mr. Leboubon. They testified they were seeking both to settle that question "as soon as possible", and to identify, obtain, and complete whatever documents were required to return the truck according to Policy (CC #1) and the *Act* "as soon as possible".

I am not aware of prevarication in any testimony given during the hearing. The cross examination of all witnesses was rigorous and vigorous. I am persuaded that Mr. Duffett's understanding of the sense of Mr. Burrage's message to Mr. Moores was not feigned or disingenuous. I accept that Mr. Duffett did believe that Mr. Burrage's message indicated that the question about the truck being needed for prosecution was still unresolved. However, I must consider alternative possible explanations of what was going on.

(A) Perhaps Mr. Duffett had, even unwittingly, allowed himself and others to be persuaded of such a (mis-)interpretation – if that is what it was – of the message, since he and others were obviously convinced the decision was not the right one.

I note the consistent testimony provided by witnesses from both sides that there was substantial discussion about this matter. I also note that at least one Conservation Officer chose, for whatever reason, not to sign the letter CGC # 2 given to Mr. Carroll. I conclude that there was opportunity for dissenting views to be held among a group of professionals, which suggests that simple self-deception was not likely to have gone unchallenged. The Grievors' actions were, in my view,

unlikely to have been based simply on self-deception or wishful thinking.

(B) Or perhaps Mr. Duffett was being imprudent. Perhaps he should have taken more care in reading, not just the opening words, but all of Mr. Burrage's message. Mr. Duffett might then have reached the same understanding that Mr. Deering had reached. Mr. Deering testified he was aware of ongoing high level background consultations that were taking place. According to his and Mr. Carroll's testimony, this awareness of the content of these discussions shaped Mr. Deering's stated understanding of Mr. Burrage's intentions. The rest of Mr. Burrage's message does clearly recognise, and perhaps even anticipates, the possibility that the truck will be returned. His message concludes: "... I would return it early this morning. It may ward off a larger problem. Can you let me know so that I might advise Peter..."

With respect, however, I find it improbable that Mr. Duffett would have reached the same understanding as Mr. Deering reached even if he had studied the message much more carefully than a brief viewing on Mr. Carroll's BlackBerry allowed. I note that Mr. Deering's understanding was affected, according to his own testimony, by his access to the background consultations that were taking place. Mr. Duffett did not have the same access. He only had the text.

The only comment that Mr. Burrage makes in the text of his message about whether the truck is needed or not, actually says, when precisely read, that it is "unlikely" that "the truck is not required by (Natural Resources) for prosecution". Eliminating the double negative, this translates as saying that *it is likely that the truck is needed* for prosecution (emphases added). Thus, given just the text of Mr. Burrage's message, I find it unlikely that a close study of the text would have led Mr. Duffett to conclude that Mr. Burrage's actual text was saying, as Mr. Deering interprets it, that the truck was not needed for evidence.

Without Mr. Deering's privileged insight, grounded in his access to the background discussions, it is not probable, in my view, that anyone could read Mr. Burrage as saying what Mr. Deering interprets him to say in CGC #4.

(C) But perhaps Mr. Duffett should have taken care to read all elements of the CGC #4 string, and to note especially that it ends in Mr. Moores' 09:29:07 sentence, "The truck can be returned". It is clear that, at 09:29:07, Mr. Moores writes, "The truck can be returned". Mr. Moores is the most senior Employer authority involved in this matter. What he says is fully authoritative.

I note however that Mr. Moores' clear and authoritative sentence is addressed, not to subordinates, but to "Don", and responds to Mr. "Don" Burrage's 07:37:57 message in which he requests that Mr. Moores "let me know" what the Department of Natural Resources decides to do about returning the truck. At 09:29:07, therefore, that sentence is not an order or a direction but a response to Mr. Burrage's request to be informed.

Ten minutes later, at 09:39:36, it may, perhaps, be interpreted as something approaching an implicit direction or order, when Mr. Moores forwards the whole string to his subordinate, Mr. Deering. Then at 09:25 AM (Labrador time?) Mr. Carroll receives the string from Mr. Deering, together with a phone call to aid him in understanding what is required.

But without these contextual conversations, the precise meaning of Mr. Burrage's sentence does not get changed into anything that can reasonably be described as confirmation that the truck is not needed for evidence, and support for Mr. Moores' decision that "The truck can be returned." Nor can Mr. Burrage's element in the sting be reasonably expected to provide the "comfort" Mr. Deering suggests it should have provided to the Grievors concerning the legality, or process

required, in actually returning the truck. Also, of course, Mr. Duffett could not reasonably be expected to read Mr. Moores' sentence as an order addressed to Conservation Officers or to himself, since it is addressed to "Don".

I must however, consider one further possibility. The use of double negatives is not unheard of in normal or hurried conversation. Perhaps a precise reading that draws on this feature of Mr. Burrage's text should be dismissed as irrelevant.

But even if we were to ignore the double negative, the fact remains that the message remains ambiguous at best, starting as it does with the word "If", the word that jumped to Mr. Duffett's attention in the Manager's office at the nursery when Mr. Carroll showed it to him on the BlackBerry.

(D) But perhaps Mr. Duffett & Mr. Porter should have ignored the email entirely, and acted, without consideration of process or legal requirement, either on what Mr. Coady said in the Garage at the nursery between 10:15 and 10:30, or on what Mr. Carroll said in the office at the nursery at between 10:30 and 10:40, or on its written formulation in what Mr. Carroll provided (CGC#1) in the Goudie Building at 11:52. On the Employer's account, all these were clear orders – and the last a written order expressly addressed to the two Grievors – with which they should have complied "as soon as possible".

But a fact makes this course of action improbable. The email was brought to Mr. Duffett's attention. That fact gave the Grievors one of three options. They could act as they did on the reasonable assumption (lacking access to conversations Mr. Deering referenced) that the direction was to return the truck "as a soon as possible" "if" the truck was not needed. This is the option they chose, and it led directly to the actions the Grievors took.

The second option open to them, which was not followed or even raised in

the hearing, was to "challenge", or seek clarification of, the actual meaning and legality of the Employer's direction, which was described to them by Mr. Carroll as based on CGC #4. I note that Brown and Beatty *Canadian Labour Arbitration* (4th ed.) actually addresses this option in commenting on allegations of "Refusal to follow instructions" at para ...

7:3610 ... the logic of the ("obey now/grieve later") rule means that employees who obey their employers and follow the rule must be allowed to challenge directives and policies they perceive as unreasonable and/or unsafe.

There is a third option, which, in my view, would have been irresponsible of them even to consider seriously: that is, they might simply have ignored practical, procedural, and legislative problems that they faced as experienced Conservation Officers with a professional "duty" to retain "evidence", according to Mr. Coady's unchallenged testimony. They might have acted as though they had not been made aware of the email (CGC #4) and as though there were no real problems to solve in order to return the truck. They did not choose this option.

(E) Finally, it must be asked, Were the Grievors not obliged by the Collective Agreement and by Arbitral Jurisprudence to put all policy and procedural questions about legality and legitimacy aside, and focus only on Mr. Moores' unambiguous statement, "The truck can be returned"? Even if the Grievors' understanding of Mr. Burrage's message were to turn out to have been entirely correct – and Mr. Deering's entirely wrong – nonetheless, should not Mr. Moores' unambiguous sentence have guided the Grievors' immediate actions, coming as it did from the highest authority in the Department?

Neither Mr. Moores 09:29:07 sentence, nor the email string as a whole, was directed to the Grievors, as Mr. Duffett pointed out when he asked Mr. Carroll for

something in writing. Mr. Moores' sentence was addressed to Mr. Burrage, who had requested the information it conveyed.

There is, in fact no persuasive evidence that the two Grievors were ever personally and clearly directed to "Return the truck." There is no evidence they were assigned as Lead Hands. There is clear evidence that they did offer assistance to Mr. Carroll to expedite his getting done what the Department clearly wanted done.

Mr. Carroll's written version (CGC #1) describes Mr. Moores' "direction" to "pass the word on to release the truck" and asks that "the direction of this activity take place as soon as possible". It is not clear, on its face, what "the direction of this activity" means. Mr. Carroll's letter (CGC #1) concludes with a request that the Grievors "advise on your actions." None of this can be reasonably described as a clear instruction addressed to the two Grievors that they "Return the truck".

**"unreasonably questioned":**

Were the Grievors unreasonable in asking and pursuing the questions they had. I note, in this context, that both Mr. Coady and Mr. Carroll testified that they understood the Grievors' concerns, and did not find their concerns unreasonable. Further, for the reasons set out above, I find no evidence that the questions posed and the efforts taken to secure the answers were "unreasonable".

**"refused":**

I find, as well, that the evidence does not support the Employer's view that the Grievors ever refused to carry out their duties in respect of the Employer's having "passed on the word" that the truck had to be returned "as soon as possible".

The evidence shows that the Grievors complied expeditiously and reasonably with the Department's decision as they understood it as presented in the way it was passed on to them.

The Employer complained that the Grievors did not, in the end, actually make the turnover of the truck. The Compliance Officer, Mr. Leboubon, did it. The Employer takes this as evidence of the Grievors' insubordinate behaviour. I note, however, that Mr. Carroll testified that he sought the Grievors' advice on how the truck might be turned over as soon as possible, and that the transfer process finally used was begun in his office and in his presence. Mr. Carroll testified that:

I understood their position. I asked how either he or I ... They suggested they could sign the item over to another Officer or Staff Member, and I could ask that Staff Member to return the truck... I asked them to get it signed and get it returned. They left the office...

There was no evidence that Mr. Carroll saw this action or arrangement as an act of insubordination. As noted above, absent a clear order or direction directed to the Grievors, and based the evidence before me, I find no grounds to conclude that their actions were insubordinate.

With respect, therefore, I do not find the Employer's position persuasive. The essential ingredients of insubordination (as set out in Brown and Beatty at para. 7:3612, order given, clearly communicated, refused to comply) are not established. I do not find that the Grievors have, on the evidence submitted, "actually done anything that justifies discipline" (Brown and Beatty para. 7:0000).

### **DECISION**

In light of the foregoing considerations, I therefore find that

**THE GRIEVANCES ARE UPHELD IN THEIR ENTIRETY.**

**The suspensions are to be withdrawn. The Grievors are to be made whole in respect of any lost wages and benefits, and the disciplines are to be removed from their personal files.**

Respectfully submitted as the decision of the Arbitrator.

John A. Scott, Ph.D.  
Arbitrator

December 1, 2011