

IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

BC PUBLIC SERVICE AGENCY
(MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT)

(the "Ministry")

-and-

BRITISH COLUMBIA GOVERNMENT AND SERVICE EMPLOYEES' UNION

(the "Union")

(Eric Koprowski Dismissal Grievance - Preliminary Evidentiary Issues)

ARBITRATOR: John B. Hall

APPEARANCES: Peter A. Gall, Q.C., for the Ministry
David Tarasoff, for the Union

DATE AND PLACE OF HEARING: February 14, 2007
Vancouver, British Columbia

DATE OF AWARD: March 13, 2007

PRELIMINARY AWARD

I. INTRODUCTION

The Ministry dismissed Eric Koprowski (the "Grievor") from his employment as a Health Care Worker effective April 27, 2006. The dismissal letter advised the Ministry had investigated certain off-duty conduct by the Grievor, and learned he had been charged with the following offences:

1. Possession of marijuana for the purpose of trafficking;
2. Production of marijuana (typically referred to as a "grow operation");
3. Three charges of uttering threats against certain individuals; and
4. One charge of breaching the Recognizance of Bail on which you were released from custody pending the criminal trial of the noted "uttering" charges.

The drug charges stemmed from a search of the Grievor's residence by the Delta Police. A Provincial Court Judge later excluded the search evidence from the criminal proceeding because the police had contravened Section 8 of the *Charter of Rights and Freedoms* and admitting the evidence would bring the administration of justice into disrepute. The Union has brought a preliminary application to have the search evidence, as well as what the authorities characterize as the resulting "conscripted" evidence, excluded from the present arbitration proceeding. The Union has also applied for a ruling that evidence concerning the "uttering" charges (including the breach of recognizance) cannot be relied upon by the Ministry to support the dismissal.

II. BACKGROUND

The parties addressed the preliminary evidentiary issues based on the following

agreed facts:

1. The Grievor was a Health Care Worker 2 in the Ministry of Children and Families. His job consisted of supervising and caring for young offenders with mental health problems who are incarcerated in secure custody. As this job involved being alone with youths, the Grievor required a *Criminal Records Review Act* clearance.
2. On November 24, 2004 the Delta Police obtained a search warrant to enter and search a residence owned by the Grievor on Gilmour Crescent in Delta. In the lower level of the residence, the police found two rooms containing, among other things, 246 marijuana plants, 15 pounds of dried marijuana bud, and grow equipment. The marijuana had an estimated value of \$152,000 and the equipment had an estimated value of \$5,000. The Grievor contends the lower level of the residence is a suite rented to a tenant.
3. In the upper level of the residence, the police found, among other things, a magazine called "High Times" dedicated to the cultivation of marijuana, and a hydro bill, both on the Grievor's nightstand in the master bedroom.
4. The Grievor returned to his residence while the search was in progress and was arrested. He did not advise the Ministry of his arrest.
5. On November 29, 2004 the Ministry received an anonymous letter advising of the Grievor's arrest for "the operation of a Marijuana Grow Operation in his Delta residence."
6. On December 9, 2004 the Ministry interviewed the Grievor. He confirmed he had been arrested. However, he said (and continues to maintain) the marijuana was found in a basement suite that he rented to a tenant, that he did not know of the grow operation, and had no involvement with it.

7. On February 11, 2005 the Grievor was charged with:
 - (a) one count of possession of marijuana for the purpose of trafficking; and
 - (b) one count of unlawful production of marijuana in contravention of the *Criminal Code of Canada*.

8. On February 18, 2005 the Ministry again interviewed the Grievor. At this meeting, he was asked to produce:
 - (a) copies of his hydro bills;
 - (b) a copy of the rental agreement with his alleged tenant;
 - (c) consent for release of the police report to Crown counsel on the marijuana charges; and
 - (d) tax information.

The Grievor was also advised that he was suspended without pay, effective immediately.

9. On February 28, 2005 the Grievor advised the Ministry to address its requests for information to his lawyer.

10. On March 11, 2005 the Grievor's lawyer agreed that the documentation requested by the Ministry could be released. However, only some of it was provided.

11. On March 23, 2005 the Grievor was charged with 2 counts of uttering threats to cause death or bodily harm, contrary to the *Criminal Code of Canada* against a neighbour, David Knowles, and a City of Delta bylaw enforcement officer, Lance Renyck. He did not advise the Ministry of these charges until 3 weeks after the fact.

12. In a letter to the Union dated April 4, 2005 the Ministry confirmed that it had requested copies of hydro bills and bank statements and the Grievor's consent to obtain a copy of the police report to Crown counsel regarding the marijuana charges. In an interview on April 15, 2005 the Ministry asked the Grievor for his consent to the release to the Employer of the report to Crown counsel on the uttering charges.
13. Based on the Union's advice, the Grievor never provided the Ministry with the hydro bills (although a summary was provided), bank statements, or consent to obtain a copy of the police reports to Crown counsel regarding the marijuana and uttering charges.
14. On May 12, 2005 the Ministry asked the Delta Police for copies of the reports to Crown counsel regarding the marijuana and uttering charges. The Police responded by letter of July 20, 2005 stating that the *Freedom of Information and Protection of Privacy Act* precluded the disclosure of this information. Crown counsel also refused to provide copies of the police reports to the Ministry.
15. On November 25, 2005 Lance Renyck advised the Ministry that his supervisor would not allow him to speak to the Ministry regarding the uttering threats charge that was laid against the Grievor.
16. On December 2, 2005 the evidence seized from the Grievor's residence, including marijuana plants and paraphernalia, was excluded as evidence in his criminal trial because "there [was] no foundation for the issuance of the telewarrant: *R. v. Koprowski and Koprowski*, unreported (Surrey File No. 143513), at para. 18.
17. The Criminal Code allows a peace officer to obtain a warrant by telephone only when it is "impracticable" for the officer to attend in person. Constable Alan West, who obtained the warrant, swore that it was impracticable for him to appear in person because "no Surrey provincial court judge was available and due to the

travel time and distance the informant was unable to attend the Judicial Justice of the Peace Warrant Centre in person, during business hours". Devitt Prov. Ct. J. found that these statements were incorrect, as Constable West did not phone and inquire as to the availability of judges. The Judge also found that travel time was not a determinative factor in the decision not to attend in person. As a consequence, he excluded the evidence seized as a result of the warrant, and the marijuana charges against the Grievor were stayed. The evidence was excluded based on the Judge's view that admitting it would bring the administration of justice into disrepute:

I accept that Cst. West did not act in bad faith, however, he was grossly careless and demonstrated a casual approach which manifests frailties in his understanding of the law and the Charter. However, in my view these misstatements would not affect the fairness of the trial as the evidence was not conscripted. Nevertheless there is in my view compelling evidence of a lack of good faith. The statements were made to persuade the justice of the peace that the preconditions had been met. Cst. West acknowledged that he only included in the [information to obtain] facts that would support the application. The search involved a residence and the breach was a serious one and not merely technical. ...

* * *

Excluding evidence under s. 24(2) of the Charter is not done to discipline or punish the peace officer but rather to avoid the administration of justice being brought into disrepute. These are serious charges and the evidence sought to be excluded may result in an acquittal. Nevertheless, gross carelessness or a casual approach constituting a lack of good faith in seeking a telewarrant for a search of a residence in this case manifests a lack of training necessary to perform the officer's duty and it cannot be condoned. Although there may have been some confusion at the time as to the proper procedure to follow it was the duty of the force to provide the necessary training to its officers. Certainly, any confusion would not include making factual statements in an [information to obtain] that had not been verified. There is no greater expectation of privacy than in a person's home. See *R. v. Silveira* (1996), 97 C.C.C. (3d) 450 (S.C.C.) paras. 140,148. In my view, to admit the evidence resulting from the search warrant would bring the administration of justice into disrepute. Accordingly, I exclude from the trial's evidence all items seized as a result of the telewarrant. (paras. 19 and 22)

18. On December 18, 2005 the Grievor was arrested and on December 19 he was charged with:
 - (a) a further count of uttering a threat to cause death or bodily harm, against his neighbour, David Knowles, contrary to the *Criminal Code of Canada*; and
 - (b) an offence of breach of undertaking or recognizance.

The Grievor was denied bail in Provincial court on December 19, 2005. He remained in custody until he was released on December 23, 2005 by agreement with the Crown on several conditions. The Grievor did not advise the Ministry of these further charges until January 8, 2006.

19. On January 12, 2006 the Ministry advised the Grievor that it was recommending that he be dismissed.
20. On March 24, 2006 the Grievor pled guilty to one charge of conveying a threat to cause death or bodily harm to one of his neighbours. The other uttering charges, along with the charge of breach of recognizance, were stayed.
21. On February 22, 2006 the Grievor advised the Ministry in writing that he would not disclose the reports to Crown counsel regarding the uttering threats charges and the breach of recognizance charge.
22. The Grievor's employment was terminated on April 27, 2006. The dismissal letter was signed by the Deputy Minister, and read in part as follows:

This is to inform you that I have carefully reviewed a recommendation that you be dismissed from your employment as a Health Care Worker at the In-Patient Assessment of Youth Forensic Psychiatric Services. This recommendation arises from an investigation into certain off-duty misconduct in which you allegedly engaged. This alleged misconduct

resulted in you being charged with a series of offences pursuant to the *Controlled Drug and Substances Act* and *Criminal Code of Canada*.

More particularly, you were charged with the following offences:

1. Possession of marijuana for the purpose of trafficking;
2. Production of marijuana (typically referred to as a "grow operation");
3. Three charges of uttering threats against certain individuals; and
4. One charge of breaching the Recognizance of Bail on which you were released from custody pending the criminal trial of the noted "uttering" charges.

Your various arrests by the police in connection with these charges apparently occurred throughout the period of November, 2004 - December, 2005. I am advised that the marijuana-related charges were recently withdrawn by the Crown as a result of the criminal court excluding all evidence acquired during the police search of your residence. Accordingly, these charges were never tried and determined within the criminal law forum. I am further advised that you recently pled guilty in Provincial Court to one of the uttering charges and that the Crown entered a Stay of Proceedings on the other uttering charges and the related breach of Recognizance charge.

The Ministry's ability to complete its investigation into these matters has been unexpectedly impeded by the fact that it was required to address a series of independent allegations of misconduct on your part occurring over a lengthy period. Additionally, you in all cases failed to provide the Ministry with timely disclosure of your arrests and related charges. Indeed, the Ministry first learned of your marijuana-related arrest by way of an anonymous letter from a member of the public two weeks after this occurred.

* * *

In determining the Ministry's disciplinary response I have paid particular regard to the following considerations:

1. Your length of service and employment record.

2. The high degree of trust the Ministry of Children and Families must place in its staff generally and especially those employed within the In-Patient Assessment Unit.
3. Youth Forensic Psychiatric Services Branch is an integral part of the criminal justice system. It is therefore essential for the Ministry to maintain a credible reputation and effective working relationship amongst the various players within that system.
4. As an employee within the justice system you are expected to abide by and uphold the law to the best of your ability. You are also expected to meet high standards of personal conduct during the performance of your duties and while off-duty to ensure that you maintain the trust and confidence of your employer, your colleagues and the youths for whom you are responsible. ...
5. Irrespective of the disposition of the related charges, your decision to participate in a marijuana grow operation is completely incompatible with your employment and the *Standards of Conduct for Public Service Employees*. It also jeopardizes the Ministry's reputation within the justice system and, more generally, the public domain.
6. Your untruthfulness during the Ministry's investigation is reprehensible. It has also fundamentally breached the trust necessary to sustain a viable employment relationship.

I have concluded that your misconduct has rendered you unfit to remain employed within the public service. Accordingly, pursuant to my authority under the Public Service Act you are hereby dismissed from your employment effective immediately.

The Ministry will continue its investigation into the events underlying the three uttering and the breach of Recognizance charges and will rely on these matters in proving just cause for your termination.

III. ADMISSIBILITY OF EVIDENCE RELATED TO THE DRUG CHARGES

The parties' arguments regarding the Union's application to exclude evidence related to the marijuana charges give rise to several issues which will be addressed under separate headings below.

A. Can an Arbitration Board Apply the Charter?

The Ministry contends there is “some question” about whether an arbitration board is a court of competent jurisdiction for the purpose of applying Section 24(2) of the Charter and excluding evidence under that provision. I acknowledge the authorities are not uniform: see, for instance, *Re Edmonton Power Inc. and IBEW* (1998), 69 L.A.C. (4th) 283 (Malone), and *Re Cape Breton (Regional Municipality) and CUPE, Local 759* (1999), 84 L.A.C. (4th) 106 (MacLellan), where the question was answered in the negative. However, in *Re Government of the Province of British Columbia and B.C.G.E.U. (Watt)* (1995), 51 L.A.C. (4th) 225 (Bruce), it was agreed that an arbitrator hearing a grievance between effectively the same parties was a court of competent jurisdiction for the purpose of granting Charter remedies sought by the Union. A later award between the parties accepted “... the basic proposition that arbitrators dealing with these particular matters should decide them in light of the fundamental values contained in the Charter”: see *Government of B.C. -and- B.C.G.E.U. (Watt)*, [1998] B.C.C.A.A.A. No. 699 (McConchie), at para. 36. More generally, I prefer the conclusion reached in *Re Toronto Transit Commission and A.T.U., Loc. 113* (2004), 126 L.A.C. (4th) 353 (Shime), citing *Weber v. Ontario Hydro* (1990), 125 D.L.R. (4th) 583 (S.C.C.), at pages 605 and 606, that an arbitration board is a court of competent jurisdiction for the purpose of dealing with Charter issues.

B. Can the Grievor Invoke the Charter?

The Ministry next submits the Grievor does not have standing to claim his rights under Section 8 of the Charter were breached in respect of evidence found in the suite. The Ministry takes the position based on the Grievor’s contention that the suite was rented to a tenant; it says the Grievor had no reasonable expectation of privacy in respect of the suite, so as to invoke the Charter protection against unreasonable search and seizure (the argument does not pertain to evidence found on the upper level of the residence).

Where, as in this case, there has been a judicial determination in a criminal proceeding regarding an employee's Charter rights, the Union acknowledges an arbitrator may make an independent assessment about whether the evidence should be admitted at arbitration; however, the Union strenuously asserts an arbitrator should not revisit the question of whether the evidence was obtained contrary to the Charter. It criticizes the contrary approach taken by Arbitrator Bruce in the *Fotheringham* award, and submits the authorities she relied upon to support an independent assessment of whether the grievor's Charter rights had been violated all concerned the admissibility of evidence.

There is considerable merit to the Union's position, and it is bolstered by the Supreme Court of Canada's direction in *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] 3 S.C.R. 77, that arbitration should not be used to re-litigate issues which have been decided in a criminal proceeding. But there is no need to express a final opinion, because I do not have sufficient evidence to ascertain the extent of the Grievor's personal right to privacy in respect of the suite.

There are admittedly the Grievor's contentions that the suite was rented and he had no knowledge of the marijuana grow operation. However, the judgments cited by the Employer establish that a reasonable expectation of privacy is to be determined "on the basis of the totality of the circumstances" after considering a non-restrictive list of factors: see *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45. For instance, and unlike the situation in *R. v. Pugliese* (1992), 71 C.C.C. (3d) 295 (Ont. C.A.), the agreed facts do not indicate whether the Grievor had any right to grant or refuse permission to enter the suite. Put somewhat differently, the agreed facts do not provide a sufficient basis to depart from Judge Devitt's determination that the entire search and seizure contravened Section 8 of the Charter. I accordingly hold the Grievor may rely on Section 24(2) to have the resulting evidence excluded at arbitration.

C. Admissibility under Section 24(2) of the Charter

Where a court of competent jurisdiction concludes evidence was obtained in violation of Charter rights, Section 24(2) provides "... the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute". The parties agree the leading authority regarding the exclusion of evidence under this provision is *R. v. Collins*, [1987] 1 S.C.R. 265. The parties also agree the Supreme Court of Canada established a three-fold approach whereby one considers: first, the nature of the evidence; next, the nature of the conduct by which the evidence was obtained; and finally, the effect on the justice system of excluding the evidence. See also Peter W. Hogg, *Constitutional Law of Canada* (Loose-leaf Edition), at page 38-10. Or, as more fully argued by the Ministry:

- (1) The court must consider whether the admission of evidence will affect the fairness of the trial. If so, then it must generally be excluded. As the Court explained in *R. v. Stillman*, [1997] 1 S.C.R. 607, this enquiry will often turn on the nature of evidence. If the evidence is conscriptive, then its admission will almost always compromise trial fairness. If it is non-conscriptive, in that it existed independently of any *Charter* breach, then its admission will rarely render a trial unfair.
- (2) The court then considers the seriousness of the *Charter* violation. Relevant factors include whether the violation was committed in good faith, whether it was inadvertent or of a merely technical nature, whether it was motivated by urgency or to prevent the loss of evidence, and whether the evidence could have been obtained without a *Charter* violation.
- (3) Finally, the court looks at factors relating to the effect of excluding the evidence. The administration of justice may be brought into disrepute by excluding evidence essential to substantiate the charge where the breach of the *Charter* was trivial. The seriousness of the offence is a relevant consideration.

Each of these questions will now be considered in turn, having regard to the parties' submissions.

1. The Nature of the Evidence

The authorities differentiate between evidence which existed independently of the Charter violation and evidence which came into existence due to the violation (the latter category being the so-called “conscripted” evidence). As explained by Mr. Justice Lamer in *Collins*:

... The trial is a key part of the administration of justice, and the fairness of Canadian trials is a major source of the repute of the system and is now a right guaranteed by s. 11(d) of the Charter. If the admission of the evidence in some way affects the fairness of the trial, then the admission of the evidence would tend to bring the administration of justice into disrepute and, subject to a consideration of the other factors, the evidence generally should be excluded.

It is clear to me that the factors relevant to this determination will include the nature of the evidence obtained as a result of the violation and the nature of the right violated and not so much the manner in which the right was violated. *Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone.* The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair. *However, the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination.* Such evidence will generally arise in the context of an infringement of the right to counsel. ... The use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded. ... It may also be relevant, in certain circumstances, that the evidence would have been obtained in any event without the violation of the Charter. (at paras. 36-37; emphasis added)

The Union acknowledges the evidence from the search and seizure of the Grievor’s residence existed independently of the Charter violation and relies on the second -- as opposed to the first -- *Collins* factor for its exclusion. The Union relies, however, on the first factor to exclude evidence of statements made by the Grievor during the Ministry’s investigation because this was “conscripted” evidence that would not have

existed but for the violation of his rights. That approach was adopted by Arbitrator McConchie in the *Watt* arbitration, where a neighbour identified in the award as "JK" had intercepted and recorded telephone calls between the grievor and her daughter using a scanner. The tape recordings were made available to the employer, and it launched an investigation into the grievor's actions as disclosed by the recordings. The union sought to exclude the recordings and all evidence flowing from them, including evidence of an investigation meeting. Arbitrator McConchie ruled in part:

The tape recordings of the grievor's private conversations with her daughter are "real evidence". The conversations would have taken place even if JK had no scanner and had not decided that he would invade the privacy of the grievor and her daughter. His violation of their privacy rights did not create the evidence but instead preserved the evidence in the form of tape recordings. The Charter breach [that] we are measuring is the breach by the Employer when it utilized the tapes. The Charter did not have application to the relationship between JK and the grievor because they are both private citizens. It does have application to the relationship between the Employer and the grievor. Looked at from this perspective, the utilization of the recordings by the Employer did not create the evidence, which would have existed whether or not the Employer came into possession of the recordings. The statements made by the grievor to the Employer in the interview are different. The grievor would not have been compelled to make any statements in the absence of the breach of her s. 8 rights because the Employer would not have had any information which would have caused it to ask those questions. Although it cannot be said that the grievor was "conscripted" to give evidence against herself, her statements in the investigation meeting do not constitute "real evidence."

* * *

The tape recordings are necessary in order for the Employer to [substantiate] its case against the grievor. The same cannot be said for the statements which the grievor has made in the investigation proceeding. (paras. 49 and 52)

Arbitrator McConchie ultimately determined the union had not established on the balance of probabilities that admission of the tape recorded evidence of the private conversations between the grievor and her daughter should be excluded, but had

established by the same standard that the statements made by the grievor subsequent to receipt by the employer of the tape recordings should be excluded (para. 57).

The Ministry submits the “conscripted” evidence should be admitted in this arbitration because the Grievor denied any knowledge of the marijuana grow operation and did not make any incriminating statements. In my view, this is a distinction without a material difference in the labour relations context. While I do not have detailed evidence before me of what was said during the meetings, it seems apparent from the sixth consideration in the dismissal letter that the Grievor’s “untruthfulness” during the Ministry’s investigation was one of the grounds it relied upon and, moreover, was regarded as having “... fundamentally breached the trust necessary to sustain a viable employment relationship”. Put simply, this evidence would not have existed without the Charter violation and has potentially adverse consequences for the Grievor. Admitting it “would render the trial unfair” under the first *Collins* factor.

2. The Nature of the Charter Violation

The Union emphasizes two points in relation to this factor: first, it maintains the breach of the Grievor’s Charter rights was committed by the very party which seeks to utilize the evidence at arbitration (i.e. those parts of Government responsible for criminal justice); and second, it argues the police committed a serious Charter violation. In response, the Minister relies on the Government’s separate role as “employer” and suggests the Charter violation was merely “procedural”.

I will deal initially with the Union’s second point; i.e. the seriousness of the Charter violation. In that regard, Judge Devitt found the breach “was a serious one and not merely technical” and there was “compelling evidence of a lack of good faith” (para. 19); at the same time, he accepted that Constable West “did not act in bad faith [but] was grossly careless and demonstrated a casual approach which manifests frailties in his understanding of the law and the Charter” (*ibid*). And while Judge Devitt did not believe the misstatements would affect the fairness of the trial as the evidence was not

conscripted, he held “gross carelessness or a casual approach constituting a lack of good faith ... [could not] be condoned” (para. 22).

The descriptive words selected by Judge Devitt obviously place the breach of the Grievor’s Charter rights on the upper range of the spectrum. Further, as set out at paragraph 38 of *Collins*, the fact the evidence could have been obtained properly tends to make the Charter violation more serious.

What of the Union’s first point and the role of “government actors”? It notes the dismissal letter portrays the Branch where the Grievor worked as “an integral part of the criminal justice system”, and says the Ministry seeks to rely on the testimony of the same police officers who breached the Grievor’s privacy rights in his own residence.

This case is quite removed from *Watt*, where Arbitrator McConchie stated “the Employer cannot be tarred with the same brush as the neighbour” who surreptitiously recorded the telephone calls (para. 33). And while Arbitrator McConchie later held the employer breached the grievor’s Charter rights when it utilized the tapes (see para. 49 reproduced above), he was satisfied at paragraph 33 that admitting the evidence “would not ... condone improper conduct on the Employer’s part”, and continued:

... When [the Employer] received the information that its employee might be counselling the commission of a fraud on the very system she was employed to protect, it was reasonable for the Employer to reach the conclusion that it must investigate the matter further. It could not ignore the information. This is not a judgment that the evidence should be admitted; it is a judgment that the repugnance that a reasonable person would feel about the neighbour’s act cannot be directly superimposed on the employer in this kind of situation.

Two quick examples will serve to both illustrate this point and emphasize that the inclusion or exclusion of the evidence is a question of careful balance. ... In [the second] example, a child care centre receives illegally obtained information which reveals that an employee is conspiring with another person to use student pictures taken for other purposes in a pornographic scrapbook he is offering on a disguised internet site. Again, a reasonable person might assume that the employer

would act on this information and not place the employee's privacy rights above the rights of the children. In both cases, a weighing of the respective interests at stake would likely lead to a clear conclusion. In other cases, such as this one, the balancing act is not so straightforward. (paras. 33-34)

These comments go somewhat beyond the immediate inquiry (i.e. the second *Collins* factor) but do lend support to the reasonableness of the Ministry investigating once it obtained information that someone in the Grievor's position might be involved with a marijuana grow operation. And while the Youth Forensic Pyschiatric Services Branch may be a part of the criminal justice system, it cannot be said that the Ministry and the Delta Police are "one and the same" given the obstacles the Ministry encountered when it sought copies of the reports to Crown counsel and other information. Finally, the Ministry did not perform the search, and did not have any involvement in the process leading to the search warrant.

3. Consequences of Excluding the Evidence

A relevant consideration in relation to this *Collins* factor is the seriousness of the offence. On that account, I accept what was said by Arbitrator Shime in *Toronto Transit Commission*; namely, "while the termination of an employee is an extremely serious matter, it is not a criminal matter" (p. 383). Citing judicial authority, the learned adjudicator went on to state: "[An arbitration is] a civil matter where the grievor's liberty is not at stake [and] my discretion to exclude the evidence should be exercised with restraint" (p. 384).

I am also mindful that excluding evidence from the search of the Grievor's residence could bring the administration of justice into disrepute when this matter is properly placed in its labour relations context. This harkens back to the second example postulated by Arbitrator McConchie in the above quotation. It is one thing to hold the Grievor should not be subject to criminal charges resulting from an illegal search and seizure; it is quite a different matter to hold the evidence cannot be admitted to determine whether the Grievor should remain employed as a Health Care Worker supervising and

caring for young offenders with mental health problems. The Ministry aptly contends there are broader interests such as public trust which may not apply in a criminal proceeding, but are very relevant to my determinations under the *Labour Relations Code*.

4. Conclusions Regarding Application of the *Collins* Factors

As should be apparent from the foregoing discussion, there are countervailing considerations as to whether evidence resulting from the search of the Grievor's residence should be excluded at arbitration. In reaching a final conclusion, I have relied on seemingly consistent rulings by our courts that Section 24(2) of the Charter should be applied less restrictively in the civil context: see, for instance, *Wong v. Insurance Corporation of British Columbia* [1993] B.C.J. No. 337, as well as the Federal Court of Appeal decisions cited by Arbitrator Shime in *Toronto Transit Commission*. As mentioned already, the Grievor's continued employment is at stake but his liberty is not threatened. Further, unlike a criminal proceeding, he can be compelled to testify and is not protected by the privilege against self-incrimination; he may also be subject to adverse inferences if evidence against him is not explained. Those points were considered in *Wong*, where the B.C. Supreme Court additionally observed:

The object of civil actions, as reflected in Rule 1(5) of the Supreme Court Rules is "determination of every proceeding on its merits". The purpose of a trial is to determine where possible the true facts of each case so that the issue can then be properly decided by applying the law to those facts. In criminal proceedings the object of determining the truth is often subordinated to the other interests such as the protection of an accused's Charter rights. In my opinion there is less justification for subordinating the search for truth by suppressing relevant evidence in a civil case as the liberty of the person is not at issue. Furthermore the court is called upon in each civil case to make a finding of what probably occurred, unlike a criminal case in which the court in acquitting an accused is simply finding the charges not proven. I can think of few things more likely to bring the administration of justice into disrepute than courts rendering judgments on the basis of facts which are provably false but for the fact that relevant evidence was excluded from the trial. (at QL p. 6)

This passage can be readily transposed to a labour arbitration. Moreover, under the *Labour Relations Code*, an arbitrator may accept evidence which may not be admissible in a court of law in order to “have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties”. In this case, there is no need to deter or prohibit improper conduct by the Ministry; it acted on an anonymous letter advising of the Grievor’s arrest for operating a marijuana grow operation. Nor would admitting “real” evidence obtained through the search of the Grievor’s residence result in an unfair hearing. Thus, on the balance of probabilities, I am satisfied that admitting the evidence would not bring the administration of justice into disrepute in the eyes of a reasonable person.

The same cannot be said of evidence obtained by the Employer through its investigatory meetings with the Grievor. This “conscripted” evidence did not exist irrespective of the Charter violation, and using it at arbitration against the Grievor would make the hearing unfair. Consistent with the general direction in *Collins*, it should be excluded in this case.

IV. ADMISSIBILITY OF EVIDENCE RELATED TO THE UTTERING CHARGES

The Union’s second preliminary application does not engage the Charter, but turns instead on more familiar principles governing when an employer may rely on “new grounds” at arbitration. The Union asserts the only conclusion to be drawn from the dismissal letter is that the Ministry did not rely on the uttering charges as a basis for termination because Ministry did not know the details at the time. The Union additionally describes the last paragraph of the dismissal letter as “non-sensical”, and argues an employer cannot fire someone while saying it will rely on what it later discovers to support the dismissal. Finally, based on particulars provided by the Ministry shortly before the preliminary hearing, the Union maintains the Ministry has not discovered anything new regarding the uttering charges since the Grievor’s employment was terminated.

I find the Union's second preliminary application is based in part on a mis-characterization of the dismissal letter. The Ministry did not know about the initial two counts of uttering threats until mid-April 2005. The Grievor had by that point been suspended without pay for roughly two months. The Ministry's attempts to obtain information regarding the charges were unsuccessful; among other things, the police advised the *Freedom of Information and Protection of Privacy Act* precluded disclosure of the reports to Crown counsel, and Mr. Renyck advised his supervisor would not allow him to speak with the Ministry about the matter. The Grievor did not tell the Ministry about the mid-December 2005 charges until early January 2006. He later advised that he would not disclose the reports to Crown counsel regarding those matters.

The Ministry was aware of the uttering charges (including the charge for breaching the recognizance of bail) when it dismissed the Grievor -- indeed, they were the third and fourth "offences" identified in the letter signed by Deputy Minister. And while the Ministry had effectively been stymied in its efforts to discover the details, the letter plainly advised the Ministry intended to continue its investigation and would rely on the charges to support its decision to dismiss the Grievor:

The Ministry will continue its investigation into the events underlying the three uttering and the breach of Recognizance charges and will rely on these matters in proving just cause for your termination.

Thus, it cannot be said the uttering charges are "new grounds" being advanced by the Ministry to justify the Grievor's dismissal; nor has the Ministry altered the grounds: cf. *Re Andres Wines and Winery & Distillery Workers* (1996), 53 L.A.C. (4th) 247 (BCLRB No. 37/96). I might have viewed the matter differently had the Ministry known of these charges and done nothing at the time. However, when it learned of the initial two counts, the Grievor had already been suspended without pay and there was little else it could do by way of imposing a disciplinary sanction at the time. And the Ministry persisted throughout in its attempts to discover the circumstances.

As the Ministry candidly concedes, it still does not know the full extent of the Grievor's actions and "will find out at the hearing when [it] can compel disclosure". This explains the continued lack of particulars and, although the Ministry may be in a somewhat precarious position, there is no reasonable risk of the Grievor being denied a fair hearing. He is presumably aware of the circumstances and can provide the information to the Union. Further, he has been given adequate notice of the grounds; will have an opportunity to hear the evidence when the Ministry presents its case; and will then have a fair opportunity to meet the allegations against him on those grounds when the Union calls its case. See *Re Canadian Airlines Int'l Ltd. and C.A.L.P.A.* (1988), 35 L.A.C. (3d) 66 (Munroe).

I accordingly find that evidence regarding the uttering charges (including the charge for breach of recognizance) is admissible at arbitration. Of course, it is not possible at this stage to determine whether the evidence establishes relevant off-duty conduct which can be relied upon by the Ministry to support the dismissal.

V. CONCLUSION

In the result, the Union's first application is allowed in part: the Ministry may call "real" evidence based on the search by the Delta Police of the Grievor's residence, but "conscripted" evidence following the search is excluded under Section 24(2) of the Charter. The Union's second application to exclude evidence relating to the uttering charges against the Grievor is dismissed. The hearing will resume on the dates scheduled during the recent conference call with counsel.

Dated at Vancouver, British Columbia on March 13, 2007.

A handwritten signature in black ink, appearing to read "John B. Hall", written over a large, faint circular stamp or watermark.

JOHN B. HALL

Arbitrator

