Federal Court  Cour fédérale

Date: 20200309

Docket: T-2038-18

Citation: 2020 FC 352

Ottawa, Ontario, March 9, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

MARK ANDREW JOHNSTON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] In August 2018, the applicant was an inmate at Kent Institution in Agassiz, British Columbia, where he was serving a sentence of eight years and six months for four counts of fraud over $5000 and other offences. As a federal inmate who was complying with his correctional plan and participating in recommended programs, the applicant received payments from Correctional Service Canada [CSC] at a modest daily rate. These payments were deposited

into a trust account held by CSC on the applicant's behalf on a regular basis. The applicant then had access to the funds for various approved purposes while incarcerated. Any remaining funds would be provided to the applicant upon release.

[2] On August 16, 2018, CSC began withholding 100 percent of the applicant's inmate income because he had not paid a costs order from this Court in favour of the Attorney General of Canada [AGC] of almost $10,000. This continued until the applicant was released on March 14, 2019, to complete his sentence in the community.

[3] The applicant has applied under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, for judicial review of the decision to make these deductions from his inmate income. He contends that CSC had no legal authority to make the deductions to discharge the costs order and, even if CSC does have such legal authority, it was unreasonable to withhold 100 percent of his inmate income.

[4] For the reasons that follow, I am satisfied that the *Financial Administration Act*, RSC, 1985, c F-11 [*FAA*], gives CSC the legal authority to make deductions from an inmate's income to discharge a debt to the federal Crown, including one arising from a costs order. Further, while the matter is not entirely free of doubt on the record before me, I am prepared to accept that CSC acted pursuant to this authority when it made the deductions in question from the applicant's inmate income. However, it was unreasonable for CSC to withhold all of the applicant's income without considering the purpose and principles that govern CSC and without considering the

impact the deductions would have on the applicant. As a result, this application must be allowed.

[5] I will have more to say about the issue of remedy below.

II. BACKGROUND

[6] The applicant began serving his federal sentence in July 2013. After the intake process, he was placed at Bath Institution, a medium security penitentiary in Bath, Ontario. However, in March 2015, the applicant was transferred to the Segregation Unit in Millhaven Institution, a maximum security penitentiary which is also in Bath, Ontario, as a result of alleged misconduct. In December 2016, the applicant was recommended for an involuntary transfer from Millhaven to Kent Institution. The applicant was eventually transferred to Kent Institution on or about April 25, 2017.

[7] The applicant disagreed with this decision. Rather than exhausting the internal grievance process first, in May 2017 the applicant filed an application for judicial review in this Court (Court File No. T-751-17).

[8] The application for judicial review was supported by an affidavit from the applicant sworn on August 11, 2017, and filed on August 16, 2017. The applicant moved subsequently for leave to file a supplemental affidavit he had sworn on October 27, 2017. Soon after this motion was filed, it came to light that someone (allegedly the applicant) had altered or fabricated four of the exhibits attached to the supplemental affidavit. All four documents were on CSC letterhead.

As filed by the applicant, the documents included false information concerning anticipated response times for grievances the applicant had filed, including one the applicant had made concerning the transfer decision. The applicant intended to rely on this information to support the argument that he should not be required to exhaust the grievance process before proceeding with judicial review of the transfer decision because it would take unduly long to do so.

[9] The AGC moved for an order striking out the applicant's Notice of Application and dismissing the application for judicial review on the basis that the applicant had attempted to perpetrate a fraud on the Court by filing false or fabricated evidence. The AGC also sought enhanced costs on the motion because of the applicant's misconduct. In response, the applicant did not seriously contest the allegation that he had altered the exhibits in question.

[10] In an order dated January 10, 2018, Prothonotary Aylen allowed the AGC's motion and dismissed the application for judicial review as an abuse of process and because the applicant lacked clean hands. With respect to costs, Prothonotary Aylen concluded that the applicant's misconduct warranted a heightened award. She ordered costs in favour of the AGC fixed at $9962.32 (inclusive of taxes and disbursements).

[11] The applicant filed an appeal of this order but it was discontinued in March 2018.

[12] Meanwhile, the applicant continued to serve his sentence at Kent Institution.

[13] On July 17, 2018, a paralegal with the Legal Services Unit of CSC sent an email to the Chief of Finance at Kent Institution attaching Prothonotary Aylen's order and inquiring whether the applicant had paid the costs ordered against him. This inquiry was forwarded to others within the finance office, who were asked to look into the matter.

[14] On July 18, 2018, Grace Landrath, an official in the finance office to whom the paralegal's query had been forwarded, in turn forwarded the email chain to one of her colleagues with the request to "set this one up as a [*sic*] Accounts Receivable." Ms. Landrath did not provide any explanation or justification for making deductions from the applicant's inmate income apart from what was apparent from the email chain – namely, that there was an outstanding costs order against the applicant.

[15] After CSC confirmed that the applicant owed the money to the AGC as opposed to CSC, steps must have been taken to set up deductions from the applicant's inmate income because eventually they began on August 16, 2018. However, neither the Certified Tribunal Record nor an affidavit filed by the respondent on this application says anything about what those steps were, who else had input into the decision, or why the amount of the deduction was set at 100 percent of the applicant's inmate income. No other approval for making these deductions besides Ms. Landrath's July 18, 2018, email is found in the record on this application.

[16] There is no issue that the 100 percent reduction of the applicant's inmate income began on August 16, 2018, and continued until the applicant was released on March 14, 2019 – that is, for a total of seven months. There is no evidence of the total amount deducted from the

applicant's pay. However, the applicant's uncontested evidence is that after he lost all his inmate income, the only money he had access to was the "minimal" amounts his family sent him so that he could continue to contact them by telephone.

[17] The applicant contacted Ms. Landrath to seek clarification about why his earnings had been reduced to zero but he did not formally grieve this decision.

[18] The applicant commenced this application for judicial review in late November 2018, when he was still incarcerated at Kent Institution.

[19] In his Notice of Application, the applicant referred not only to deductions made from his inmate income but also to withdrawals directly from his inmate trust account. However, the applicant's affidavit in support of this application refers only to deductions from his inmate income and there is no other evidence in the record to suggest that CSC withdrew any funds from the applicant's trust account to discharge the costs order. As a result, I have proceeded on the basis that only the deductions from the applicant's inmate income are at issue here.

III. PRELIMINARY ISSUE

[20] The respondent's principal position is that this application should be dismissed because it is premature. More particularly, the respondent contends that the Court should not consider the application on its merits because the applicant failed to exhaust an effective alternative remedy – namely, the internal CSC grievance process – before seeking judicial review. The respondent

also submits that one consequence of the applicant's failure to grieve the decision first is that the record on this application for judicial review is incomplete.

[21] There is strong support for the respondent's submission that, as a general rule, this Court ought not to deal with a matter before any effective and reasonably available alternative remedies have been exhausted: see *Strickland v Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713, at paras 40-45 [*Strickland*]. The offender grievance process has often been recognized by this Court as an effective alternative remedy with respect to actions by CSC (although this is a case-by-case determination): see, for example, *Nome v Canada (Attorney General)*, 2016 FC 187 at paras 19-26 and the cases cited therein. However, I would not give effect to this principle in the present case, essentially for three reasons.

[22] First, while the record on this application for judicial review is very modest, this is not a reason to decline to decide the application on its merits.

[23] Pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106, when the applicant commenced this application he requested that CSC produce material relevant to the application that was in its possession. CSC responded by producing a record which was certified to contain "true copies of the documents regarding the decision made by the Warden of Kent Institution on or about November 24, 2018, involving the deduction of Mr. Johnston's allowances earned to pay court costs imposed by the Federal Court of Canada." The reference to a decision by the Warden on or about November 24, 2018, is puzzling given that the deductions began months earlier and because there is no record of a decision by the Warden on that or any other date.

Nevertheless, the respondent has presumably produced all relevant documents in the possession of CSC.

[24] The only record of the decision-making process that led to the deductions being made is the email chain described above. The respondent also provided an affidavit from Linda Saele, the Acting Assistant Warden Management Services of Kent Institution, affirmed on February 20, 2019. The affidavit provides some general background and context and identifies the legal authority under which CSC maintains the deductions were made. If the record supporting the original decision in July or August 2018 to deduct 100 percent of the applicant's income is thin (and it is), this is not because the applicant did not grieve that decision. It is because of how that decision was made in the first place. Moreover, and importantly, the state of the record does not prevent me from assessing the merits of the application for judicial review.

[25] Second, even if it is the case that the applicant should have filed an internal grievance before seeking judicial review in November 2018, it is far from clear that this is still an effective and available alternative remedy today. As noted above, the applicant was released from custody in March 2019. Given this material change in circumstances, the respondent should have provided evidence that the applicant still has access to the grievance process if it hoped to persuade the Court to dismiss the application on this basis as premature. None was provided.

[26] The affidavit from Ms. Saele describes CSC's grievance process. According to Ms. Saele, in the present case, that process would have begun with a request to the head of Kent Institution to reduce or waive the deductions that were being made from the applicant's

inmate income. If dissatisfied with the response to this request, the applicant could then have engaged the offender grievance process provided for by sections 90 and 91 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*] and sections 74 to 82 of the *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCRR*].

[27] As noted, however, Ms. Saele's affidavit was affirmed on February 20, 2019. This was before the applicant was released into the community. The affidavit is silent on what remedies under the *CCRA* or the *CCRR*, if any, are available to an offender who is no longer incarcerated. The respondent did not file any other evidence to address this question. If I were to dismiss this application for judicial review as premature and it then turned out that the applicant no longer had access to the remedy he would have had while incarcerated, this could leave him without any recourse at all – except perhaps to return to this Court. This is not a risk I am prepared to take nor would it be a sensible use of scarce resources.

[28] Third, the present application raises issues of importance beyond the applicant's own case. Prison inmates are a uniquely vulnerable group. They face many significant restrictions and disadvantages over and above the loss of liberty inherent in a sentence of incarceration. They also face real barriers to access to justice. On judicial review, courts exercise a "constitutional duty to ensure that public authorities do not overreach their lawful powers" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 29 [*Dunsmuir*]). In the present case, issues of broad importance have been raised and fully argued. The Court should not shirk its duty to ensure the lawfulness of decisions by CSC affecting federal inmates. The respondent has not suggested that this application for judicial review is moot. Deciding the

application on its merits will benefit the immediate parties by resolving the present dispute. It will also offer guidance for CSC and for other inmates besides the applicant should the same issues arise again in the future.

IV. STANDARD OF REVIEW

[29] The applicant submits that CSC's determination that it had the legal authority to make deductions from his inmate income to discharge the costs order should be reviewed on a correctness standard while the decision to reduce his inmate income by 100 percent should be reviewed on a reasonableness standard. The respondent contends that in all respects the decision should be reviewed on a reasonableness standard.

[30] Subsequent to the hearing of this matter, in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] the Supreme Court of Canada set out a revised framework for determining the standard of review with respect to the merits of an administrative decision. Reasonableness is the presumptive standard, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Vavilov* at para 10).

[31] Applying *Vavilov*, it is certainly arguable that there is no basis for derogating from the presumption that reasonableness is the applicable standard of review for all substantive aspects of CSC's decision, including the question of its legal authority to do what it did. However, it is not necessary to resolve this issue here. As I explain below, even on the more stringent correctness standard, I am satisfied that CSC had the legal authority to make deductions from the applicant's inmate income to discharge the costs order.

[32] With respect to the amount of the deductions, the parties agree, as do I, that the decision to deduct 100 percent of the applicant's inmate income should be reviewed on a reasonableness standard. That this is the appropriate standard is reinforced by the revised framework for selecting the standard of review in *Vavilov*.

[33] The majority in *Vavilov* also sought to clarify the proper application of the reasonableness standard (at para 143). The principles the majority emphasizes were drawn in large measure from prior jurisprudence, particularly *Dunsmuir*. Although, as already noted, the present application was argued prior to the release of *Vavilov*, the footing upon which the parties advanced their respective positions concerning the reasonableness of CSC's decision is consistent with the *Vavilov* framework. I have applied that framework in coming to the conclusion that CSC's decision to deduct 100 percent of the applicant's inmate income is unreasonable; however, the result would have been the same under the *Dunsmuir* framework.

[34] The exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). For this reason, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96). The legal constraints that bear on administrative decision-making – including the statutory scheme within which a decision is made – are of particular importance when assessing the reasonableness of a decision (*Vavilov* at paras 106 and 108).

[35] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). The burden is on the applicant to demonstrate that CSC's decision to deduct 100 percent of his inmate income to discharge the costs order is unreasonable. The applicant must establish that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100) or that the decision is "untenable in light of the relevant factual and legal constraints that bear on it" (*Vavilov* at para 101).

[36] One difficulty in the present case is that no reasons contemporaneous with the decision to begin making deductions from the applicant's inmate income were provided. The only explanation for the decision in the record is found in Ms. Saele's affidavit, which was of course given after the fact and in response to this application for judicial review. In her affidavit, Ms. Saele refers to section 155(1) of the *FAA*, sections 78(2) and 96 of the *CCRA*, sections 104.1(5) to (7) of the *CCRR*, and Commissioner's Directive 860 – Offender's Money, and then simply states: "In accordance with the above authorities, CSC began garnishing [*sic*] the Applicant's income on August 16, 2018." Ms. Saele does not offer any other explanation or justification for the decision to make deductions from the applicant's inmate income apart from the authorities she identifies. She does not address the decision to reduce the applicant's inmate income to zero at all.

[37] As the Court noted in *Vavilov*, "an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided" (at para 137). As will be discussed below, the source of CSC's legal authority to make deductions from the applicant's inmate income to discharge the costs order can be determined despite the absence of reasons for the initial decision to do so. However, the record in the present case does not shed any light on the critical question of why the deductions were made at 100 percent of the applicant's inmate income as opposed to some lower percentage, or not at all. Nevertheless, I "must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable" (*Vavilov* at para 138). The majority in *Vavilov* also made the following important observation: "But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape" (*ibid.*). The determinative question is whether the outcome – that is, whether withholding all of the applicant's inmate income because he had not paid the costs order – is tenable in light of the relevant legal constraints.

V. LEGISLATIVE FRAMEWORK

[38] Several interconnected legal constraints form the context for any decision to make deductions from a penitentiary inmate's income and the rate at which those deductions are made. Given their importance, it is appropriate to set them out in detail here.

[39] To begin with the purpose of the federal correctional system, section 3 of the *CCRA* describes this as follows:

Purpose of correctional system	**But du système correctionnel**
3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by **(a)** carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and **(b)** assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.	**3** Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

[40] CSC is the entity responsible for ensuring that the purpose of the correctional system is achieved by these means.

[41] Section 4 of the *CCRA* sets out a number of principles that guide CSC in achieving this purpose, including the following:

Principles that guide Service	**Principes de fonctionnement**
4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:	**4** Le Service est guidé, dans l'exécution du mandat visé à l'article 3, par les principes suivants :

…	…
(c.2) the Service ensures the effective delivery of programs to offenders, including correctional, educational, vocational training and volunteer programs, with a view to improving access to alternatives to custody in a penitentiary and to promoting rehabilitation;	**c.2)** il assure la prestation efficace des programmes offerts aux délinquants, notamment les programmes correctionnels et les programmes d'éducation, de formation professionnelle et de bénévolat, en vue d'améliorer l'accès aux solutions de rechange à la mise sous garde dans un pénitencier et de promouvoir la réadaptation;
(d) offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted;	**d)** le délinquant continue à jouir des droits reconnus à tout citoyen, sauf de ceux dont la suppression ou la restriction légitime est une conséquence nécessaire de la peine qui lui est infligée;
…	…
(h) offenders are expected to obey penitentiary rules and conditions governing temporary absences, work release, parole, statutory release and long-term supervision and to actively participate in meeting the objectives of their correctional plans, including by participating in programs designed to promote their rehabilitation and reintegration; and	**h)** il est attendu que les délinquants observent les règlements pénitentiaires et les conditions d'octroi des permissions de sortir, des placements à l'extérieur, des libérations conditionnelles ou d'office et des ordonnances de surveillance de longue durée et participent activement à la réalisation des objectifs énoncés dans leur plan correctionnel, notamment les programmes favorisant leur réadaptation et leur réinsertion sociale;
…	…

[42] Pursuant to section 15.1 of the *CCRA*, CSC develops a correctional plan for each offender in order to ensure that offenders receive the most effective programs to rehabilitate them and prepare them for reintegration into the community, on release, as a law-abiding citizen. Among other things, a correctional plan sets out objectives for the offender's participation in programs and objectives for "the meeting of their court-ordered obligations, including restitution to victims or child support."

[43] Section 78(1) of the *CCRA* deals specifically with payments to offenders. It provides as follows:

Payments to offenders	**Rétribution**
78 (1) For the purpose of **(a)** encouraging offenders to participate in programs provided by the Service, or **(b)** providing financial assistance to offenders to facilitate their reintegration into the community, the Commissioner may authorize payments to offenders at rates approved by the Treasury Board.	**78 (1)** Le commissaire peut autoriser la rétribution des délinquants, aux taux approuvés par le Conseil du Trésor, afin d'encourager leur participation aux programmes offerts par le Service ou de leur procurer une aide financière pour favoriser leur réinsertion sociale.

[44] Commissioner's Directive 730, which sets out the pay scales for federal inmates, echoes this language, stating that one of its purposes is to "encourage offenders to participate in program assignments which contribute to their rehabilitation and reintegration into the community and the protection of society."

[45] The present case concerns the withholding of payments to an offender to which he would otherwise be entitled. This is dealt with by additional provisions of the *CCRA*, the *CCRR* and another Commissioner's Directive.

[46] To begin with, section 78(2) of the *CCRA* permits deductions from payments authorized by the Commissioner under section 78(1) of the *CCRA* or from income from a prescribed source. (Section 104.1(1) of the *CCRR* explains what is meant by income from a prescribed source. This has no bearing on the present matter.)

[47] Section 78(2) of the *CCRA* provides as follows:

Deductions	**Retenues**
(2) Where an offender receives a payment referred to in subsection (1) or income from a prescribed source, the Service may	**(2)** Dans le cas où un délinquant reçoit la rétribution mentionnée au paragraphe (1) ou tire un revenu d'une source réglementaire, le Service peut :
(a) make deductions from that payment or income in accordance with regulations made under paragraph 96(z.2) and any Commissioner's Directive; and	**a)** effectuer des retenues en conformité avec les règlements d'application de l'alinéa 96z.2) et les directives du commissaire;
(b) require that the offender pay to Her Majesty in right of Canada, in accordance with regulations made pursuant to paragraph 96(z.2.*1*) and as set out in a Commissioner's Directive, an amount, not exceeding thirty per cent of the gross payment referred to in subsection (1) or gross	**b)** exiger du délinquant, conformément aux règlements d'application de l'alinéa 96z.2.*1*), qu'il verse à Sa Majesté du chef du Canada, selon ce qui est fixé par directive du commissaire, jusqu'à trente pour cent de ses rétribution et revenu bruts à titre de remboursement des

income, for reimbursement of the costs of the offender's food and accommodation incurred while the offender was receiving that income or payment, or for reimbursement of the costs of work-related clothing provided to the offender by the Service.	frais engagés pour son hébergement et sa nourriture pendant la période où il reçoit la rétribution ou tire le revenu ainsi que pour les vêtements de travail que lui fournit le Service.

[48] These provisions must be read in conjunction with associated regulations in the *CCRR*. In essence, paragraph 78(2)(a) of the *CCRA* provides for deductions from an inmate's income for certain purposes that are defined elsewhere while under paragraph 78(2)(b) an offender can be required to make payments to Her Majesty in right of Canada as reimbursement for certain costs incurred in connection with the offender's incarceration – specifically, the costs of food, accommodation and work-related clothing. The "purposes" referred to in paragraph 78(2)(a) as well as the manner in which funds are to be withheld or recovered from inmates are dealt with in the *CCRR*. Specifically, the reference in paragraph 78(2)(a) to "regulations made under paragraph 96(z.2)" of the *CCRA* is to regulations "prescribing the purposes for which deductions may be made pursuant to paragraph 78(2)(a) and prescribing the amount or maximum amount of any deduction, which regulations may authorize the Commissioner to fix the amount or maximum amount of any deduction by Commissioner's Directive" (see *CCRA* s 96(z.2)). Similarly, the reference in paragraph 78(2)(b) to "regulations made under paragraph 96(z.2.1)" is to regulations "providing for the means of collecting the amount referred to in paragraph 78(2)(b), whether by transferring to Her Majesty moneys held in trust accounts established pursuant to paragraph 96(q) or otherwise, and authorizing the Commissioner to fix, by

percentage or otherwise, that amount by Commissioner's Directive, and respecting the circumstances under which payment of that amount is not required" (see *CCRA* s 96(z.2.1).

[49] The relevant regulations made pursuant to these provisions are found in section 104.1 of the *CCRR*, under the heading "Deductions and Reimbursement for Food, Accommodation, Work-related Clothing and Access to Telephone Services." Only three are pertinent for present purposes.

[50] First, section 104.1(2) of the *CCRR* stipulates that deductions may be made under paragraph 78(2)(a) of the Act for the purpose of reimbursing Her Majesty in right of Canada for

(a) the costs of food, accommodation and work-related clothing provided to the offender by the Service; and

(b) the administrative costs associated with access to telephone services provided to the offender by the Service.

[51] Second, section 104.1(3) of the *CCRR* provides that these deductions shall be made before depositing the offender's earnings into the Inmate Trust Fund.

[52] Third, section 104.1(4) of the *CCRR* provides that the Commissioner "is authorized to fix, by Commissioner's Directive, the amount or maximum amount of any deduction made pursuant to paragraph 78(2)(a) of the Act or the maximum amount to be reimbursed, by percentage or otherwise, pursuant to paragraph 78(2)(b) of the Act."

[53] This brings us, finally, to the relevant Commissioner's Directive [CD] – namely, CD 860 – Offender's Money. CD 860 sets out three purposes it is meant to serve but only one is pertinent to this application, that is: "To encourage offenders to budget their money so they have funds for authorized expenditures and for their release."

[54] CD 860 sets out the respective responsibilities of the institutional head and the offender when it comes to an offender's money. According to the Directive, each offender is responsible for his or her personal budgeting to ensure the availability of funds for, among other things, personal expenses and property while incarcerated (e.g. telephone calls, canteen, personal hygiene), expenses while on release in the community, and "court ordered obligations."

[55] CD 860 contemplates inmates having two accounts held in trust on their behalf by CSC – a current account and a savings account. After any applicable deductions are made from an inmate's income (discussed below), as a general rule 90 percent of the net amount is to be deposited in the inmate's current account and the remaining 10 percent is to be deposited in the inmate's savings account. Offenders may deposit funds from other sources into their savings account (e.g. funds they bring with them on admission, pensions, gifts, and so on). Transfers from the savings account to the current account of up to $750 per year may be made (although under paragraph 30 of CD 860 the institutional head has the authority to authorize requests for transfers exceeding this annual amount for certain specified purposes, including "reimbursement for any indebtedness to the Crown, or reimbursement for court ordered obligations including restitution and child support").

[56] According to paragraph 29 of CD 860, the current account "may be used for any purchase that supports the Correctional Plan or for constructive and legitimate inmate activities."

[57] As contemplated in section 104.1(4) of the *CCRR*, CD 860 sets certain percentages of inmate income up to fixed maximum amounts for payments towards the cost of food and accommodation. The Directive also provides in paragraph 15 for reductions or waivers of food and accommodation deductions by the institutional head at an offender's request. The offender must satisfy the institutional head that the deduction in question "constitutes an undue interference pursuant to subsection 104.1(7) of the *CCRR*" to be granted a reduction or waiver of the deduction. This authority to reduce or waive deductions will be discussed further below.

[58] As well, paragraph 4 of CD 860 provides as follows:

> Deductions will be made from the offender's income before depositing his/her earnings in the Inmate Trust Fund. Deductions will be in the following order of priority:
>
> a) reimbursement for any indebtedness to the Federal Crown
>
> b) deductions for food and/or accommodation
>
> c) deductions for the administration of the inmate telephone system
>
> d) contributions to the Inmate Welfare Fund.

[59] It will be apparent from this list that CD 860 contemplates deductions from an offender's income for additional purposes besides those mentioned in the *CCRA* and the *CCRR*, as reviewed above. One of these is "reimbursement for any indebtedness to the Federal Crown." This, in turn, is defined in the Annex to CD 860 as including "court orders, Canada Revenue Agency

'request to pay', costs awards to the Federal Crown, and other monies owed to the Federal Crown." This is the kind of "reimbursement" at issue here.

[60] The applicant contends that CSC had no legal authority to make deductions from his inmate income to discharge the costs order, principally because this purpose is not mentioned in the *CCRA* or the *CCRR*. While I agree that this purpose is not mentioned in either the *CCRA* or the *CCRR*, I do not agree that CSC therefore lacked the legal authority to make a deduction from the applicant's inmate income for this purpose.

[61] CD 860 cites several statutory provisions as its legal foundation, including the provisions of the *CCRA* and the *CCRR* reviewed above. Paying a costs order in favour of the federal Crown is not mentioned anywhere in the provisions of the *CCRA* or the *CCRR* that are cited or anywhere else. However, CD 860 also cites several provisions of the *FAA*. Strangely, the ones that are noted do not appear to have anything to do with the matters dealt with in CD 860 while section 155 of the *FAA*, the specific provision of the Act that does address the use of deductions to discharge a debt to the federal Crown, is not mentioned. Despite this, I am satisfied that section 155 of the *FAA* does grant CSC the legal authority to make deductions from an inmate's income in accordance with CD 860 in order to discharge a debt to the federal Crown, including an outstanding costs order. As reflected in Ms. Saele's affidavit, CSC is of the same opinion.

[62] Section 155 of the *FAA* provides in part as follows:

Deduction and set-off	**Déduction et compensation**
155 (1) Where any person is indebted to	**155 (1)** Le ministre compétent responsable du recouvrement

(a) Her Majesty in right of Canada, or **(b)** Her Majesty in right of a province on account of taxes payable to any province, and an agreement exists between Canada and the province whereby Canada is authorized to collect the tax on behalf of the province, the appropriate Minister responsible for the recovery or collection of the amount of the indebtedness may authorize the retention of the amount of the indebtedness by way of deduction from or set-off against any sum of money that may be due or payable by Her Majesty in right of Canada to the person or the estate of that person.	d'une créance soit de Sa Majesté du chef du Canada, soit de Sa Majesté du chef d'une province s'il s'agit d'impôts provinciaux visés par une entente entre le Canada et la province en vertu de laquelle le Canada est autorisé à percevoir les impôts pour le compte de la province, peut autoriser, par voie de déduction ou de compensation, la retenue d'un montant égal à la créance sur toute somme due au débiteur ou à ses héritiers par Sa Majesté du chef du Canada.
…	…
Consent of other Minister	**Assentiment du ministre compétent**
(4) No amount may be retained under subsection (1) without the consent of the appropriate Minister under whose responsibility the payment of the sum of money due or payable referred to in that subsection would but for that subsection be made.	**(4)** La retenue d'argent prévue par le paragraphe (1) ne peut être effectuée sans l'assentiment du ministre compétent responsable, en l'absence de ce paragraphe, du paiement de la somme en cause.

[63] Under this provision, the Minister of Justice and Attorney General of Canada (the Minister responsible for the recovery of the debt in question here) may authorize the retention of funds otherwise payable to the applicant (i.e. his inmate income) to recover the applicant's debt

to the federal Crown provided that the Minister of Public Safety and Emergency Preparedness (the Minister under whose responsibility the inmate income would otherwise be payable to the applicant) consents. Thus, CSC correctly determined that it had the legal authority to make the deductions at issue here.

[64] One potential concern for present purposes is that none of the authorities reviewed above – least of all, section 155 of the *FAA* – is mentioned anywhere in the record of the original decision-making process. Moreover, there is no direct evidence that either Minister (or their delegates) expressly gave the necessary approvals for recovery from the applicant to be undertaken pursuant to section 155 of the *FAA*. Nevertheless, I am prepared to assume that the paralegal from the Legal Services Unit who initiated the recovery of the debt was in fact acting on authority delegated from the Minister of Justice and Attorney General of Canada to withhold funds owing to the applicant and that the officials in the finance office at Kent Institution who approved and set up the deductions from the applicant's inmate income were in fact acting on authority delegated from the Minister of Public Safety and Emergency Preparedness to consent to this arrangement. While this is sufficient to permit me to move on to what I see as the main issue in this case, I would add this. Even if it might not be necessary for either Minister to be involved personally in a matter such as this (a point on which I offer no opinion), given the importance of the interests engaged in decisions such as the one at issue here, in future one would hope to see, at the very least, more involvement by senior levels of management within the relevant departments than apparently occurred here, even at the first stage of the decision making.

[65] Whether it was reasonable to make the deductions that were actually made in this case given the legal constraints on the decision to do so is a different question. I turn to it now.

VI. ANALYSIS

[66] The central issue in this application can now be stated simply: Was it reasonable for CSC to deduct all of the applicant's inmate income to discharge the unpaid costs order? In my view, it was not. While I agree with the respondent that CD 860 together with the statutory and regulatory provisions reviewed above provide the legal authority to make deductions from a penitentiary inmate's income to discharge a costs order in favour of the federal Crown, I cannot agree that the deductions from the applicant's inmate income were made "in accordance" with these authorities, as Ms. Saele put it in her affidavit. On the contrary, I find that it is impossible to reconcile the outcome in this case with those authorities. In the absence of any explanation for the 100 percent deduction of the applicant's inmate income, I can only conclude that this outcome is untenable in light of the relevant legal constraints on CSC decision-making.

[67] Inmate income can play an important role in meeting the objectives of the correctional system. By providing an incentive to participate in the programs identified in an offender's correctional plan, it promotes the rehabilitation of offenders and their reintegration into the community as law-abiding citizens. Even learning a skill as basic as being able to budget one's money, including saving for release, can promote these objectives. Having access to funds while incarcerated to pay for such elementary things as canteen, telephone calls, and personal hygiene can also help to ensure that the conditions of incarceration meet at least a basic level of humaneness. On the other hand, achieving these goals can be impaired or even frustrated

entirely if inmate income is taken away. This is no doubt why, pursuant to the *CCRR*, in CD 860 the Commissioner has placed limits on the amount of inmate income that can be deducted for prescribed purposes. Even with respect to fines and restitution resulting from a CSC disciplinary process, the rate of payment is generally capped at 25 percent of the total income to be deposited in the inmate trust fund.

[68] Deductions for the purpose of discharging a debt to the federal Crown are not expressly subject to any such limits in CD 860. Nevertheless, the ultimate governing authority for CSC is the *CCRA*. To repeat, section 3 of that Act states that the purpose of the correctional system is to contribute to the maintenance of a just, peaceful and safe society by carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders and assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community. Given the direct connection between the payment of inmate income and achieving the purpose of the correctional system by the means identified, it is incumbent upon CSC to consider the potential consequences of deducting income from an inmate to discharge a debt to the federal Crown, notwithstanding the fact that CD 860 does not require this.

[69] CSC does not appear to dispute that the factors I have identified in the preceding paragraphs are relevant considerations when deciding whether to make deductions from an offender's inmate income and, if so, at what rate. However, as expressed in Ms. Saele's affidavit, CSC's position is that it is not incumbent upon CSC to consider these factors <u>before</u> beginning to make the deductions. Rather, it is up to an offender to raise them in a request to the

head of the institution where they are incarcerated for a reduction or waiver of the deduction and, if necessary, in a grievance of an adverse decision on such a request. Accordingly, in the present case, the respondent contends that the applicant could and should have made a request to the head of Kent Institution to reduce or waive the deductions that were being made from his inmate income. If they were not considered by CSC, this is simply because the applicant failed to make such a request.

[70] I do not agree that the right to seek a reduction or waiver of a deduction from the institutional head absolves CSC of the responsibility to consider the potential impact of the deduction on the offender before beginning to make the deduction.

[71] While nothing ultimately turns on this, I note that there is a question about the statutory basis for the authority of the head of Kent Institution to reduce or waive the deduction being made to the applicant's inmate income given the purpose for which that deduction was being made – namely, to make payments towards the costs order.

[72] In her affidavit, Ms. Saele cites section 104.1(7) of the *CCRR* as the authority for this. It provides as follows:

(7) Where the institutional head determines, on the basis of information that is supplied by an offender, that a deduction or payment of an amount that is referred to in this section will unduly interfere with the ability of the offender to meet the objectives of the offender's correctional	**(7)** Lorsque le directeur du pénitencier détermine, selon les renseignements fournis par le délinquant, que des retenues ou des versements prévus dans le présent article réduiront excessivement la capacité du délinquant d'atteindre les objectifs de son plan correctionnel, de répondre à

plan or to meet basic needs or family or parental responsibilities, the institutional head shall reduce or waive the deduction or payment to allow the offender to meet those objectives, needs or responsibilities.	des besoins essentiels ou de faire face à des responsabilités familiales ou parentales, il réduit les retenues ou les remboursements ou y renonce pour permettre au délinquant d'atteindre ces objectifs, de répondre à ces besoins ou de faire face à ces responsabilités.

[73] This authority to reduce or waive a deduction is limited to "a deduction or payment of an amount that is referred to in this section." However, section 104.1 of the *CCRR* refers only to deductions or payments under section 78(2) of the *CCRA* and, as discussed above, section 78(2) does not address deductions to discharge a debt to the federal Crown unconnected to the correctional system (e.g. in the form of a costs order from a court).

[74] Although the respondent also relied on section 104.1(7) in its Memorandum of Fact and Law, in oral argument counsel acknowledged that, on its face, this provision did not appear to apply to the present case. However, counsel also emphasized that even if it did not apply directly, section 104.1(7) of the *CCRR* identified some relevant factors that should be taken into account in a request for relief.

[75] For the sake of future cases, I underscore CSC's position here that an offender may seek relief under section 104.1(7) of the *CCRR* in relation to deductions being made to discharge a debt to the federal Crown that is unconnected to the specific types of deductions mentioned in section 104.1. More broadly, whether or not this particular provision gives an institutional head the authority to reduce or waive such deductions, I agree with the respondent that there must be an internal process for seeking relief when deductions are being made from inmate income for

purposes beyond those contemplated by section 78(2) of the *CCRA*. Further, I agree with the respondent that section 104.1(7) of the *CCRR* identifies several salient considerations. Whatever might be its precise legal basis in the *CCRA* or the *CCRR*, such a process for seeking relief is an important after-the-fact safeguard. However, its availability does not absolve CSC of the responsibility to consider the question posed in section 104.1(7) of the *CCRR* before starting to make deductions in the first place.

[76] In my view, an application to an institutional head under section 104.1(7) of the *CCRR* or some analogous process should not be the first time anyone with CSC turns his or her mind to the question of whether a deduction from an offender's income "will unduly interfere with the ability of the offender to meet the objectives of the offender's correctional plan or to meet basic needs or family or parental responsibilities." Approaching the matter in this way is inconsistent with the fundamental duties on CSC that flow from sections 3 and 4 of the *CCRA*. Rather, these factors should be considered when the question of whether to begin making deductions first arises. If an undue interference of this sort will be caused by a deduction, the deduction should not be made in the first place. If these factors are not considered at the outset, CSC risks taking a step that is inconsistent with its duties under sections 3 and 4 of the *CCRA* – especially its overarching responsibility for the rehabilitation of offenders and their reintegration into the community as law-abiding citizens. An offender should not be required to wait for the time it takes to prepare a request under section 104.1(7) of the *CCRR* or an analogous process and then to receive a decision from the institutional head to rectify an erroneous decision that could have been avoided at the outset if only the potential impact of the deductions on the offender had been considered. (I note that Ms. Saele did not provide any evidence concerning how long it typically

takes for a request under section 104.1(7) of the *CCRR* to be dealt with at Kent Institution or elsewhere or how long it typically takes to grieve an adverse decision after that.)

[77] It goes without saying that a court-ordered obligation such as a costs order is a serious matter that cannot simply be ignored, even if one is incarcerated in a penitentiary. Given CSC's responsibility for supporting offenders in meeting their court-ordered obligations, including costs orders, it may be appropriate in a given case for CSC to step in and facilitate payments by offenders in relation to such obligations. The guiding principle must be to act consistently with the offender's correctional plan and with the overarching goals of the correctional system. Given the general guidance found in CD 860, the official initially charged with deciding whether or not to approve a deduction to discharge a debt to the federal Crown must consider, among other things, whether making the deduction would cause interference with the offender's ability to meet the objectives of his or her correctional plan or to meet basic needs or family or parental responsibilities. Limiting the deduction to a certain percentage of the offender's income might help to avoid this impact in a given case. While in theory even a 100 percent deduction may be justifiable, given the potential importance of inmate income as an incentive to participate in recommended programs and the clear limits on deductions for other purposes in CD 860, one would expect this to be the highly exceptional case. Conversely, even a very small regular deduction could interfere unduly with the ability of the offender to meet the objectives of his or her correctional plan. It all depends on the circumstances of the particular case. Given the potential consequences for an offender of having his or her inmate income reduced or even eliminated, CSC must demonstrate that it has considered those consequences and that they are justified before taking this step (cf. *Vavilov* at para 135).

[78] In the present case, the record provides no evidence that the potential consequences of reducing the applicant's inmate income by 100 percent given his specific circumstances were considered before the decision to do so was made. Indeed, in the absence of any explanation for doing so, this outcome in and of itself compels the conclusion that these potential consequences were not considered at all. Given the importance of inmate income as discussed above, the outcome is untenable. In fairness, counsel for the respondent did not strongly argue otherwise at the hearing of this application and even conceded that the reasonableness of the decision was "doubtful."

[79] Finally, the applicant contends that the 100 percent garnishment of his inmate income breached his rights under section 7 of the *Canadian Charter of Rights and Freedoms*. In view of the determinations above and the absence of any evidentiary support for this claim, it is neither necessary nor appropriate to address this issue (cf. *Al-Abbas v Canada (Citizenship and Immigration)*, 2019 FC 1000 at paras 17-19, and the authorities cited therein).

VII. REMEDY

[80] Having agreed with the applicant that it was unreasonable for CSC to deduct 100 percent of his inmate income, what remedy, if any, should follow?

[81] Remedies under section 18.1(3) of the *Federal Courts Act* are discretionary (*Strickland* at paras 37-38). Having regard to all of the circumstances – including the fact that the applicant is no longer facing deductions from his inmate income because he is no longer receiving inmate income – I have concluded that the appropriate remedy is to declare unlawful CSC's decision to

deduct 100 percent of the applicant's inmate income between August 16, 2018, and March 14, 2019. The assessment of the reasonableness of an administrative decision is fundamentally an assessment of that decision's lawfulness. That CSC acted unlawfully when it withheld all of the applicant's inmate income follows from my finding that the decision to do so is unreasonable. Given the particular circumstances of this case, however, no other remedy is called for.

[82] Typically, a successful application for judicial review results in the decision in question being set aside and the matter being remitted to a new decision maker for redetermination (cf. *Vavilov* at para 141). In the present case, however, this would serve no useful purpose because the applicant is no longer receiving inmate income. There is nothing to re-determine.

[83] The applicant sought an order for the return of the funds deducted that were from his inmate income. The respondent did not address this particular remedy in submissions, arguing instead simply that the application should be dismissed.

[84] I am not prepared to grant the remedy sought by the applicant.

[85] The applicant does not dispute (nor could he in this proceeding) that he is indebted to the federal Crown as a result of the January 10, 2018, costs order. The funds were deducted from his inmate income to discharge (at least in part) his obligations under this order. Presumably the funds were remitted by CSC to the Department of Justice, as requested. While it was unreasonable and, indeed, unlawful for CSC to recoup funds from the applicant in the manner

that it did, those funds were taken to discharge a valid debt to the federal Crown. There is no legal basis to order their return to the applicant now.

[86] In view of this conclusion, it is not necessary to decide whether, in any event, the Court would have had jurisdiction under section 18.1(3) of the *Federal Courts Act* to make an order for restitution in the context of an application for judicial review (cf. *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585, at paras 26 and 52).

VIII. COSTS

[87] Acknowledging the roots of this matter in the January 10, 2018, costs order and the circumstances that gave rise to that order, Mr. Sloan, counsel for the applicant, did not seek costs on behalf of his client in the present application in the event that he was the successful party. At the same time, Mr. Sloan asked me to consider the fact that he was acting on a certificate issued by Legal Aid Ontario [LAO]. He submitted that some indemnification to that body by way of a costs order may be appropriate.

[88] I agree that it is appropriate to recognize LAO's contribution in this way. As I have already discussed, this case raised issues of broad importance. The continued viability of LAO is crucial for marginalized and disadvantaged groups such as penitentiary inmates to be able to overcome the significant barriers to access to justice they face. The quantum of costs that will be ordered is intended both to provide reasonable indemnification to LAO for its contribution and to acknowledge its important role in making it possible for this application to be brought forward in the first place.

[89] Accordingly, I am ordering costs against the respondent in the amount of $1000.00 inclusive of taxes and disbursements. These costs shall be paid to Mr. Sloan in trust pursuant to Rule 400(7) of the *Federal Courts Rules*. It will then be for Mr. Sloan to remit these funds to LAO in accordance with the terms of his certificate and section 46(4) of the *Legal Aid Services Act, 1998*, SO 1998, c 26.

IX. CONCLUSION

[90] For the foregoing reasons, the application for judicial review is allowed with costs. The Court declares that the 100 percent reduction of the applicant's inmate income while he was an inmate at Kent Institution to discharge the January 10, 2018, costs order in favour of the Attorney General of Canada was unlawful.

JUDGMENT IN T-2038-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision by Correctional Service Canada to withhold 100 percent of the applicant's inmate income while he was an inmate at Kent Institution to discharge the January 10, 2018, costs order in favour of the Attorney General of Canada is declared unlawful.
3. The respondent shall pay costs in the amount of $1000.00 inclusive of taxes and disbursements to J. Todd Sloan, Barrister and Solicitor, in trust.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2038-18
STYLE OF CAUSE:	MARK ANDREW JOHNSTON v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 6, 2019
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DATED:	MARCH 9, 2020

APPEARANCES:

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