Henry Chilman should have to work 15 consecutive days before being entitled to rest days without any compensation beyond straight time. Granted he received overtime for the first day back at the centre. But, this had only to do with the employer's failure to provide him with seven days of notice. It did not flow from the hardship which he faced of working a further five days before the centre's schedule brought him to the brink of the rest day entitlement. Beyond this, the hypothetical offered by Mr. Landry not only illustrates an even harder case, it raises the spectre of abuse by management. If by merely transferring an employee from the annex to the centre opportunistically one could work an employee for 20 days without rest paying only straight time, it might occur to a manager to effect some cost savings by doing so.

I have thought long and hard about how I might construe the collective agreement so as to guard against such injustices and abuse. The last clause of art. 15.18 has tempted me. But, in the end, I have reached the prudent conclusion that, given my limited interpretive authority as an adjudicator, I ought not so to stretch words. For the reasons which I have given, this grievance is dismissed. But I must say that I am hopeful that the parties will take up the torch. Together they have it in their power prospectively to set the matter right so that the injustice suffered by Henry Chilman will not be repeated. At the same time language can be employed in order to forestall any pyramiding of benefits.

Re Board of School Trustees of School District No. 33 (Chilliwack) and Chilliwack Teachers' Association

[Indexed as: School District No. 33 (Chilliwack) and Chilliwack Teachers' Assn., Re]

British Columbia, H.A. Hope, Q.C. June 20, 1990.

Disciplinary action — Proof — Standard of proof — Arbitral review of jurisprudence regarding standard of proof — Proof on balance of probabilities single standard but responsive to nature of allegations, in particular, inherent likelihood of facts asserted and gravity of consequences of finding — Allegation of voyeurism by teacher requiring proof to high degree of probability — Standard of proof not met.

Disciplinary offences — Work relationships — Sexual harassment — Gym teacher suspended for seven months without pay for allegedly peeping into girls' change room — Conclusion of student honestly but mistakenly drawn on observations inconsistent with objective facts — Investigation by principal based on issue of whether student telling truth rather than whether student mistaken — Possibility of error or another plausible explanation not

pursued — Reinstatement and compensation for lost wages and benefits ordered.

a [See *Brown & Beatty*, 3:2500; 7:2500; 7:3580]

EMPLOYEE GRIEVANCE alleging unjust discipline. Grievance allowed.

L. Shore, for the union.

b *J.S. Clyne*, Q.C., for the employer.

AWARD

I

The grievor in this dispute is a high school teacher who was placed on suspension for seven months in response to an accusa-
c tion by a student that he was looking into a girls' change room at the school on the afternoon of October 18, 1989. The incident was not reported by the student until November 7th and the teacher was not told of the accusation until November 10th, more than three weeks after the incident was said to have occurred. He
d denied it and has maintained his denial. The association does not contest the propriety of the penalty selected. The sole issue is whether the accusation is true. The school board, in meetings held on November 28th and 30th, concluded the accusation was true and imposed the suspension.

e It is appropriate in this case to limit the identification of the persons involved to the roles they played in the events. The student is a 17-year-old girl who is due to graduate this year. The incident that gave rise to her accusation occurred during a 30-second episode in a storage room which is part of a secure area adjacent to
f the gymnasium in the high school. The storage room is a disused corridor, the doors of which are kept locked. Access to the storage room is had through a foyer, the doors of which are also kept locked. The foyer area includes another room, called the ticket room, which can be locked.

g In short, the secure area is made up of the storage room, the ticket room and the foyer. Locking the foyer doors secures the entire area, and, as stated, the storage room and ticket room can be individually locked. The secure area is used to store a variety of objects that must be kept under lock and key. The change room
h backs on to the storage room and includes a door, also disused, which previously provided access to the change room from the corridor. Change room access is now obtained from another door that fronts onto the gymnasium. In effect, the change room door has become part of the wall of the storage room.

There is a vent, or grille, located in the bottom part of the change room door approximately 12 in. from the floor. It is 18 in. wide and eight in. high. In the student's initial interview with school authorities, which was conducted by the principal of the high school on November 7, 1989, she was recorded as having said that she saw the teacher on his "hands and knees" on the storage room floor "adjacent to the grille to the door of the girls' change room". That observation occurred in a split second between when the student opened the door and the teacher reacted to her presence. The student was asked in this hearing for the first time to estimate where the teacher's head was in relation to the grille in that split second view. She estimated the distance to be six in.

In a view of the storage room taken as a part of the hearing, it became apparent that her description of what she saw was not consistent with the posture of a person who is looking through the grille. In particular, any person on hands and knees, even a person of average height, towers above the grille by several inches. The teacher is six ft. three in. in height and, on hands and knees, would be well above the grille. Further, nothing can be seen through the grille from a distance of six in. In order to see through it into the change room, a person must bend forward in an exaggerated and extended crouch and must place her or his eye against the grille. I will review the significance of that finding later.

The student told three fellow students and her parents of the incident on the day it occurred, but the school board authorities did not learn of her suspicions until two weeks later when the student's father approached the principal of the high school on November 1st to inform him of the incident but not the details. The student, as stated, made her first statement to the school authorities on November 7, 1989. The principal was assigned to investigate her allegation. The student spent 20 days talking to her family and considering whether she should report her suspicions. She was recorded in her statement to the principal on November 7th as having said that the teacher "appeared to her" to be looking into the change room but, "perhaps there was another plausible explanation". The possibility of a plausible explanation was not pursued. In a further interview with the principal two days later she was recorded as having modified her statement in the sense that she no longer acknowledged the possibility of error. On that second occasion she made an unqualified accusation that the teacher was looking into the change room. I have concluded on the evidence that the student made a mistake and, in any event, that the school board failed to prove on a balance of probabilities that the teacher was looking into the change room.

In giving reasons for having reached that conclusion, I commence by saying that the only evidence called by the school board to prove that the teacher was looking into the change room was the evidence of the student. The school board called six witnesses, including the student's mother, two fellow students with whom she had discussed the matter, the principal, and the chairman of the school board. But the student was the only witness who was in a position to say whether the teacher was looking into the change room. Her evidence was circumstantial in the sense that it consisted of observations she made upon which she formed her conclusion. I will deal with the arbitral authorities later. At this stage it is sufficient to say that the conclusion itself has no evidentiary value independent of the observations that gave rise to it. That is, it was not helpful for the student to say that she saw the teacher looking into the change room. What was needed were details of the facts that led her to reach that conclusion.

The position of the school board, in effect, was that the objective facts support a finding that the teacher had been found on his hands and knees in an area made up of a bare floor and wall which included the change room door and that the only reasonable conclusion to reach was that he was looking into the change room. However, that position was belated in the sense that the question of what was contained in the area of the change room door was not addressed by the school board until November 29th, six weeks after the incident was said to have occurred. The position of the association was that the area around the change room door contained a stack of cases of canned pop and a net bag of ten basketballs that the teacher was inspecting. Even after the issue arose, the school board limited its investigation to speaking to the student and obtaining her recollection. In short, it was six weeks before the student was questioned about the objective, physical facts relating to the storage room on the day in question.

The clear implication is that the principal saw the issue from the start as one of whether the student was telling the truth, not whether she was mistaken. When he was questioned in this hearing about the student's observation that there may have been another plausible explanation, he dismissed the possibility out of hand and made it clear that he viewed the sole issue as being whether it was the student or the teacher who was telling the truth. Further, it appeared that he believed the student. He was a long-time friend of the student's father, he held her in high regard and the clear implication is that he believed she had seen the teacher looking into the change room. That mind set appears to have influenced the scope of his investigation. I will return to that

question later. I now turn to the factors I considered that led me to conclude that the school board had not proven its case.

II

The teacher had been employed at the high school for the previous three years. He enjoyed an excellent reputation. He was the coach of a highly successful junior boys' basketball team. He said in evidence that when the student came into the storage room on October 18th, he was on his hands and one knee in front of the change room door. The teacher said that he was partially shielded from her view by a row of cases of canned pop and that he was in the course of inspecting a net bag containing ten basketballs at the time. He was preparing them for a basketball shooting drill which was scheduled for 7:00 a.m. the following morning. His evidence, in effect, was that his posture was changing as he leaned forward to manipulate the basketballs in the net bag. He was looking for numbers written on them. His practice was to select balls in numbered sequence so that he could ensure that none went missing during the drill. On his evidence, his head would come into proximity with the change room door as he adjusted his posture to examine the basketballs.

The members of the school board rejected his explanation on the basis of facts presented to them by the principal. Those facts were in error in a number of respects. The errors arose by reason of a chain of circumstances, the first of which was the failure of the student to report the incident in a timely fashion. By the time she did report it, the objective facts surrounding the incident were stale. In the result, the teacher lost the opportunity to respond to the accusation while his memory of the event was fresh. The principal was new to the high school and was not familiar with the staff. Hence, he had not had an opportunity to develop confidence in the character and integrity of the teacher. (The teacher was highly regarded. He enjoyed an excellent reputation with no indication of deviant or improper behaviour.) Conversely, and quite coincidentally, the principal and the student's father had known each other for many years, the principal described him as a friend, and, the principal held the student herself in high regard.

It was quite clear in his evidence that the principal believed that the student was telling the truth even before he talked to the teacher and that he approached the investigation with that mind set. In the result, he limited his investigation to three brief interviews with the student and one meeting with the teacher. Except for a few brief visits to the storage room he conducted no investigation of the objective facts surrounding the incident. In the

result, his report contained innuendoes which were highly prejudicial to the teacher on a number of collateral issues that could have been resolved by an investigation of the objective facts.

The third element in the chain of circumstances was the decision not to involve professional investigators. The student came forward on November 7th to provide details of her accusations. She spoke with the principal in a brief interview in which he was supportive rather than investigative in posture, with the result that her suspicions were reinforced rather than challenged. The principal later described the interview as one in which the student had "shared her observations" with him. It was an apt description. However, it was not an apt process for the investigation of a serious allegation of misconduct. After the first interview, a discussion took place with respect to whether the allegation should be investigated by some outside agency, such as the Royal Canadian Mounted Police (RCMP). The decision was made, apparently in consultation with the outside agencies, to investigate the matter internally and the principal was assigned to the investigation. Hindsight invites the conclusion that all parties would have been better served if a professional and independent investigator had been selected.

The next complicating circumstance came in the form of the investigative technique adopted by the principal. As pointed out by the school board in argument, he had no training or experience as an investigator. He approached the investigation with an excessive concern for confidentiality and the welfare of the student. In particular, he wanted to ensure that the incident did not become a traumatic experience for her. In response to that concern, he adopted an uncritical approach to her accusation that had the effect of reinforcing it when its very nature invited a challenge in order to test its reliability. Secondly, he reflected a concern shared by all parties about confidentiality. But he let that concern inhibit the investigation to the point that, as stated, he limited it to three brief interviews with the student, an equally brief questioning of the teacher, and a number of perfunctory visits to the storage room.

The next circumstance relates to the contents of the storage room. On the student's recollection of the facts, it was bare in the vicinity of the change room door. On the teacher's recollection, the area contained cases of canned pop and a net bag of basketballs. It was clear on the evidence that the storage room contents can change significantly on a day-to-day basis. Canned pop is one component of that change. The senior and junior boys' basketball teams have the concession for the sale of canned pop in the school. They use the proceeds to fund the activities of the teams. The

inventory is kept under lock and key in the storage room and the ticket room. On the school board's own evidence, it is routine for there to be a large quantity of cases of canned pop kept in the storage room along the wall adjacent to the change room door. The principal gave evidence that he visited the storage room after the incident and found that it contained canned pop in approximately the quantity and location described by the teacher throughout November of 1989. There are occasions when there are no cases of canned pop present, but the implication in the evidence is that storing pop in the storage room is a routine event.

The same can be said with respect to basketballs. The senior and junior boys' basketball teams used the proceeds from the sale of pop to purchase 16 high quality basketballs in the summer preceding the incident. Those basketballs were numbered one to 16 by the teacher in his capacity as coach of the junior boys' basketball team. He worked in conjunction with the coach of the senior boys' team. The balls were first used in a basketball clinic conducted by the two coaches in August of 1989. At the end of the basketball clinic, at least ten of the basketballs were placed in a net bag and stored in the storage room pending the commencement of basketball season on October 23rd. (There was no evidence with respect to the remaining six basketballs.) Some time prior to the incident in question, the teacher began using the balls in basketball shooting drills. Formal practices were prohibited until the season opened on October 23rd.

As indicated, a major issue between the parties was whether there were cases of canned pop and a net bag of ten basketballs present in the storage room on the day in question. The only direct evidence on that point came from the student and the teacher. The first time the teacher addressed that issue was after he had been questioned by the principal on November 10th. That interview caused him to reconstruct what he had been doing when the student came into the room. The first time the student was required to address that issue in specific terms was on November 29th when she was questioned by the principal in response to the explanation offered by the teacher. Her recollection, as stated, was that there were no basketballs and no cases of canned pop present.

The school board did not investigate that difference in recollection when it surfaced on November 28th. The principal was assigned to conduct an investigation, but he limited himself to interviewing the student. He also obtained delivery dates for pop but he did not speak to any of the persons who could be expected to have knowledge of the objective facts. The teacher's explanation was investigated to some extent by the association. Invoices and

delivery dates of shipments of canned pop were obtained and the person in charge of the inventory, being the coach of the senior
a boys' basketball team, was interviewed. The results of that investigation were communicated to the school board on November 28th. The facts were to the effect that a large quantity of pop and a net bag of ten basketballs were present in the storage room on the day in question and were removed at some later date. Those facts
b were rejected by the school board on the basis that the members preferred the recollection of the student as communicated to them on November 30th by the principal.

The circumstance that added to the chain that cast suspicion on the teacher consisted of a coincidence established in evidence wherein the canned pop and basketballs which were present in the
c storage room on October 18th, were removed the next afternoon, being October 19th, by two students working under the direction of the coach of the senior boys' team. In particular, the cases of pop and basketballs were moved from the storage room to the ticket room. The quantity of pop in the storage room at the time can be
d estimated from the fact that it required the two students the better part of two periods to move it the relatively short distance from the storage room to the ticket room.

A further coincidence with respect to the presence or absence of canned pop and basketballs came in the form of a return visit to
e the storage room by the student on the afternoon of October 19th. When she returned to the room, the canned pop and basketballs had been removed. As stated previously, she spent several minutes there, as compared with 30 seconds the previous day, and the compelling inference to be drawn is that what she recalled when
f she was asked six weeks later was the state of the room as it appeared on October 19th, not the state of the room as she saw it the previous day. It was that coincidence that caused her to deny that there was any pop or basketballs in the room.

The school board's position in this hearing was that the evidence
g did not support a finding that there were cases of canned pop and basketballs in the storage room that day. The only evidence tendered by the board to support that submission was the recollection of the student expressed six weeks after the event. Support for the contention by the association that there were cases of
h canned pop and basketballs present came in part from the documentary evidence filed by the parties and partly from the evidence adduced *viva voce* from witnesses in the hearing.

The documentary evidence in the hearing consisted of notes made of the two meetings of the school board; notes of two brief meetings between the principal and the student; two reports

prepared by the principal with respect to his investigation of the incident, one dated November 14th and one dated November 30th; photographs of the area taken by the principal, and sundry correspondence between the parties. The portion of the documentary evidence supporting the presence of canned pop and basketballs consisted of a record of statements made by the association and the teacher to school board members in their meeting of November 28th. In those statements the association related the substance of an interview with the coach which was not challenged in that meeting or in the subsequent meeting on November 30th.

The interview attributed to the coach was augmented in this hearing by evidence given *viva voce* by the coach that supported the submission of the association that there were pop and basketballs present in the storage room on the day in question. His evidence in the hearing was less precise than his statements to the association due to the passage of time. But, when weighed in light of the other evidence, his recollection compelled the inference that the canned pop and basketballs were in the storage room on October 18th and were removed on October 19th. In particular, he was able to say conclusively from school schedules that the move took place on either October 6th or October 19th.

The facts that made it probable to the point of certainty that it was October 19th included the evidence of the coach that the move coincided with the ordering of a new supply of canned pop. Turning to a review of those facts, the evidence was that 210 cases of pop were delivered to the school on September 12th, being 36 days before the incident in question. The next delivery was 200 cases on October 31st, being 13 days after the incident. In considering the likelihood of the order for that delivery having been placed on October 6th, a number of factors render that conclusion unlikely.

Firstly, the basketballs and pop were moved on the same day, and, on the undisputed evidence, the reason for moving the basketballs from the storage room to the ticket room was to anticipate the opening of the basketball season on October 23rd. October 19th was a Thursday and it was the last day of school before the commencement of the basketball season on the following Monday, being October 23rd. (Friday, October 20th was a professional development day and classes were not scheduled.) There was no reason offered for moving the basketballs on October 6th, being two weeks prior to the opening day of the season, as opposed to October 19th, being the last day before the season started.

In that same vein, it is more likely that an order for an additional supply of pop would be made on October 19th, being 12 days

before delivery, as compared with October 6th, being 25 days prior to delivery. As stated, the conclusion that there was pop remaining
a on October 18th was consistent with evidence given by the principal as to the status of the storage room in the days following the delivery of the 200 cases on October 31st. He reported to the board that as of November 28th both the ticket room and the storage room contained a full supply of pop. He said that the ticket
b room, "other than the floor space required to open the door and that covered by the net of [basket] balls, . . . is wall to wall and almost floor to ceiling in cans of pop", and that during the same period he had "entered and observed the storage room on five separate occasions. On each occasion a stock of canned pop cans
c approximately eight foot long by three and one-half feet high was located along the west wall of the storage room between the entrance door wall and the door to the girls' change room."

Hence, in the 29 days of consumption following the delivery on October 31st, the ticket room continued to be full of pop and there was a stack in the storage room which had remained unchanged on
d five separate occasions between November 1st and November 29th. That stack was of a configuration similar to the one described by the teacher as being present on October 18th. The facts with respect to the pop inventory in the 29 days throughout November
e do not prove that a similar inventory existed in the 36 days between September 12th and October 18th, but it is at least consistent with the presence of a stack of cases of canned pop described by the teacher as being present that day. When all of the evidence is weighed, the probabilities compel the conclusion that the teacher's recollection of the state of the storage room was
f accurate and that there were cases of canned pop and basketballs present on October 18th.

When the employer asked rhetorically in argument how the student could have overlooked objects as obvious as a stack of cases of canned pop and a net bag containing ten basketballs, the
g reply from the evidence is that her view of the storage room on that day was only 30 seconds long, that during that 30 seconds she was self-conscious, distracted, surprised and that it was her visit to the storage room the next day when the pop and basketballs were gone that remained fixed in her memory.

h It was apparent in the evidence that the board members concluded that the teacher had been found on his hands and knees near the grille with no objects in the vicinity to explain his presence. On the evidence before me, that conclusion was not correct. I concluded that there was a row of cases of canned pop along the wall and a net bag containing ten basketballs on the

floor in front of the change room. The fact that there were cases of canned pop and basketballs present does not amount to conclusive proof that the grievor was not looking into the change room. However, it does mean that his explanation was consistent with the objective facts. I will return to the significance of that issue of fact later.

A further circumstance that cast suspicion on the teacher was the fact that there was a separation in the vanes of the grille. There was no indication in the evidence of how long the vanes had been in that condition. In particular, there was no evidence to indicate that the separations were of recent origin or that they were deliberate. No member of the teaching staff or custodial staff was called as a witness with respect to the grille or the length of time it had been in that condition. More importantly, no member of the custodial staff was interviewed about the grille. That fact is significant because the principal implied in his report that the separations in the vanes were made deliberately and, by association, invited the inference that the teacher may have made them.

In particular, the principal wrote as follows in his report: "In no way is the distortion in the grille a result of excessive use or kicking." No opinion evidence was called and the expertise upon which that conclusion was based was not disclosed. It was implicit in the evidence that the grille had always been part of the door and that the area, in earlier times, had been open to other students, including boys. It is less than paranoia to speculate that the separations, if they were made deliberately, may have had something to do with the boy students who, over the years, had been using the change room next door and who had ready access to the grille before the corridor was closed. In any event, there was no evidence that tied the teacher or any other person to the separations in the vanes or supported the inference that they were made deliberately.

III

Before reviewing the facts further, it is convenient to give some consideration to the apparent conclusions the members of the school board reached in rejecting the teacher's explanation. The reasons for their decision were communicated to the association by the district superintendent in a letter dated December 12, 1989. It reads as follows:

> The grounds for the Board's decision were that it accepted the student's account of the incident at Chilliwack Senior Secondary School when she found [the teacher] in the locked store room adjacent to the girls changing room at about 3:10 p.m. on October 18, 1989 looking through the door vent or grille

> into the changing room. The Board found that [the teacher's] conduct constituted just and reasonable cause for discipline. Because of the nature of his conduct and his continued lack of candour throughout the various meetings held between him, his representatives and the Board and its representatives, the Board considered suspension without pay until June 30, 1990 was an appropriate penalty in the circumstances.

That letter makes it clear that the board members made their decision based upon the student's account of the circumstances. The student never attended the meetings and she made no written statement. Her account was communicated in summary form by the principal in his two written reports and in the comments he addressed to the board in its meeting of November 30th. The notes of the two board meetings do not include the deliberations of the board members. However, it is implicit in the pattern of questioning in the documentary evidence and from responses of the chairman of the board in this hearing that various factors contributed to the board's acceptance of the student's conclusion that she saw the teacher looking into the change room.

The first report filed by the principal is dated November 14, 1989. It is in that report that the principal summarized what he understood to be the student's position. He appeared to attribute to her the assertion that she actually saw the teacher with his eye against the grille. He wrote in his report as follows: "She claims that she saw [the teacher] on his hands and knees looking upward through the grille of the door to the girls' change room." In the notes prepared by the principal of his first interview with the student she is quoted as saying that "she came to the storage room; upon entry she noticed [the teacher] on hands and knees adjacent to the grille to the door of the girls' change room". It was not until his second interview when she was noted as having said that the teacher was looking upward in the vent. The principal did not record that difference between the two interviews. In her evidence in this hearing the student was finally asked to describe precisely where the teacher's head was when she first saw him and she said it was six in. from the grille. It is clear from the evidence that the school board members concluded that the student had come upon the teacher actually looking through the grille when in fact his head was six in. away from it.

Other aspects of the report cast suspicion upon the presence of the teacher in the storage room. In particular, the principal presented eight points in his report that he described as "relevant information". One of the points carried the implication that the locking of the storage room door by the teacher was a suspicious circumstance. However, the evidence in the hearing disclosed that

the entire area is treated as a secure area because valuables that are required to be kept under lock and key are stored there. In any event, there was at least the possibility that the student was incorrect about the state of the doors. That possibility arises because she only recalled unlocking one set of doors and the likelihood on the evidence is that if only one set of doors was locked, it would be the foyer doors not the storage room doors. Leaving the foyer doors unlocked would be a serious breach of security and would leave the items stored in the secure area, other than those contained in the storage room itself, open to theft by any passer-by.

It would appear that neither the student nor the teacher was asked about the foyer doors until after the first meeting of the board on November 28th. The statement of the teacher at the board meetings and in evidence was that he had definitely locked the foyer doors but that he was uncertain about whether he locked the storage room door, although he readily conceded that he may have locked them in a reflex action. In any event, either the locking of the door was a neutral and irrelevant fact, and thus should not have been included in the report, or the facts with respect to the routine followed in the area should have been investigated and the student should have been questioned while her memory was fresh about which of the two doors was unlocked.

As stated, the student's recollection was that she had only unlocked one set of doors. In considering whether she may have been mistaken in her recollection, it is necessary to consider the specific issue of the doors and the general issue of the quality of her memory and responsiveness. She was not required to direct her mind to the question of the doors until November 7th, three weeks after the incident and she was not asked to distinguish between the foyer doors and the storage room door until November 29th, six weeks after the incident.

The quality of her memory was called into question when she was asked in evidence about the storage room lock. She insisted that it could not be opened from the inside without a key. She maintained that recollection under questioning until she was shown a photograph which displayed a knob on the inside of the door which permitted it to be activated manually. Even then, the most she would concede was that she may have been incorrect. In short, the quality of her memory was such that she could be in error in her recollection and remain insistent that she was correct until it was proven to her that she was wrong. The inference I drew from her demeanour and responsiveness was that, having overcome her misgivings in making the accusation, she was defensive about

making admissions that would call the accuracy of her observations into question. Even on collateral issues, her response to any
a challenge to her memory was to become more insistent that she was right.

There were other aspects of her evidence that caused concern. For example, she said in her evidence-in-chief in the hearing that she went to the storage room on October 18th as a result of a
b discussion with the coach of the senior boys' team about poster paper. She said she needed the paper for a project she was doing and that she had been pressing the coach to obtain it. She said that on the day in question he told her the poster paper was finally available in the storage room and that he gave her his keys so that she could obtain it.

c However, in cross-examination, the student said that she was only presuming that she had obtained the keys from the senior boys' basketball coach on October 18th. She said "I don't remember getting the keys from [him]. I'm guessing because I talked to him 99 percent of the time." (The coach was one of five witnesses
d called by the association. He could not recall whether he gave the keys to the student. Nor could he recall the poster paper discussion she described, although he did not deny either event.) Her admission in cross-examination that she was not sure if it was the coach from whom she obtained the key that day is difficult to
e reconcile with her detailed evidence about the conversation she said she had with him. It was never explained why the paper was not present and why the coach, whom she quoted as saying he had acquired it, would not query her statement that it was not there. It seems reasonable to assume that he would have responded by
f telling her where he had put it.

Further, she demonstrated an inability to recall details which should have been much more memorable than the state of the locks. For example, when she and a fellow student went to the storage room on October 19th, being the day following the
g incident, and spent considerable time there. She went there for the purpose of looking through the grille to test if she could see into the change room. She wanted to test her theory that the teacher had been looking into the change room. But she could not recall if her friend had done the same thing. The friend gave evidence and
h said that she had indeed looked through the grille. As stated previously, a person looking through the grille is required to adopt a distinctive and exceedingly awkward posture. In short, the student was present when her friend adopted that posture but she neither observed that her friend was in the same position in which she had seen the teacher the day before, nor did she recall the

event later. It was apparent that the student was capable of having no recollection of even significant details.

A further question raised in the report given to the school board members was whether the presence of the teacher in the storage room was a matter of routine. That question became complicated by the fact that the teacher was not able to offer a full explanation for his presence when he was first confronted with the student's accusation. That confrontation came when he was questioned by the principal in the presence of the assistant superintendent on November 10, 1989. Present at the meeting was the teacher and a representative of the association. When first questioned, the teacher could not immediately recall the full context of his encounter with the student. He could recall the student coming in while he was there. He could also recall that he had originally gone to the storage room to examine a kitchen knife in a box of household goods he had stored there. What he could not immediately recall was the routine aspect of his presence, being the preparation of the basketballs.

His assertions of fact with respect to his presence were not challenged in this hearing. In particular, his evidence that he had attended that day to examine a kitchen knife was not disputed and, in any event, was corroborated by evidence given by his fiancée. She said that she intended to buy a kitchen knife and the teacher had volunteered to inspect a kitchen knife he had in the box of household goods he had stored in the storage room to see if it was suitable. She said he had neglected to attend to that chore and she had reminded him a number of times. She recalled that he advised her on October 18th that he had inspected his knife and it was rusted and unsuitable. She had good reason to recall the date because her parents were in Europe on vacation and her brother was injured in a traffic accident that day. I will return to her evidence later. At this stage it is sufficient to say that it was not challenged in cross-examination and was not contradicted.

In short, the teacher had a specific reason to be present in the storage room that day. But, leaving that reason aside, it was clear on the evidence that he visited the storage room as a matter of routine in his capacity as coach of the junior boys' basketball team. It was implicit that the principal could have learned that fact upon a simple inquiry made of students and other teachers familiar with the basketball programme. However, he made no such inquiries. Nevertheless, he included in his report an implication that the presence of the teacher in the storage room that day was out of the ordinary. He wrote in recording the teacher's response to his questioning: "[The teacher] said that he infrequently entered that

room for he had little reason to do so and that he had perhaps been in there less than half a dozen times this year."

a The teacher agreed that he had estimated that he had been in the storage room about six times since school had resumed that fall. However, he denied describing that pattern of attendance as infrequent or that he had said that he had little reason to go to the storage room. The notes of his questioning made by the assistant b superintendent support the teacher's recollection in the sense that there is no reference to the statements attributed to him by the principal, nor is there any reference to that subject-matter. In any event, if the principal had investigated the facts he would have found out that the teacher did attend in the storage room as a c routine part of his duties as coach of the junior boys' team. Once again, I make that finding on the basis that the teacher's account of the facts was not challenged or investigated.

In the result, there were no facts established to support an inference that the presence of the teacher in the storage room on the day in question was anything other than routine. Before the d principal suggested otherwise, he should have investigated the facts. Further, he should have exercised greater care to ensure that any comments attributed to the teacher were accurate. On the basis of the proven facts, there was nothing unusual about the grievor's presence in the storage room that day and nothing e unusual about his assertion that he took the time to prepare basketballs for a shooting drill the following morning. Those facts, as stated, were not investigated by the principal despite the availability of a number of teachers and students who were bound to have knowledge of the basketball routine.

f The school board did not contest the fact that there was a shooting drill scheduled for the following morning or that such shooting drills were routine. There was no question on the evidence that the shootaway owned by the teacher and used in shooting drills was kept in the storage room at the material time. Nor was g there any question on the evidence of the coach of the senior boys' basketball team that the net bag of basketballs had been in the storage room until it was removed with the cases of canned pop. The accuracy or inaccuracy of those facts could have been tested readily by questioning any number of potential witnesses. The h school board did not question any of the persons in a position to support or refute the teacher's assertions and, in the final result, they were unchallenged.

The next aspect of the facts that raised suspicion in the minds of the members of the school board relates to aspects of the principal's report which triggered a belief in the board members

that conflicting explanations had been offered by the teacher. It was apparent that the board members were of the view that the teacher had given one explanation when confronted on November 10th and had offered a different explanation in the school board meeting of November 28th. A significant factor in that conclusion was the principal's statement that the teacher had denied ever being on his hands and knees in front of the change room door. In his report the principal wrote in part as follows:

> Following a detailed explanation of the allegations, [the grievor] responded that he did recall the occasion on which the student entered the storeroom and he was there, but that in no way was he on his hands and knees.

The teacher denied making that statement, as did the representative of the association. Once again, the notes taken by the assistant superintendent tended to support the recollection of the teacher. The only mention of that subject in the assistant superintendent's notes quotes the teacher as having said "no" to a question as to whether he was on his hands and knees when the student entered. The principal conceded in cross-examination that the actual context of the question and answer was that the teacher denied being on his hands and knees looking into the change room. The principal agreed that the teacher had never denied being on his hands and knees. That distinction was never made clear to the members of the school board. In fact, the misleading aspect of the principal's report was intensified in his summary. He included the following paragraph in that summary:

> 5. There is one central difference in testimonies; the student claims that she observed the teacher on his hands and knees with his head facing the grille of the door to the girls' changeroom; *the teacher claims that he was not on his hands and knees and was not near the door when she entered.*

(Emphasis added.)

It is clear on the evidence of the principal himself that it was not correct to say that the teacher denied being on his hands and knees or that he had ever said that he was not near the door when the student entered. There was simply no basis in fact established to support that aspect of his report. Once again, the failure of the principal to exercise precision in attributing statements to the teacher was highly prejudicial to the investigation.

Certain other aspects of his summary were beyond the facts proven in evidence. For example, a statement that the teacher and the association representative "agreed that this student was particularly credible and mature grade 12", was denied by the teacher and the association representative. The principal expanded upon that theme in his evidence, attributing to the teacher such

statements as, "he stated she was generally regarded as a most outstanding citizen of our school and that he [the teacher] was
a baffled why she would state what she did if she did not believe it to be true. He said she was a fine young lady, he could not understand why she might do that as well."

It became clear in the evidence that the teacher made no such statements. Not only is that summary not contained in the
b principal's report, it is not an exchange that was recorded in the notes of the assistant superintendent and it was denied by both the teacher and the representative of the association. It was clear in context that the statements reflect the assessment of the principal, not the teacher. The teacher did agree that he could think of no reason why the student would make a false accusation against
c him, but the context in which that admission was made was embellished by the principal.

I do not make those observations for the purpose of placing the principal's assessment of the student in question. I record them for the purpose of showing that the report, while it is presented as a
d factual summary of an investigation, appears to be more a presentation of the principal's account of events from his perspective and his bias. The assistant superintendent's notes generally support the evidence of the teacher and the association representative that the teacher confined himself in the main to responding to
e questions put by the principal. The report of the principal was misleading because he did not confine himself to quoting the teacher verbatim or, better still, by obtaining a written statement from him.

Turning back to the reaction of the teacher when he was first
f confronted, there is an implication that the members of the school board felt that he should have been able to recall the full context of his encounter with the student on that occasion. However, the evidence of the manner in which the questioning took place and the reaction of the teacher is consistent with his assertion of inno-
g cence. The principal agreed that as the questioning progressed on November 10th, the teacher appeared to be shocked, surprised and confused. The association representative who attended the meeting is a counsellor who said that he is trained to assess emotional responses and that he applies that training daily as part of his
h duties. He was not tendered as an expert but offered the opinion in cross-examination that the teacher was genuinely surprised and bewildered by the accusation. That same reaction of confusion and anxiety is reflected in the assistant superintendent's notes.

In addition to his reaction in the questioning, the fact that the teacher had no ready explanation bespeaks a person taken by

surprise. Certainly he would have had ample opportunity and incentive to concoct an explanation if he actually had been looking into the change room. It was established in evidence that he was aware that the presence of a "peeping tom" was assumed by school authorities as a result of the reporting of the incident by the student's father. The teacher learned that fact from the head custodian on November 1, 1989. The head custodian had been assigned by the principal to cover the grille in the change room door and he advised the teacher that the presence of a "peeping tom" was suspected.

If the teacher had been looking into the change room on October 18th, he could be expected to know the student had seen him by reason of his discussion with the head custodian. The request for a meeting ten days later would have been sufficient to put him on his guard with respect to preparing an explanation. Hence, the very fact that he was taken off guard and was confused by the allegation was consistent with his innocence. Obviously the teacher could have been acting a part, but, at the least, his reaction was consistent with his assertion that he had not been looking into the change room.

In the context of implications arising from the reaction of the teacher to the circumstances, I return to the evidence of the teacher's fiancée. As stated, she recalled October 18th because of the serious injury sustained by her brother. It was on that basis that she was able to place her discussion about the knife in context. She was also able to recall that the teacher gave no indication of anxiety or concern about the day's events. She said that he was in good spirits and, while he was subject to mood swings when he was under stress, was good-humoured and relaxed. Once again, her evidence did not prove that he was not looking into the change room. But his demeanour was not what one would expect from a person concerned about whether he had been caught in a compromising position.

As for the inability of the teacher to place the incident in immediate context, the manner in which the questioning was scheduled appeared to be deliberately designed to take him by surprise and off guard. The questioning took place more than three weeks after the incident and the teacher was given only two hours' notice of the meeting and no notice of the accusation itself. No explanation was given for the absence of detail or the reason behind the shortness of the notice. The principal said that he knew the notice would cause anxiety and he wanted to give it as close to the meeting as possible for that reason. But that did not explain the lack of details. In any event, for whatever reason, the notice

was not structured so as to alert the teacher to the subject-matter to be discussed. It reads as follows:

> Information regarding an inappropriate activity in which it is alleged you were involved has been brought to my attention by a parent and subsequently a student. I am responsible to investigate such allegations and therefore consider it most important that I share with you specifics and that you have an opportunity to respond and to clarify. I am anxious to resolve this issue and ask that you meet with [the assistant superintendent] and myself at 3:15 p.m. today in my office. You may, of course, arrange for a CTA representative to be present during our discussion. I apologize for the formality, . . . , but the nature of this allegation requires that procedures designed to safeguard the rights of all involved are followed. Thanks.

The principal had all the facts he deemed relevant on November 9th. He agreed that he delivered the notice personally and remained to watch the teacher open it and read it. But when the teacher sought to question him on the details, he refused to elaborate on the cryptic language used in the notice. Thereafter the teacher joked about the notice. In short, the reaction described by the principal was one of curiosity and good humour rather than anxiety.

The rationale for the form and content of the notice remained elusive in the evidence. In particular, there was no explanation why no details were included which would inform the teacher of the incident in question or the student involved. In substance, it was merely a notice of a request for a meeting. The reason for including the reference to "inappropriate activity" with no indication of the nature of the activity was not made clear. As stated, the principal said he expected that the form of the notice would cause anxiety in the teacher, but he never explained why creating that anxiety was essential to the process and why he did not simply give notice of a meeting, or, alternatively, provide full details of the reason for the meeting. Nor was it explained why the principal found it necessary to deliver the notice personally or to wait around until the teacher had read the notice and had reacted to it.

It is difficult to see how providing details of the accusation would have prejudiced the investigation. If it is assumed for purposes of analysis that the student was mistaken, notice would have given the teacher an opportunity to recall the event and present a reasoned explanation. Conversely, if the teacher had indeed been looking into the change room, providing him with details of the accusation would have done nothing to compromise the investigation or provide him with information he did not already possess.

The conclusion I reached on the evidence was that the principal was convinced before he interviewed the teacher that he had been looking into the change room and that he structured a confronta-

tion that he hoped would lead to some overt or tacit acknowledgement of guilt. The notice and its delivery was the first phase of that confrontation. However, from the time the teacher was first approached with the notice and was given an opportunity to read it in the presence of the principal, he behaved as one would expect an innocent and unwary person to behave. He joked about the notice when he received it, with no apparent signs of stress or anxiety. Later, when confronted in the meeting, he responded in a manner consistent with an innocent person who is met with an allegation involving moral turpitude that he perceived as constituting a serious threat to his reputation and career.

On balance, the teacher's explanation that he was not able to place the incident in complete context until after the questioning was over is consistent with the circumstances and does not raise a basis for suspicion. However, the clear implication was that the members of the school board did entertain some question in their minds about why the teacher had not volunteered an immediate explanation. Further, on the same point, it was apparent that the board members were concerned about why the teacher had not come forward between November 10th and November 28th to offer a complete explanation. On that point, it was clear in the evidence that during the confrontation with the principal, the teacher was advised by the representative of the association to say nothing further until he had an opportunity to obtain legal advice. Secondly, the questioning terminated with the school board officials advising the grievor and the association representative that they would be advised if the matter was to proceed further. The next contact between the teacher and the board was when the teacher was advised in a letter dated November 24, 1989, that the issue would be considered at a meeting of the school board on November 28th. That was the next occasion at which the teacher had an opportunity to present his explanation.

On another point, the student was quoted in her second interview with the principal as having said that she returned to the storage room "a couple of days" after the incident. She was quoted by the principal in his report as having said that she returned to the storage room "two days later" to check if a person could see through the grille into the change room. In her evidence in the hearing she said it was one day later. The implication is that her change in recollection came as a result of questions put by the association at the November 30th meeting of the school board when it was suggested that two days later, being October 20th, was a professional development day and it was not likely that the student would be there. In her evidence, the student did not seek to

reconcile that change in recollection. She simply stated that she had gone to the storage room the next day.

a A similar pattern of unexplained inconsistencies could be found with respect to other details attributed to her in notes prepared by the principal with respect to his brief meetings with her. In particular, she gave different accounts of her brief conversation with the teacher on October 18th. Those differences were not b critical but they did disclose the fact that neither the principal nor the student realized the need for accuracy and consistency. For example, in the notes made by the principal of the two interviews, the student was recorded as having said that she came two steps into the storage room, spoke with the teacher about poster paper, and then left. In her evidence she said that she spoke briefly with c the teacher, searched quickly for poster paper and then left. Once again, that contradiction was unexplained.

A further problem arose with respect to an apparent conclusion by the members of the school board that there were girls in the change room at the time. That conclusion was based upon a report d of an interview with the student which was done on November 23, 1989. In that interview the principal ascertained that the student did not know if there were any girls in the change room but he invited the members of the school board in his report to make the assumption that the change room was occupied. That assumption e was based on the fact that a volleyball team practice was scheduled and because the student had encountered a fellow student after the incident who had just changed in the change room. In any event, when the principal interviewed the student on November 23rd, he did not pursue the issue. In particular he did f not interview the student who had been in the change room. Once again, it would appear that he placed little weight in the possibility that the student was mistaken. He was prepared to simply accept that the change room must have been occupied.

However, it was clear that a possibility existed that the room g was not occupied at the material time. The principal finally interviewed the fellow student on January 8, 1990, more than a month after the suspension was imposed. The fellow student advised the principal that there were a number of girls in the change room at that time. However, the friend gave evidence in h this hearing and said that she had confused two dates and was not able to say whether there were any other girls there at the time.

That question was left further in doubt in the evidence adduced in the hearing. No evidence was called from any other member of the volleyball team or from the coach of the team. In fact, they were not interviewed. There seems to be no doubt that a volleyball

practice took place that day, but its precise timing and the sequence in which team members entered the change room was left in doubt. Further, there was evidence that indicated strongly that there were no girls in the change room at the material time. In particular, the student was asked in evidence if it was possible to hear someone opening the storage room door. Her answer was, "It depends on who is in the changing room. If there are girls screaming in there you can't hear." A similar observation was made by the principal in his report. He wrote, "When girls are in the change room, a cacophony of noise travels through the grille into the storeroom." Having made that observation, the student did not suggest at any time in her various interviews or in her evidence that she heard such a noise coming from the change room on the day in question, or that there was anything else to indicate that the change room was occupied when she entered the storage room.

The investigation conducted by the principal and the report he filed, coupled with the coincidental circumstances I have described, resulted in the matter being brought before the school board meeting in an atmosphere of suspicion and doubt about the credibility of the teacher's responses. However, on the evidence adduced in the hearing, that atmosphere of suspicion would have been dispelled if an investigation of the surrounding facts had been conducted prior to the November 28th meeting or, following that meeting, prior to the November 30th meeting when the decision to reject the explanation of the teacher was made.

IV

In concluding that the school board failed to prove that the teacher was looking into the change room, it was necessary for me to consider the authorities relating to the standard of proof required. The school board urged that the standard was proof on a balance of probabilities and that the nature of the disciplinary offence alleged did not require any higher degree of proof than is required in any allegation of misconduct.

In support of that proposition, the school board relied on the reasoning in *Re Board of School Trustees of School District No. 37 (Delta) and Gordon Hutton* (unreported), July 11, 1978 (Cumming). In that decision George Cumming Q.C., as he then was, concluded as follows on p. 8: "We are of the opinion that this [the dismissal of a teacher] is a civil matter and that civil standards should be applied and we have, accordingly, done so." There the question was whether the teacher had struck a student.

That reasoning does not support the contention that the civil standard does not involve varying degrees of proof, depending on

the fact at issue. The law is now clear, if it was ever in doubt, that the degree of proof required does vary. The onus upon the school board was to prove on a balance of probabilities that it had just cause to impose a seven-month suspension on the grievor: see *Re KVP Co. and Lumber & Sawmill Workers' Union, Loc. 2537* (1965), 16 L.A.C. 73 (Robinson), and the cases cited on pp. 96-7. On p. 96 the arbitrator wrote:

> [W]here the question arises whether or not the penalty was for just cause, the company must establish just cause not only for the imposition of a penalty but for the imposition of the particular penalty imposed.

The submission of the association was that the school board was required to prove the facts upon which it relied to a high degree of probability. In particular, the association said that the school board was required to produce clear and convincing evidence of the facts upon which it relies to establish just cause.

I agree with the submission of the school board that the standard governing this dispute is proof on a balance of probabilities. Further, I agree that proof on a balance of probabilities is a single standard. Finally, I am of the view that there are only two standards of proof in our legal system, being proof on a balance of probabilities and proof beyond a reasonable doubt. I do not agree that there is a third standard falling between the balance of probabilities and reasonable doubt tests: see *Re Normandy Hospital Ltd. and Hospital Employees' Union, Loc. 180* (1987), 32 L.A.C. (3d) 397 (Greyell) at pp. 400-4.

But that does not mean that proof on a balance of probabilities can be measured in any manner aloof from the nature of the facts at issue. The balance of probabilities test invokes a single standard, but the application of that standard must respond to the nature of the facts asserted. In particular, in the balance of probabilities test, disputed facts are weighed in the context of their inherent probability or likelihood and in the context of the gravity of the results of finding a disputed fact to have been proven. Placed in the context of the facts at issue in this dispute, the questions of probability raise an immediate question of whether it is likely or inherently probable that the grievor would commit the act alleged against him. Secondly, consideration must be given to whether the facts alleged were proven to the degree of probability required, having regard to the consequences for the grievor if the allegation against him is found to have been proven.

Those basic principles have been defined in a number of decisions of high authority. Perhaps the decision most frequently cited in arbitral jurisprudence is *Smith v. Smith*, [1952] 3 D.L.R.

449, [1952] 2 S.C.R. 312. In *Smith v. Smith* the court adopted the reasoning of Dixon J. in *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336, 12 A.L.J. 100, 44 A.L.R. 334 (Aust. H.C.). The following is a portion of the extract from that decision cited by Cartwright J. [at pp. 463-4]:

> "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency."

There have been numerous applications of that reasoning in the arbitral authorities. The principles require that an arbitrator approach disputed issues of fact involving allegations of criminal or immoral misconduct with a firm sense of the consequences of finding the allegations to have been proven and with a careful consideration of the inherent likelihood or probability that the allegation is true. The appropriate standard was addressed by Lord Denning in *Bater v. Bater*, [1951] P. 35, [1950] 2 All E.R. 458, 114 J.P. 416 (C.A.). The reasoning in that decision was adopted by the Supreme Court of Canada in *Hanes v. Wawanesa Mutual Ins. Co.* (1963), 36 D.L.R. (2d) 718, [1963] 1 C.C.C. 321, [1963] S.C.R. 154, and more recently in *Continental Ins. Co. v. Dalton Cartage Co.* (1982), 131 D.L.R. (3d) 559, [1982] 1 S.C.R. 164, 25 C.P.C. 72. That reasoning has been applied in numerous arbitration decisions. Most recently it was applied in *Normandy Hospital* on p. 404 where the following extract from *Bater v. Bater* appears:

> "It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability, within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

Numerous arbitrators have found the reasoning in those decisions to be singularly apt with respect to the issues raised in cases involving the discipline or dismissal of employees. Where there are consequences flowing from a finding that a disputed fact has been proven that go beyond the imposition of discipline or a dismissal, those factors must be included in the probability equation. Allegations amounting to criminal or sexual misconduct which impact upon the issue of employability generally and allegations made against a person's professional reputation which may affect that person's career have been viewed by arbitrators as constituting consequences that require proof of disputed facts to a high degree of probability: see *Re Chilliwack General Hospital and Hospital Employees' Union, Loc. 180* (1985), 18 L.A.C. (3d) 228 (Munroe) at pp. 238-9.

In that decision Mr. Munroe cited and relied on the decision of the Ontario Court of Appeal in *Re Glassman and Council of College of Physicians & Surgeons* (1966), 55 D.L.R. (2d) 674, [1966] 2 O.R. 81. In *Glassman and College of Physicians & Surgeons*, Laskin J.A., as he then was, wrote as follows on p. 699:

> A man's professional reputation, threatened by allegations of misconduct against which he pledges his credit as a witness, should be upheld unless there be very strong evidence shattering his defence of that reputation: See *R. v. Chapman* (1958), 121 C.C.C. 353 at p. 362, 29 C.R. 168 at p. 177, 26 W.W.R. 385; *Re Robb and Council of Dental Surgeons of B.C.* (1964), 46 D.L.R. (2d) 202.

That same reasoning was applied by the British Columbia Court of Appeal in *Brethour v. Law Society of B.C.*, [1951] 2 D.L.R. 138, 1 W.W.R. (N.S.) 34. On p. 141 O'Halloran J.A. wrote as follows:

> In my judgment a member of the Law Society ought not to be disbarred from practice so long as a reasonable probability remains that his side of the story may be true.

Allegations of impropriety made against teachers by their students are not uncommon and their vulnerability to such allegations requires that care be taken in any adjudicative process to ensure that the rights of the teacher are preserved with the same scrupulous care that the rights of students, parents and society generally are preserved. In that context, it is appropriate to require proof to a high degree of probability of any allegations made against the professional reputation of a teacher, bearing in mind not only the disciplinary consequences of finding such allegations to be true, but the implications in terms of professional reputation.

Finally, on the issue of the appropriate standards, I turn back to the concept of likelihood or inherent probability. In that context it is

generally conceded that the less likely a disputed fact is to be true, the higher the degree of probability that must be established in support of it. In *Smith v. Smith*, for example, the disputed facts related to an assertion that two parties had committed adultery. In the court below it had been concluded that such an allegation required proof beyond a reasonable doubt. The Supreme Court concluded that proof on a balance of probabilities was the appropriate standard but that proof to a high degree of probability was required because our law requires a presumption that it is unlikely that persons would act in breach of the law and in breach of moral standards.

The same reasoning was applied in *Brethour v. Law Society of B.C.* and *Glassman and College of Physicians & Surgeons*. That is, it was seen as inherently unlikely that professional persons would act contrary to the standards of their profession. Quite apart from the implication that those who subscribe to a code of professional conduct will act in accordance with that code, there is the pragmatic assumption that it is unlikely that persons will risk their professional standing and reputation by committing acts which will expose them to disciplinary action or expulsion.

The school board urged that there was no evidence to support the contention that finding that the act was committed would have a serious impact upon the grievor's career. It was submitted, for instance, that the grievor was not dismissed in response to the misconduct, but was only suspended. However, I am satisfied that a high school teacher who has been found to have been surreptitiously watching students change their clothing faces an impediment to career advancement and employability in other educational settings. Admittedly it is an act which has some moral ambivalence in the sense that it can provoke snickering as well as outrage. When the act is perpetrated by school boys, the issue becomes one of propriety. However, when such conduct is committed by a male teacher who has female students placed in his charge, the act must cause great concern as to its implications with respect to more serious and more deviant behaviour and with respect to the suitability of such a person to perform the role of a teacher.

I agree that issues such as rehabilitation, transfers to less sensitive teaching assignments and other factors which mitigate in favour of having the problem addressed and resolved, may be available to protect a teacher from loss of employment. But that is not the point. An allegation of voyeurism against a male teacher in a high school attended by young women must be seen as having grave implications in terms of the career of that teacher. The principal and other officials described the conduct as being in

breach of a "sacred trust" imposed on teachers by parents and the community. It was obvious that it was seen as serious misconduct and a finding against the teacher would carry grave consequences for him beyond the suspension. In summary, I am of the view that the allegation made in this case must be proven to a high degree of probability.

I turn now to the standard applicable to circumstantial evidence. I repeat my previous observation that the only evidence led to establish that the teacher was looking into the change room, being the evidence of the student, was circumstantial in the sense that it consisted of observations made from which the conclusion was drawn that the teacher was looking into the change room. In weighing that evidence, it is appropriate to exercise the caution that has been urged in both criminal and civil proceedings with respect to evidence that does not attest directly to the fact in issue. Much of the judicial reasoning with respect to circumstantial evidence has arisen in the context of the criminal law. The closest analogy to the circumstances in this case are those decisions relating to identification evidence which is circumstantial in the sense that it consists of observations made by a witness which gave rise to a conclusion as to the identification of a person.

Here the issue raised is not who the student saw, but what she saw. Nevertheless, the test is apt because the same issues with respect to weighing the circumstantial evidence arise. Where an entire case turns upon the accuracy of the observations of a single witness, the circumstances surrounding the matter are of critical importance. The following is an extract from Peter K. McWilliams, Q.C., *Canadian Criminal Evidence*, 2nd ed. (1984), p. 550:

> In Ontario, the Court of Appeal has adopted the rule founded in *The People v. Casey (No. 2)*, [1963] I.R. 33, that the jury should be told to bear in mind that there have been a number of instances in the past where witnesses, whose honesty was undisputed and whose opportunities for observation were adequate, made positive identifications which were subsequently shown to be wrong, and that juries should be warned to be especially cautious before accepting identification evidence, though they are at liberty to act upon it if after careful examination of it they feel satisfied beyond reasonable doubt as to its correctness.

A review of the governing principles and the importance of being able to assess critical evidence based upon the powers of observations of a single witness were discussed by the Alberta Court of Appeal in *R. v. Duhamel* (1980), 56 C.C.C. (2d) 46 at p. 53, [1981] 1 W.W.R. 22, 24 A.R. 215, where the court applied the circumstantial evidence rule in *R. v. Comba*, [1938] 3 D.L.R. 719, 70 C.C.C. 205, [1938] S.C.R. 396. On p. 55 the court cited the following passage from the decision of Ritchie J. in *United States*

of America v. Sheppard (1976), 70 D.L.R. (3d) 136, 30 C.C.C. (2d) 424, [1977] 2 S.C.R. 1067:

> "It is to be observed that there was no suggestion in the *Comba* case that any of the evidence called by the Crown was either tainted or unreliable. It came from witnesses whose integrity was at no time put in question and who testified as to a variety of circumstances which had excited enough suspicion against the accused to occasion his arrest and trial, but which taken together did not establish his guilt in accordance with the accepted standards of proof in such cases ..."

There it is made apparent that the factors relating to the opportunity the individual had to observe, including such factors as any impediment or distraction and any other objective fact that may cast doubt of the accuracy of the observation, must be taken into account. In those circumstances there is an affirmative obligation upon the party bearing the onus to establish the surrounding circumstances. That is not to say that the circumstantial evidence rule applies to issues that lie to be resolved on an application of the balance of probabilities standard. That rule was devised as a particular application of the reasonable doubt standard that governs in criminal proceedings. It has long since been determined that the rule does not apply in arbitral proceedings: see *Re Assn. of Radio & Television Employees and Canadian Broadcasting Corp.* (1968), 19 L.A.C. 295 (Christie).

However, in applying the balance of probabilities test, an arbitrator must consider the extent to which circumstantial evidence is consistent with the conclusion advanced. Where that conclusion is based upon an observation made in a split second, the question of consistency with the surrounding facts is of great importance, including the possibility of another conclusion inconsistent with the one advanced. Here the question is whether the school board met that test, recognizing that the only evidence led was the evidence of the student.

V

I agree with the approach taken by the school board members to the disputed issues of fact. That is, I agree that if I were to accept, as they did, that there were no cases of pop and no net bag containing basketballs present in the storage room on the day in question, that would be strong evidence that the teacher committed the act alleged. The absence of the pop and basketballs would deprive him of an explanation for his presence on the floor of the storage room. Further, it would establish that his explanation was false and would invite the conclusion that he was also lying about whether he was looking into the change room. However, for the reasons given, I concluded that there were cases of pop and basketballs present. I further concluded that his explanation for

his presence and his posture was consistent with the facts and had not been disproved by the school board.

a In terms of the onus on the parties, it should not be suggested that the onus was upon the teacher to prove that his explanation is true. For example, he was not obligated to prove that there were cases of pop and basketballs present. The onus of proof in a case such as this reposes upon the school board, including the onus of b proof with respect to the presence or absence of the pop and the basketballs. That is not to deny that in every adjudicative process there may come a time when the evidentiary burden, being the burden with respect to the proof of particular issues of fact, will shift. Hence, in an allegation of misconduct of the kind at issue in c this dispute, there may have come a stage when the weight of the evidence established *prima facie* that the teacher committed the act alleged unless he was in a position to meet the *prima facie* case with an adequate explanation. However, in this dispute the allegation by the student was not sufficient, of itself, to constitute a *prima facie* case against the teacher.

d As stated, the circumstances are analogous to criminal proceedings where proof of the act rests entirely upon the acuity and implications of the observations of a single witness. Here the question of whether the teacher committed the act alleged against him was subject to the acuity of the student's observations. A e finding that there was no pop or basketballs present was necessary to support the student's conclusion that the teacher was looking into the change room. That is, it was necessary to find that he was on his hands and knees before a bare change room door in a bare wall with no apparent explanation for his presence in order to f conclude that he must have been looking into the change room. The school board failed to prove that necessary fact.

Further, it was necessary for the student to describe a posture consistent with a person looking into the change room in order to sustain the conclusion that the teacher was so engaged when she g entered the room. The posture she did describe raised the possibility that the teacher was looking into the change room, but was not sufficient to overcome his denial in the absence of more compelling circumstances. In order for the student's observation to be consistent with a person looking through the grille, it would have been h necessary for her to describe someone in an exaggerated forward crouch with their eye in close proximity to the grille and their head bent at an awkward angle. Certainly the description of a person on hands and knees adjacent to the grille with their head six in. from it is not consistent with a person looking through the grille. Bearing in mind the principles that govern the weighing of circumstantial evidence, I again emphasize the fact that the

student had only a split second in which to make her observation. Further, the nature of the investigation that followed reinforced rather than challenged her conclusion that the teacher had been looking through the grille.

There is no intention in this award to criticize the student or the principal. Dealing first with the student, it was quite apparent that what she saw in the storage room aroused her suspicion and continued to cause her concern to the point were she felt compelled to speak. Obviously it would have been better if she had come forward earlier, but that is a matter of judgment and does not imply any lack of believability. The only circumstance in which she appears to have deliberately misled the investigation was when she told the principal that she had spoken with one friend when she left the storage room, when in fact she had spoken with three friends. In that circumstance she said that her concern was to avoid getting her friends involved. In short, she fell within the scope of the witness defined in *United States of America v. Sheppard* as a witness "whose integrity was at no time put in question and who testified as to a variety of circumstances which had excited enough suspicion" against the teacher to support an investigation into the circumstances. Thereafter she became caught up in the investigation and unfolding facts that tended to support rather than challenge her suspicions.

Turning to the principal, he appeared to view the issues from the start as involving a question of whether the student or the teacher was telling the truth and he obviously opted in favour of the student. In his questioning of the teacher he is recorded in the notes of the assistant superintendent as having pressed the teacher on three occasions with the observation that the student was sure of what she saw. That observation represented the persistent theme in his questioning. When confronted with the teacher's equally persistent denial, instead of pursuing the possibility of an error, the principal asked the teacher if there was some antipathy between him and the student which would explain why she would make up such a story. In short, he allowed his attention to be diverted from the possibility of an error to the question of which of the two participants was telling the truth.

The principal persisted in following the theme of whether the student had any reason not to tell the truth. In his report he emphasized in the context of the responses of the teacher, that the teacher, "could think of [no] reason why [the] student might make such an allegation if untrue". He repeated that same theme in other parts of his report. He wrote under "relevant information" that "Neither the father nor the student appear to be motivated by spite or malice. Both have stated that beyond this incident they have a high regard for the teacher. Further, neither appears to

consider the incident as gravely as we [the school authorities] do." Finally, he returned to that same theme in his summary and one of
a the five points he made was an observation that he had not been able to detect malice or vindictiveness in the student. He wrote as follows: "There is no apparent reason why the student would fabricate the details of this incident, and there is no detected attitude of malice or vindictiveness."

b On the issue of fabrication he formed the apparent conclusion that he would be able to detect any tendency on her part to be deceitful. Nowhere in his report did he contemplate the possibility of an error. I repeat, he recorded the student as saying in the first interview that there may have been another plausible explanation,
c but that potential was never pursued. In fact, her comment about another plausible explanation was not included in the report received by the board.

In his responses to the board he continued to express a belief in the truthfulness of the student. At one point he said in response to a question that, "I met [the student] on several occasions and there
d were no 'signals' that she was lying. She appears to regret the necessity of sharing the information." In that same session he underlined his belief in her honesty when he said that accompanying her verbal response to questions about the teacher's explanation was a "non-verbal response". When asked to particularize his
e comment, he said that the student had smiled. He repeated that observation in his evidence in this hearing and it was apparent that he felt that the fact that the student found the explanation amusing somehow strengthened her recollection of the event and, conversely, weakened the teacher's explanation.

f A further complication in the principal's approach to the investigation was his belief that the interests of all parties, including the teacher, require that he maintain strict confidentiality. On that basis, he did not pursue the objective facts relating to the teacher's explanation with other witnesses. The clear implication in his
g evidence was that he was motivated by a concern for confidentiality and an equal belief that the issue was one of credibility and was restricted to a question of whether the student or the teacher was telling the truth. It was apparent in his responses in cross-examination that he saw no real need to go beyond their accounts
h of what occurred.

It was an unfortunate approach in retrospect but it cannot be said that it was inspired by any *mala fides* or ill will. Just as the circumstances in the storage room aroused the suspicions of the student, they aroused a sense of outrage in the principal which dominated his approach to the issues. His demeanour in giving evidence, with respect to how he viewed an act of voyeurism in the circumstances underlined his sense of outrage and gave insight

into his investigative approach. However, while that explains the circumstances, it does not detract from the fact that the evidence failed to establish that the teacher was looking into the change room. Even if the evidence were capable of establishing *prima facie* that the teacher was looking into the change room, and I am of the view that the evidence did not meet that test, then the explanation offered by the teacher was consistent with the objective facts and was not disproved by the board.

The contemplation, first by the principal and then by the board, of whether the student appeared to be telling the truth and was therefore correct in her assertion that the teacher was looking into the change room ignored the possibility of honest mistake. It was a circumstance contemplated in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at p. 357, 4 W.W.R. (N.S.) 171 (B.C.C.A.). There O'Halloran J.A. said:

> Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

That observation is singularly apt in the facts before me. The evidence does not support the conclusion reached by the board. In fact, the evidence tends to support the explanation offered by the teacher. I am compelled to conclude that the student, although believable as a witness, was honestly mistaken about what she saw. In the result the grievance must be granted. The board is directed to reinstate the teacher and to compensate him for his lost wages and benefits. I will retain jurisdiction to assist the parties in the calculation of that amount if that becomes necessary.

Re Brass Craft Canada, Ltd. and Canadian Automobile Workers, Local 2168

[Indexed as: Brass Craft Canada, Ltd. and C.A.W., Loc. 2168, Re]

Ontario, E.E. Palmer, Q.C. November 2, 1990.

Benefits — Medical plans — Definitions — "Out-patient surgery" — Refers not only to hospital procedures but also procedures performed in non-institutional or clinic setting — Dental surgery performed in private clinic covered — Benefits improperly denied.

[See *Brown & Beatty*, 8:3320]

EMPLOYEE GRIEVANCE relating to medical benefits. Grievance allowed.

B. Rovers and others, for the union.
K. Wilson and others, for the employer.