T-350-96

BETWEEN:JACQUES MINEAU, inmate, currently incarcerated in the Port-Cartier penitentiary, situated on chemin de l'Aéroport, in Port-Cartier, Quebec,

Applicant,

AND:HUBERT BESNIER, in his capacity as chairperson of the disciplinary tribunal of the Port-Cartier penitentiary, situated on chemin de l'Aéroport, in Port-Cartier, Quebec,

-and-

ATTORNEY GENERAL OF CANADA,

Respondents.

O R D E R

DENAULT J.:

The application for *certiorari* is allowed and the decision of the chairperson of the disciplinary tribunal of the Port-Cartier penitentiary dated January 25, 1996, finding the applicant guilty and imposing a sentence of ten days of disciplinary segregation with loss of privileges, is set aside.

OTTAWA, April 16, 1997

PIERRE DENAULT
J.F.C.C.

Certified true translation

C. Delon, LL.L.

T-350-96

BETWEEN:JACQUES MINEAU, inmate, currently incarcerated in the Port-Cartier penitentiary, situated on chemin de l'Aéroport, in Port-Cartier, Quebec,

Applicant,

AND:HUBERT BESNIER, in his capacity as chairperson of the disciplinary tribunal of the Port-Cartier penitentiary, situated on chemin de l'Aéroport, in Port-Cartier, Quebec,

-and-

ATTORNEY GENERAL OF CANADA,

Respondents.

REASONS FOR ORDER

DENAULT J.:

The applicant is seeking a writ of *certiorari* to set aside a finding that he was guilty of a disciplinary offence made by the disciplinary tribunal of the Port-Cartier institution where he is an inmate.

The applicant was charged with having bootleg alcohol in his cell contrary to paragraph 40(*i*) of the *Corrections and Conditional Release Act*, R.S.C. 1985, c. C-44.6 (the Act). According to the affidavit of the chairperson of the disciplinary tribunal, the corrections officer, Mr. Savard, who was the only witness who testified at the hearing, identified the substance found in the applicant's cell as bootleg alcohol, based mainly on the texture and the odour given off by the product, his experience in this area and his personal knowledge of alcohol. It should be noted, on this point, that it is impossible to verify exactly what the witness said since the transcript of his testimony is not available; because of a recording error, only the comments of the chairperson in passing sentence are available.

The chairperson of the disciplinary tribunal, who was satisfied beyond a reasonable doubt that the applicant was guilty of the offence set out in paragraph 40(*i*) of the Act, that is, that he had had contraband in his possession, to wit, bootleg alcohol, sentenced him to ten days in disciplinary segregation with loss of privileges.

While the offence is defined in paragraph 40(*i*) of the Act, the procedure for dealing with the charge is set out in subsections 43(1) and (3). They read as follows:

40.An inmate commits a disciplinary offence who

...

possession of, or deals in, contraband;

...

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.

(2)...

(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.

Section 2 of the Act defines the following expressions:

contraband means

(*a*) an intoxicant,

...

intoxicant means

a substance that, if taken into the body, has the potential to impair or alter judgment, behaviour or the capacity to recognize reality or meet the ordinary demands of life, but does not include caffeine, nicotine or any authorized medication used in accordance with directions given by a staff member or a registered health care professional;

Commissioner's Directive No. 580 sets out the disciplinary measures that may be imposed on inmates, and includes the following provisions:

35.The rules of evidence in criminal matters do not apply in disciplinary hearings. Chairpersons may admit any evidence which they consider reasonable and trustworthy.

39.The chairperson shall decide if the evidence produced at the disciplinary hearing substantiates, beyond a reasonable doubt, each charge against the inmate.

Counsel for the applicant argued that he should have been acquitted, since there was no evidence whatsoever that he had been in possession of an intoxicant.

Counsel for the respondent argued that the decision to find the applicant guilty of the offence of being in possession of contraband, in this instance bootleg alcohol, was made properly and in compliance with the rules of natural justice and procedural fairness. She argued specifically that a court may admit testimony that is not expert evidence but that is nonetheless the opinion of a witness on a fundamental aspect of the case, the weight of that testimony being entirely a matter for the court trying the case. In support of her position, counsel cited the decision of the Supreme Court in *Graat v. The Queen*, [1982] 2 S.C.R. 819. In that case, in which the Court had to determine whether an individual's ability to drive was impaired by alcohol, both the Supreme Court and the trial judge believed the opinion evidence of two police officers who said that the individual's ability to drive was impaired by alcohol. Dickson J., speaking for the Court, wrote:

Nor is this a case for the exclusion of non-expert testimony because the matter calls for a specialist. It has long been accepted in our law that intoxication is not such an exceptional condition as would require a medical expert to diagnose it. An ordinary witness may give evidence of his opinion as to whether a person is

> drunk. This is not a matter where scientific, technical, or specialized testimony is necessary in order that the tribunal properly understands the relevant facts. Intoxication and impairment of driving ability are matters which the modern jury can intelligently resolve on the basis of common ordinary knowledge and experience. The guidance of an expert is unnecessary.

> If that be so it seems illogical to deny the court the help it could get from a witness' opinion as to the degree of intoxication, that is to say whether the person's ability to drive was impaired by alcohol. If non-expert evidence is excluded the defence may be seriously hampered. If an accused is to be denied the right to call persons who were in his company at the time to testify that in their opinion his ability to drive was by no means impaired, the cause of justice would suffer.

> Whether or not the evidence given by police or other non-expert witnesses is accepted is another matter. The weight of the evidence is entirely a matter for the judge or judge and jury. The value of opinion will depend on the view the court takes in all the circumstances.

Interesting though this Supreme Court decision may be, it cannot apply in this instance without being distinguished on several points. In this case, not only is the charge against the applicant not the same as in *Graat*, but the essential issue to be decided is also very different. In *Graat*, the Court had to decide whether a person's ability to drive was impaired by alcohol. In the case at bar, the Chairperson had to decide whether the applicant was in possession of contraband, to wit, an intoxicant, and more specifically, pursuant to the actual definition of that expression, a "substance that, if taken into the body, has the potential to impair or alter judgment, behaviour or the capacity to recognize reality or meet the ordinary demands of life".

It seems plain that this was not proved. It is not sufficient for an officer to testify as to the texture and the odour given off by the product in order to establish that the product had the potential to impair or alter judgment, behaviour or the capacity to recognize reality, and so on, on the part of the person in possession of it. The officer's experience in this area and personal knowledge of alcohol could not substitute for scientific, technical or specialized testimony, which would at least have indicated the level of alcohol in the container discovered in the applicant's cell.

Since the decision of the Chairperson of the disciplinary tribunal was vitiated by an error of law, the application for *certiorari* must be allowed. Accordingly, the decision of the Chairperson of the disciplinary tribunal of the Port-Cartier penitentiary dated January 25, 1996, finding the applicant guilty and imposing a sentence of ten days' disciplinary segregation with loss of privileges, is set aside.

OTTAWA, April 16, 1997

PIERRE DENAULT

J.F.C.C.

Certified true translation

C. Delon, LL.L.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO:	T-350-96
STYLE OF CAUSE:	JACQUES MINEAU and HUBERT BESNIER et al.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	APRIL 10, 1997
REASONS FOR JUDGMENT OF DENAULT J.	
DATED:	APRIL 16, 1997

APPEARANCES:

RENÉE MILLETTE	FOR THE APPLICANT
ROSEMARIE MILLAR	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

RENÉE MILLETTE MONTRÉAL, QUEBEC	FOR THE APPLICANT
GEORGE THOMSON DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE RESPONDENTS