Federal Court  Cour fédérale

Date: 20160122

Docket: T-819-15

Citation: 2016 FC 76

Ottawa, Ontario, January 22, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

JEAN CLAUDE BRETON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review concerns a decision of the Independent Chairperson, Mr. Romain [ICP or ICP Romain] of the Institutional Disciplinary Court at Collins Bay Institution, where, the ICP sentenced the applicant to seven days of segregation upon accepting a plea of guilty to threatening to assault a correctional officer in breach of paragraph 40(h) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA].

[2] The applicant seeks judicial review on the grounds that the ICP fostered a bias against duty counsel, appearing for the applicant, thereby compromising the ICP's ability to preside over the applicant's case in a fair manner. Additionally, the applicant argues that the proceeding was unfair and that the ultimate sanction imposed was unreasonable based on the evidence and circumstances before the ICP.

[3] I am of the opinion, albeit with some reservations, that the applicant has not established an actual or reasonable apprehension of bias that would warrant the intervention of this Court. However, I am of the opinion that the ICP erred in determining the sanction to be imposed and as a result the application for judicial review is allowed.

I. Background

[4] The applicant is serving a five year sentence at the Collins Bay Institution for robbery, aggravated assault, possession of dangerous weapons, accessory after the fact and failure to comply with a probation order.

[5] In December of 2014, while at the Millhaven Institution, the applicant admits to having made statements and acted in a manner that could be viewed as a threat to a corrections officer. The applicant was charged with the disciplinary offence of "fights with, assaults or threatens to assault another person" [the Disciplinary Charge] under paragraph 40(h) of the CCRA. The applicant also faces charges under the *Criminal Code*, RSC 1985, c C-46 arising out of the same incident.

[6] As a result of the alleged threats, the applicant was placed in administrative segregation in Millhaven Institution for a period of fifty (50) days. He was subsequently transferred to Collins Bay Institution.

[7] It was at Collins Bay Institution, on April 22, 2015, where the applicant appeared before ICP Romain, represented by duty counsel, Ms. Kingston, to answer to the Disciplinary Charge against him. Just prior to the commencement of the hearing it was agreed between the applicant, duty counsel and the Court Advisor for the Institutional Disciplinary Court at Collins Bay Institution and Correctional Manager with Correctional Service of Canada (CSC), Elliott Gray, that the applicant would plead guilty to the Disciplinary Charge and a joint submission would be advanced regarding the sanction to be imposed. The joint submission recommended that the applicant be given credit for thirty (30) days of time served in segregation (the maximum length of disciplinary segregation that can be awarded under the CCRA). In other words the joint submission recommended no further punishment; presumably in recognition of the fifty (50) days of segregation the applicant had previously served as a result of the incident that led to the Disciplinary Charge.

[8] At the commencement of the Disciplinary hearing there was an issue with the disclosure of material relevant to the Disciplinary Charge. A request for an adjournment to allow the applicant to receive and review the material in question was denied by the ICP, however a request by Ms. Kingston to consult with the applicant outside the hearing room was granted. The previously non-disclosed material remained in the hearing room in accordance with the ICP's practice of not allowing charging documents to be removed.

[9] On returning to the hearing room the applicant plead guilty to the Disciplinary Charge. The applicant, through Ms. Kingston, then called into question the accuracy of the facts as set out in the Disciplinary Charge. The applicant sought to have a reference to uttering a death threat removed for the purpose of the guilty plea. The ICP refused to amend the particulars of the charge without the consent of the charging officer involved and the Institution. Consent was not provided by the charging officer.

[10] As a result of the applicant's concern with the accuracy of the facts as set out in the Disciplinary Charge the ICP again granted a request by Ms. Kingston to consult with the applicant. After this consultation the applicant confirmed his intent to plead guilty to the Disciplinary Charge as drafted. The ICP accepted the plea of guilt and convicted the applicant.

[11] The ICP subsequently rejected the joint submission on the appropriate sanction and imposed seven days of disciplinary segregation on the applicant.

II. Impugned Decision

[12] In addressing the appropriate sanction, the ICP recognized that he had been provided a joint submission but also noted that he was not bound by the joint submission. He further noted that there was a need to take into consideration the safety and security of the Institutional staff and that this was not the applicant's first offence involving threats to staff members. In reaching a decision on sentence the ICP noted that: (1) the charge was very serious; (2) the sentence had to be fitting and appropriate; (3) although the applicant had already spent time in segregation that was not a punishment levied by the court; (4) the court had to levy its own sanction based on the

facts before it; and (5) the punishment of five days segregation imposed on the applicant for the first incident had not seemed to have deterred the applicant.

[13] The ICP imposed a further seven (7) days of segregation which he described as the "minimum end as far as [he was] concerned."

III. Incidents that Gave Rise to Bias Allegations

[14] The bias allegations advanced by the applicant arise as the result of a conflict between the ICP and duty counsel, Ms. Kingston. The conflict arose from two complaints that Ms. Kingston initiated with the Deputy Warden in February and March 2015. Ms. Kingston initiated the February, 2015 complaint alleging that in that month she had been subjected to sexual harassment as a result of ICP Romain perusing a copy of Maxim magazine while in the court and in her presence. Scott Doering, Court Advisor at Collins Bay Institution from 2006 to 2015 and current Coordinator of Correctional Operations at Collins Bay Institution, who was present during the February, 2015 incident, was instructed to speak with ICP Romain and Ms. Kingston regarding the complaint.

[15] Ms. Kingston stated she was dissatisfied with the Institutional response to her complaint.

[16] ICP Romain became aware that Ms. Kingston had initiated the February, 2015 complaint.

[17] In response to Ms. Kingston's February, 2015 complaint ICP Romain placed a Maxim magazine cover over a men's fashion magazine which he then displayed in the hearing room in Ms. Kingston's presence in March, 2015. This act led to Ms. Kingston bringing her March, 2015 complaint to the Deputy Warden. ICP Romain acknowledged his actions in correspondence, but explained this behaviour as an attempt "to teach her that "one cannot judge a book by its cover"". However, according to Ms. Kingston's affidavit, the Deputy Warden advised there was nothing she could do about the presence of the Maxim magazine in the courtroom because anyone could buy the magazine in the store. Mr. Doering stated in his affidavit that Ms. Kingston declined to participate in a discussion with ICP Romain to achieve an informal resolution. Mr. Doering also noted in his affidavit that the magazine is not pornography.

[18] It appears this was the end of the Institution's pursuit of her complaints.

[19] ICP Romain then sent a series of four letters to Legal Aid Ontario between March 11, 2015 and March 25, 2015 reporting "great difficulty" with Ms. Kingston, setting out the circumstances around her complaints to the Deputy Warden, and raising a variety of concerns with respect to her conduct and behaviour. In this correspondence, ICP Romain repeatedly requests that Ms. Kingston no longer be assigned as duty counsel for the Disciplinary Court at Collins Bay Institution.

[20] In addition to the delivery of the four letters to Legal Aid Ontario, ICP Romain also prepared a memorandum that he intended to distribute to all officers at Collins Bay Institution. This memorandum addressed the incidents that led to Ms. Kingston's complaints to the Deputy

Warden and commented on Ms. Kingston's conduct in the role of duty counsel. Specifically the letter alleges that Ms. Kingston constantly touched inmates inappropriately, used foul language in off the record conversations, and that she appeared before the court inappropriately attired on three occasions. Officials within Collins Bay Institution refused to allow ICP Romain to distribute this letter but he did attach it to his March 16, 2015 letter to the Area Director of Legal Aid Ontario.

[21] Ms. Kingston responded to all of the allegations contained in ICP Romain's various letters and the memorandum prepared for internal distribution within Collins Bay Institution, in a single letter to Legal Aid Ontario dated April 10, 2015.

[22] On April 22, 2015 Ms. Kingston appeared before ICP Romain in her capacity as duty counsel. All three matters involved joint submissions on sentencing, all of which ICP Romain chose not to follow. The final of these three submissions involved the applicant. It is against this backdrop that the applicant advances the bias argument.

IV. Relevant Legislation

[23] Sections 38 – 44 of the CCRA establish an inmate disciplinary regime within the federal corrections system that is intended to encourage inmate conduct that promotes good order within federal penitentiaries and contributes to inmate rehabilitation and reintegration into the community. The relevant portions of the legislation and regulations are reproduced in Appendix "A" at the end of this Judgment and Reasons.

V. Applicant's Submissions

[24] The applicant submits that there is a duty to act fairly in the prison disciplinary context and that fairness in turn requires that the applicant be made aware of the allegations and evidence against him. The applicant further submits that disciplinary court proceedings under the CCRA are subject to section 7 of the *Charter* and are therefore to be conducted in accordance with principles of fundamental justice (*Hanna v Mission Institution),* [1995] FCJ No 1370 at para 36, 102 FTR 275 (TD).

[25] The applicant argues that the ICP's failure to adjourn the hearing to allow disclosure, or at a minimum afford the applicant and his duty counsel the opportunity to review the non-disclosed material privately amounted to a breach of fairness and was fundamentally unjust. Similarly, it is argued that the applicant was placed in the position of having to choose between an unfair trial, or pleading guilty to things he did not do in hopes of receiving a time served sentence. Placing the applicant in this position was not only fundamentally unjust but prevented the applicant from exercising his right to a reasonable opportunity to retain and instruct counsel as provided for at subsection 31(2) of the CCRA.

[26] The applicant submits that had he been given an opportunity to review the non-disclosed material he would have realized that the documents generated at the time of his alleged offence did not indicate that he had threatened death as alleged in the particulars of the Disciplinary Charge. This would have likely changed his position on the plea of guilty resulting in a different decision.

[27] The applicant further submits he could not receive a fair trial before ICP Romain due the animosity that existed between the ICP and the duty counsel representing him, Ms. Kingston. The applicant relies on ICP Romain's failure to accept previous joint submissions involving Ms. Kingston on the day of his hearing as further evidence of the inevitable unfairness that would occur in his hearing before ICP Romain where Ms. Kingston acted as duty counsel.

VI. Respondent's Submissions

[28] The respondent submits that the ICP was not bound to adopt the joint submission and that the decision to impose seven (7) days of segregation was reasonable on the grounds that it was a transparent, justifiable and intelligible decision.

[29] The respondent notes that the recommendation of the parties was only one factor to be considered by the ICP, who also was required to consider the seriousness of the offence and all relevant aggravating and mitigating circumstances (*Swift v Canada (Attorney General)*, 2014 FC 1143 at para 80 [*Swift*]). The ICP explained why he rejected the joint submission, concluding the punishment proposed was unduly light and failed to adequately reflect the applicant's history of threatening guards.

[30] With respect to issues of disclosure, the respondent argues that the applicant raised concerns but subsequently chose to proceed by way of guilty plea thereby waiving any procedural rights he may have had in this regard.

[31] In regard to the alleged bias, the respondent argues the applicant had an obligation to raise the issue at the first possible opportunity if there was a belief that ICP Romain was biased against him and his counsel. The respondent relies on the Federal Court of Appeal's decision in *Bassila v Canada*, 2003 FCA 276 at para 10, 124 ACWS (3d) 833 [*Bassila*] to argue that in failing to do so the applicant waived his right to now allege bias on the part of ICP Romain.

[32] The respondent concludes by arguing the decision is reasonable and nothing suggests bias played a role in the ICP's decision other than the bald allegation set out in the applicant's material. The respondent points the Court to Mr. Doering's affidavit wherein he reported he saw ICP Romain accept and reject joint submissions, that he takes the same approach with all counsel and ensures the proposed sentences are appropriate based on the severity of the offences, number of offences, past infractions and submissions from counsel.

VII. Issues

[33] The following issues are raised in this application:

1) Did the ICP deny the applicant a fair hearing by failing to provide him with an adjournment in order to remedy the disclosure issue;
2) Did the ICP foster bias against Ms. Kingston thus compromising his ability to preside over the applicant's case in a fair manner; and
3) Was the sentencing decision of the ICP reasonable?

VIII. Standard of Review

[34] The parties submit, and I agree that the reasonableness standard of review applies to the ICP's assessment of the applicant's guilt and the sentencing decision which engage questions of fact and mixed fact and law (*Angou v Canada (Attorney General)*, 2006 FC 1462 at para 11, 304 FTR 253; *Swift* at para 33). The correctness standard applies to the procedural fairness issues including bias (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 43)

IX. Analysis

A. *Procedural Fairness in Disciplinary Proceedings*

[35] Before addressing the issues it will be useful to briefly consider the law governing prison discipline.

[36] In *Terreault v Cowansville Penitentiary*, 2003 FC 1529, 250 FTR 207 [*Terreault*], Mr. Justice Edmond Blanchard sets out the rules governing prison discipline at paragraph 13 of that decision:

> 13 According to the respondents, the rules governing prison discipline are clearly explained in *Hendrickson v. Kent Institution*, [1990] F.C.J. No. 19 (T.D.) on line: QL:
>
> > The principles governing the penitentiary discipline are to be found in Martineau No. 1 (*supra*) and No. 2 [Footnote: [1979] 50 CCC (2nd) 353 (SCC)]; Re Blanchard and Disciplinary Board of Millhaven Institution [Footnote: [1982] 69 CCC (2d) 171]; Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution [Footnote: [1985] 19 CCC (3d) 195], and may be summarized as follows:

1. A hearing conducted by an independent chairperson of the disciplinary court of an institution is an administrative proceeding and is neither judicial nor quasi-judicial in character.

2. Except to the extent there are statutory provisions or regulations having the force of law to the contrary, there is no requirement to conform to any particular procedure or to abide by the rules of evidence generally applicable to judicial or quasi-judicial tribunals or adversary proceedings.

3. There is an overall duty to act fairly by ensuring that the inquiry is carried out in a fair manner and with due regard to natural justice. **The duty to act fairly in a disciplinary court hearing requires that the person be aware of what the allegations are, the evidence and the nature of the evidence against him and be afforded a reasonable opportunity to respond to the evidence and to give his version of the matter** [emphasis added].

4. The hearing is not to be conducted as an adversary proceeding but as an inquisitorial one and there is no duty on the person responsible for conducting the hearing to explore every conceivable defence, although there is a duty to conduct a full and fair inquiry or, in other words, examine both sides of the question.

5. It is not up to this Court to review the evidence as a court might do in a case of a judicial tribunal or a review of a decision of a quasi-judicial tribunal, but merely to consider whether there has in fact been a breach of the general duty to act fairly.

6. The judicial discretion in relation with disciplinary matters must be exercised sparingly and a remedy ought to be granted "only in cases of serious injustice" (Martineau No. 2, p. 360). [My emphasis.]

B. *Issue 1 – Denial of Adjournment*

[37] The affidavit of Mr. Elliott Gray refers to "the documents from his [the applicant's] segregation placement as a result of the incident". These appear to be the documents that were not disclosed to the applicant however the documents do not form part of the record before this Court.

[38] The applicant demonstrates in his Memorandum of Fact and Law that there is a discrepancy between the information contained in the Charge Sheet and the information in Mr. Gray's affidavit, which relies on the segregation placement documents that the applicant did not receive prior to the Disciplinary Hearing. The segregation placement documents, according to the affidavit of Mr. Gray, do not indicate that the applicant threatened death as is alleged in the Charge Sheet. The failure of the parties to include the documentation underpinning the irregular disclosure has unfortunately deprived this Court of the ability to determine the nature of the discrepancy between the segregation placement documents and the Charge Sheet.

[39] However, I am satisfied that despite the lack of complete disclosure in advance of the Disciplinary hearing, evidence on the record establishes that the applicant was aware of the case to be met. Ms. Kingston states in her affidavit that:

> Prior to the commencement of the trial, the **Applicant and I reviewed the charge sheet and reports in Mr. Gray's presence and had off-the record discussions with Mr. Gray** [emphasis added]. A joint submission of credit for 30 days time served in segregation on a guilty plea was agreed upon. Again, Mr. Romain ignored the joint submission and imposed a further seven days in segregation.

[40] While the applicant argues at paragraph 31 in his Memorandum of Fact and Law that "the disclosure that the applicant was not permitted to view would likely have changed his position on pleading", there is no evidence to this effect in either the applicant's affidavit in the affidavit of Ms. Kingston or in any other document in the record before this Court.

[41] The duty to act fairly in disciplinary proceedings under the CCRA requires that the person be aware of what the allegations are, the evidence and the nature of the evidence against the individual and that the individual be afforded a reasonable opportunity to respond to the evidence and give his/her version of the matter (*Terreault* at para 13). It has also been held in the jurisprudence that an ICP has the discretion to order or deny an adjournment and the Court will only grant a remedy in the case of a denial where irreparable harm has resulted (*Goulet v Canada (Correctional Service)*, [1996] FCJ No 1307 at paras 19-20, 121 FTR 54 (TD)).

[42] In this case I am of the view that while disclosure occurred very late in the process: it did occur just prior to the hearing, as reflected in Ms. Kingston's affidavit. As such, I am satisfied that the applicant had at least the opportunity to become aware of the discrepancy between the Charge Sheet and the segregation placement documents. I further note that although the ICP denied the adjournment request, he did grant the applicant's request to have an opportunity to consult with duty counsel after being made aware of the disclosure issue. It was after this consultation that the applicant pleaded guilty to the Disciplinary Charge.

[43] I am therefore not persuaded that the ICP, in exercising his discretion to deny the request to adjourn the proceeding to another day, caused the applicant irreparable harm. As such I am of the view there was no breach of procedural fairness.

[44] In the alternative, I agree with the respondent, that the applicant waived issues regarding the improper disclosure when he elected to proceed with a guilty plea and sentencing as a result.

C. *Issue 2 – Bias*

[45] The test for bias was recently restated by Justice Abella on behalf of a unanimous Supreme Court of Canada in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General),* [2015] 2 SCR 282 [*Yukon*]:

> 20 The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:
>
> > ... what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted; *Committee for Justice and Liberty v. National Energy Board*, [1978 1 S.C.R. 369] , at p. 394, per de Grandpré J. (dissenting)]
>
> […]
>
> 26 The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias**,** as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias**:** see *Wewaykum*, at para. 77; *S. (R.D.),* at para. 114, per Cory J. As Cory J. observed in *S. (R.D.)*:
>
> > ... allegations of perceived judicial bias will generally not succeed unless the impugned

> conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. [Emphasis added; para. 141.]

[46] The *Yukon* decision was considered by Justice Russel Zinn in *Ali v Canada (Minister of Citizenship and Immigration)*, 2015 FC 814 where he emphasizes at paragraph 23 the necessity of considering the conduct of the entire proceeding: "The jurisprudence is clear that when considering whether there is a reasonable apprehension of bias, the conduct of the entire proceeding must be examined in a careful and thorough manner. The record must be considered in its entirety to ascertain whether the cumulative effect of any transgressions or improprieties lead to the apprehension of bias."

[47] In examining the circumstances in this case, it is clear that there was an ongoing conflict between ICP Romain and duty counsel, Ms. Kingston. This conflict primarily related to ICP Romain's possession of a Maxim magazine in the hearing room which Ms. Kingston found offensive and led to Ms. Kingston's complaint to Institutional authorities.

[48] ICP Romain further aggravated the situation by possessing a copy of the Maxim magazine cover in the hearing room on a second occasion.

[49] The applicant relies on evidence relating to this conflict to establish bias. In addition, the applicant also referred the Court to *Romain v Ontario (Lieutenant Governor)*, [2005] OJ No

3721, 258 DLR (4th) 567 (Div Ct) to submit that ICP Romain has previously engaged in egregious conduct when functioning in the capacity of a Justice of the Peace many years ago. I have reviewed the applicant's submissions in this regard but do not find the conduct of ICP Romain when acting in the capacity of a Justice of the Peace many years ago to be of relevance in addressing the question of bias that has been raised in the context of this application.

[50] In advancing an allegation of bias, the party alleging bias must overcome a presumption of impartiality. That presumption is not easily displaced, placing a high burden on the alleging party (*Yukon* paras 25 and 26).

[51] In this case the applicant established a significant and unresolved conflict as between ICP Romain and Ms. Kingston. However, this conflict cannot be considered in isolation. It is also necessary to consider what occurred at the hearing and the actions of the applicant and Ms. Kingston in light of the allegation of bias that is now being advanced.

[52] The transcript of the hearing demonstrates that ICP Romain was professional and courteous in addressing the issues before him. He did not summarily dismiss the joint submission on punishment but rather considered the submission and advanced his reasoning for choosing to depart from the joint submission. The transcript also reveals that Ms. Kingston did not, at any point in the course of the hearing, raise bias as a concern. Similarly there is no evidence to indicate that she identified this as a concern in her consultations with the applicant. As noted by the Federal Court of Appeal in *Bassila* at paragraph 10, "a party who believes a presiding judge has created a reasonable apprehension of bias must make that position known at the first

opportunity. One cannot secretly nurse a reasonable apprehension of bias for the purpose of raising it in the event of an adverse result."

[53] The evidence of the respondent's affiants, Mr. Doering and Mr. Gray, was to the effect that ICP Romain's approach to the joint submission was fully consistent with the manner he approached these submissions in other cases. Their evidence is to the effect that ICP Romain generally ensured joint submissions were appropriate in the context of the offence before him, rejecting the submissions when necessary and imposing increased or decreased penalties as appropriate. They conclude that ICP Romain's approach in the applicant's case was consistent with his approach in other cases and with other counsel before him.

[54] I am certainly troubled by the ICP's conduct in response to Ms. Kingston's complaint. His behaviour as reflected in the record was in my view both unbecoming and reflects poor judgment by someone fulfilling the role ICP Romain has been entrusted with within the CCRA disciplinary system. However, despite my significant discomfort with ICP Romain's behaviour in response to Ms. Kingston's complaint, I am not satisfied that the applicant has met the high burden of establishing that a reasonable, fully informed bystander would conclude that ICP Romain was biased (*Bassila* at para 9).

D. *Issue 3 – Reasonableness of the Decision*

[55] After reviewing the transcript of the hearing, I am of the view that the ICP: (1) improperly fettered his discretion; and (2) failed to consider all measures taken by the CSC in

connection with the offence and before the disposition of the disciplinary charge as required by subsection 34(f) of the CCRR.

(1) Improper Fettering of Discretion

[56] In determining that the joint submission would not be accepted and imposing a punishment of seven days of segregation the ICP states that: "Now he may have spent time in and obviously I agree that he spent time in segregation when the offense first committed **but that's still not a sanction that's levied by the court. The court has to levy it's own sanction based on the facts that it has before it and that's exactly what I have to do here, today**". [Emphasis added.]

[57] The ICP's statement indicates that he believes he is bound to impose an additional punishment in this case as opposed to recognizing the time in segregation already served. In this regard, I note that the fifty (50) days of segregation significantly exceeds the maximum period of thirty (30) days available as a disciplinary punishment under paragraph 44(1)(f) of the CCRR. In light of the administrative punishment already imposed and served, the ICP was under no obligation to levy an additional sanction having accepted the applicant's plea of guilt.

[58] The ICP's belief that he was required to impose an additional sanction is, in my opinion, a reviewable error.

(2) Failure to consider all measures taken in connection with the offence

[59] The record also indicates that the applicant was facing criminal charges for the same incident that formed the subject matter of the Disciplinary Charge. The initiation of criminal charges is, in my view, a measure taken by the CSC in connection with the offence that was before ICP Romain. Subsection 34(f) of the CCRR requires the ICP to consider all such measures before imposing a punishment:

34. Before imposing a sanction described in section 44 of the Act, the person conducting a hearing of a disciplinary offence shall consider	**34.** Avant d'infliger une peine visée à l'article 44 de la Loi, la personne qui tient l'audition disciplinaire doit tenir compte des facteurs suivants :
(f) any measures taken by the Service in connection with the offence before the disposition of the disciplinary charge;	f) toute mesure prise par le Service par rapport à cette infraction avant la décision relative à l'accusation;

[60] There is no evidence on the record to indicate criminal charges were considered by the ICP contrary to the obligation imposed by regulation.

(3) Conclusion

[61] I am of the opinion that the ICP's errors render the decision to impose seven (7) days of segregation as a punishment unreasonable. In reaching this result I am mindful that decisions in the CCRA disciplinary process are to be extended a significant degree of deference on judicial review. However, deference should not shield a decision from review where the decision maker has fettered his or her discretion or failed to comply with statutory provisions or regulations.

X. Costs

[62] In oral argument, the parties addressed the question of costs and agreed that while the successful party should be awarded costs, any reward should be nominal in light of the applicant's circumstances. Costs are to be awarded to the successful party in the amount of $100.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted, the decision is set aside. Costs in the amount of $100 are awarded to the applicant.

"Patrick Gleeson"

Judge

APPENDIX "A"

Corrections and Conditional Release Act, SC 1992, c 20:

38. The purpose of the disciplinary system established by sections 40 to 44 and the regulations is to encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community.	**38.** Le régime disciplinaire établi par les articles 40 à 44 et les règlements vise à encourager chez les détenus un comportement favorisant l'ordre et la bonne marche du pénitencier, tout en contribuant à leur réadaptation et à leur réinsertion sociale.
39. Inmates shall not be disciplined otherwise than in accordance with sections 40 to 44 and the regulations.	**39.** Seuls les articles 40 à 44 et les règlements sont à prendre en compte en matière de discipline.
40. An inmate commits a disciplinary offence who	**40.** Est coupable d'une infraction disciplinaire le détenu qui :
[…]	[…]
(h) fights with, assaults or threatens to assault another person;	h) se livre ou menace de se livrer à des voies de fait ou prend part à un combat;
[…]	[…]
41. (1) Where a staff member believes on reasonable grounds that an inmate has committed or is committing a disciplinary offence, the staff member shall take all reasonable steps to resolve the matter informally, where possible.	**41.** (1) L'agent qui croit, pour des motifs raisonnables, qu'un détenu commet ou a commis une infraction disciplinaire doit, si les circonstances le permettent, prendre toutes les me- sures utiles afin de régler la question de façon informelle.
(2) Where an informal resolution is not achieved, the	(2) À défaut de règlement

institutional head may, depending on the seriousness of the alleged conduct and any aggravating or mitigating factors, issue a charge of a minor disciplinary offence or a serious disciplinary offence.

informel, le directeur peut porter une accusation d'infraction disciplinaire mineure ou grave, selon la gravité de la faute et l'existence de circonstances atténuantes ou aggravantes.

42. An inmate charged with a disciplinary offence shall be given a written notice of the charge in accordance with the regulations, and the notice must state whether the charge is minor or serious.

42. Le détenu accusé se voit remettre, conformément aux règlements, un avis d'accusation qui mentionne s'il s'agit d'une infraction disciplinaire mineure ou grave.

43. (1) A charge of a disciplinary offence shall be dealt with in accordance with the prescribed procedure, including a hearing conducted in the prescribed manner.
(3) The person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question.

43. (1) L'accusation d'infraction disciplinaire est instruite conformément à la procédure réglementaire et doit notamment faire l'objet d'une audition conforme aux règlements.
(3) La personne chargée de l'audition ne peut prononcer la culpabilité que si elle est convaincue hors de tout doute raisonnable, sur la foi de la preuve présentée, que le détenu a bien commis l'infraction reprochée.

44. (1) An inmate who is found guilty of a disciplinary offence is liable, in accordance with the regulations made under paragraphs 96(i) and (j), to one or more of the following:
(a) a warning or reprimand;
(b) a loss of privileges;
(c) an order to make restitution, including in respect of any property that is damaged or destroyed as a result of the offence;
(d) a fine;
(e) performance of extra

44. (1) Le détenu déclaré coupable d'une infraction disciplinaire est, conformément aux règlements pris en vertu des alinéas 96i) et j), passible d'une ou de plusieurs des peines suivantes :
a) avertissement ou réprimande;
b) perte de privilèges;
c) ordre de restitution, notamment à l'égard de tout bien endommagé ou détruit du fait de la perpétration de l'infraction;

duties; and (f) in the case of a serious disciplinary offence, segregation from other inmates — with or without restrictions on visits with family, friends and other persons from outside the penitentiary — for a maximum of 30 days.	d) amende; e) travaux supplémentaires; f) isolement — avec ou sans restriction à l'égard des visites de la famille, des amis ou d'autres personnes de l'extérieur du pénitencier — pour un maximum de trente jours, dans le cas d'une infraction disciplinaire grave.

Corrections and Conditional Release Regulations, SOR/92-620 (CCRR):

25. (1) Notice of a charge of a disciplinary offence shall	**25.** (1) L'avis d'accusation d'infraction disciplinaire doit contenir les renseignements suivants :
(a) describe the conduct that is the subject of the charge, including the time, date and place of the alleged disciplinary offence, and contain a summary of the evidence to be presented in support of the charge at the hearing; and	a) un énoncé de la conduite qui fait l'objet de l'accusation, y compris la date, l'heure et le lieu de l'infraction disciplinaire reprochée, et un résumé des éléments de preuve à l'appui de l'accusation qui seront présentés à l'audition;
(b) state the time, date and place of the hearing.	b) les date, heure et lieu de l'audition.
(2) A notice referred to in subsection (1) shall be issued and delivered to the inmate who is the subject of the charge, by a staff member as soon as practicable.	(2) L'agent doit établir l'avis d'accusation disciplinaire visé au paragraphe (1) et le remettre au détenu aussitôt que possible.
31. (1) The person who conducts a hearing of a disciplinary offence shall give the inmate who is charged a reasonable opportunity at the hearing to	**31.** (1) Au cours de l'audition disciplinaire, la personne qui tient l'audition doit, dans des limites raisonnables, donner au détenu qui est accusé la possibilité :
(a) question witnesses through the person conducting the hearing, introduce evidence,	a) d'interroger des témoins par l'intermédiaire de la personne qui tient l'audition, de

call witnesses on the inmate's behalf and examine exhibits and documents to be considered in the taking of the decision; and

(b) make submissions during all phases of the hearing, including submissions respecting the appropriate sanction.

(2) The Service shall ensure that an inmate who is charged with a serious disciplinary offence is given a reasonable opportunity to retain and instruct legal counsel for the hearing, and that the inmate's legal counsel is permitted to participate in the proceedings to the same extent as an inmate pursuant to subsection (1).

34. Before imposing a sanction described in section 44 of the Act, the person conducting a hearing of a disciplinary offence shall consider
(a) the seriousness of the offence and the degree of responsibility the inmate bears for its commission;
(b) the least restrictive measure that would be appropriate in the circumstances;
(c) all relevant aggravating and mitigating circumstances, including the inmate's behaviour in the penitentiary;
(d) the sanctions that have been imposed on other inmates for similar disciplinary offences committed in similar

présenter des élé- ments de preuve, d'appeler des témoins en sa faveur et d'examiner les pièces et les documents qui vont être pris en considération pour arriver à la décision;

b) de présenter ses observations durant chaque phase de l'audition, y compris quant à la peine qui s'impose.

(2) Le Service doit veiller à ce que le détenu accusé d'une infraction disciplinaire grave ait, dans des limites raisonnables, la possibilité d'avoir recours à l'assistance d'un avocat et de lui donner des instructions en vue de l'audition disciplinaire et que cet avocat puisse prendre part aux procédures au même titre que le détenu selon le paragraphe (1).

34. Avant d'infliger une peine visée à l'article 44 de la Loi, la personne qui tient l'audition disciplinaire doit tenir compte des facteurs suivants :
a) la gravité de l'infraction disciplinaire et la part de responsabilité du détenu quant à sa perpétration;
b) ce qui constitue la mesure la moins restrictive possible dans les circonstances;
c) toutes les circonstances, atténuantes ou aggravantes, qui sont pertinentes, y compris la conduite du détenu au pénitencier;
d) les peines infligées à d'autres détenus pour des infractions disciplinaires

circumstances;
(e) the nature and duration of any other sanction described in section 44 of the Act that has been imposed on the inmate, to ensure that the combination of the sanctions is not excessive;
(f) any measures taken by the Service in connection with the offence before the disposition of the disciplinary charge; and
(g) any recommendations respecting the appropriate sanction made during the hearing.

semblables commises dans des circonstances semblables;
e) la nature et la durée de toute autre peine visée à l'article 44 de la Loi qui a été infligée au détenu, afin que l'ensemble des peines ne soit pas excessif;
f) toute mesure prise par le Service par rapport à cette infraction avant la décision relative à l'accusation;
g) toute recommandation présentée à l'audition quant à la peine qui s'impose.

40. (1) Subject to subsection (2), where an inmate is ordered to serve a period of segregation pursuant to paragraph 44(1)(f) of the Act while subject to a sanction of segregation for another serious disciplinary offence, the order shall specify whether the two periods of segregation are to be served concurrently or consecutively.
(2) Where the sanctions of segregation referred to in subsection (1) are to be served consecutively, the total period of segregation imposed by those sanctions shall not exceed 45 days.

40. (1) Sous réserve du paragraphe (2), la décision de mettre le détenu en isolement aux termes de l'alinéa 44(1)f) de la Loi alors qu'il purge déjà une peine d'isolement
pour une autre infraction disciplinaire grave doit préciser si les peines d'isolement doivent être purgées concurremment ou consécutivement.
(2) Lorsque les peines d'isolement visées au paragraphe
(1) doivent être purgées consécutivement, leur total ne peut pas dépasser 45 jours d'isolement.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-819-15
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PLACE OF HEARING:	OTTAWA, ONTARIO
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APPEARANCES:

Mr. John Dillon	FOR THE APPLICANT
Mr. Max Binnie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John Dillon Barrister and Solicitor Kingston, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT