Federal Court  Cour fédérale

Date: 20200702

Docket: T-494-19

Citation: 2020 FC 741

[REVISED ENGLISH TRANSLATION]

Ottawa, Ontario, July 2, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

ÉRIC PERRON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Paragraph 40(k) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act], provides as follows:

40 An inmate commits a disciplinary offence who	40 Est coupable d'une infraction disciplinaire le détenu qui:
. . .	. . .

(k) takes an intoxicant into the inmate's body;	k) introduit dans son corps une substance intoxicante;
. . .	. . .

[2] The situation contemplated by this provision is not equivalent to the offence committed by the presence of a specific quantity of an intoxicant in the body of a person, as with the criminal offence of operation while impaired, that is, over 0.08 grams of alcohol (*Criminal Code*, RSC 1985, c C-46, section 320.14).

[3] In this case, the Act reflects a zero-tolerance policy against drug use in prisons. The offence is the person taking an intoxicant into the person's body, and a positive test result triggers the presumption that the person has indeed taken a prohibited substance into their body.

[4] It is accepted that Mr. Perron "[took] an intoxicant into [his] body". However, he is requesting judicial review of two decisions by the independent chairperson sitting for Archambault Institution's disciplinary court [the disciplinary court] dated December 17, 2018 (preliminary issue), and February 27, 2019, relating to his conviction under paragraph 40(k). These decisions state that (1) the Correctional Service of Canada [the Service] is not required to systematically disclose to inmates the quantitative levels of the urinalysis for disciplinary charges under paragraph 40(k) of the Act; and that (2) Mr. Perron cannot seek a second opinion other than through the dispute mechanisms enshrined in the Act and the *Corrections and Conditional Release Regulations*, SOR/92-620 [Regulations]. According to Mr. Perron, the decisions violate procedural fairness and deprive him of full answer and defence.

[5] For the reasons that follow, the application for judicial review is dismissed.

II. Facts

[6] Under paragraph 54(b) of the Act, an inmate can be required to submit to urinalysis as part of the Service's prescribed random selection urinalysis program and the Urinalysis Program [the Program] in accordance with any directives of the Service's Commissioner of Corrections appointed under subsection 6(1) of the Act that the regulations may provide for.

[7] The validity of the provisions of the Act, in particular paragraph 54(b), is not disputed in this case, and, in any event, paragraph 54(b) of the Act has already been found valid and consistent with sections 7, 8, 12 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (*Fieldhouse v British Columbia*, 1995 CanLII 1978 (BC CA), 98 CCC (3d) 207).

[8] The Program is an essential tool used by the Service as part of its disciplinary system, the purpose of which is to encourage inmates to conduct themselves in a manner that promotes order in penitentiaries, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community (section 38 of the Act).

[9] Mr. Perron has been serving a four-year and four-month jail sentence at Archambault Institution, a federal penitentiary located in Sainte-Anne-des-Plaines, since June 8, 2017. On January 25, 2018, he had to submit to urinalysis under the Program. As of that date, Mr. Perron had no disciplinary record.

[10] On February 1, 2018, at the Service's request, the Gamma-Dynacare laboratory [Dynacare], the only laboratory in Canada certified by the Substance Abuse and Mental Health Services Administration [SAMHSA] of the United States Department of Health and Human Services [HHS], tested Mr. Perron's urine sample and found that it was positive for tetrahydrocannabinol carboxylic acid [THC carboxylic acid].

[11] Dynacare transmitted the positive test result certificate to the manager of the Service's Urinalysis Program [the Program Manager]; the laboratory certificate did not mention the quantitative level of the substance detected, THC carboxylic acid, only the positive test result.

[12] On February 16, 2018, a copy of the laboratory analysis certificate was given to Mr. Perron, and on the basis of the positive test result, Mr. Perron received a disciplinary offence report for "[taking] an intoxicant into [his] body" contrary to paragraph 40(k) of the Act.

[13] On February 21, 2018, counsel for Mr. Perron sent a request to the Program Manager to obtain a sample of the first urine sample taken from Mr. Perron for the purpose of seeking a second opinion; this was to be sent to a laboratory other than Dynacare, the Biron laboratory, a laboratory not certified by SAMHSA.

[14] On February 26, 2018, the Program Manager responded by refusing to provide a urine sample for a second opinion to be performed at another laboratory. She further stated that the only [TRANSLATION] "authorized [urinalysis] laboratory" under the Act and Regulations was the Dynacare laboratory, and that the result of a second opinion produced in another laboratory

[TRANSLATION] "[could] not therefore be taken into account since it [would] not be in compliance with the conditions established in the Act and Regulations".

[15] The Program Manager noted that if Mr. Perron wished to contest the results of the urinalysis, paragraphs 56 and 57 of Commissioner's Directive 566-10 (Urinalysis Testing) (in effect since June 18, 2015) [Directive 566-10] provided for the possibility of requesting a "retest", but always at the Dynacare laboratory.

[16] The Program Manager asked Mr. Perron's counsel to let her know of her intentions: request a retest and/or obtain Dynacare's report on the applicant's urine sample.

[17] In the end, Mr. Perron did not request a retest. However, he did, upon requesting it, receive a report from Dynacare indicating the quantitative level of THC carboxylic acid found in his urine sample.

[18] Given the Program Manager's refusal to provide a urine sample so that he could instruct another laboratory to carry out an independent second analysis, Mr. Perron requested that the offence report be rejected on the ground that his fundamental rights had been violated.

III. Proceedings before the disciplinary court

[19] On March 1, 2018, Mr. Perron appeared before the disciplinary court and entered a plea of not guilty for the offence under paragraph 40(k) of the Act. A formal date was set for March 14, 2018.

[20] On March 14, 2018, the disciplinary court ordered a postponement until March 28, 2018, to allow the Service to define its position on Mr. Perron's request to send the urine sample to a laboratory other than Dynacare for a second opinion.

[21] On March 28, 2018, the Attorney General of Canada intervened in the file before the disciplinary court. The Attorney General's representative requested a postponement of the hearing to allow it to determine whether it could agree to the applicant's request, and to present evidence concerning the Service's position regarding the refusal to send the urine sample to a laboratory of Mr. Perron's choice.

[22] The request to intervene and the postponement of the hearing were contested by Mr. Perron on the grounds that the request to intervene was late; in fact, Mr. Perron was ready that day to argue for a dismissal of the charges on the basis of the refusal to provide the sample for the purpose requested.

[23] The disciplinary court granted a postponement until April 25, 2018, to allow the Attorney General to review the evidence and intervene.

[24] On April 23, 2018, the Attorney General filed a request for an additional extension of four weeks to complete its evidence. Mr. Perron again opposed the request to postpone on the grounds that it would obstruct an expeditious administrative procedure and his right to cross-examine the witnesses.

[25] The independent chairperson granted the request to postpone, but did not set a precise date [TRANSLATION] “considering that this decision [would] depend on several factors . . .”. The case was put back on the disciplinary court’s schedule on May 23, 2018, and was postponed to June 20, 2018, given the Attorney General’s absence and the deadlines for filing affidavits.

[26] In the meantime, the Attorney General sent the applicant and the disciplinary court three affidavits, one from a toxicologist, Dr. Albert Fraser, dated May 17, 2018; one from the Program Manager, dated May 24, 2018, and one from the person in charge of the Dynacare laboratory, Sami Jamokha, dated May 25, 2018.

[27] In his affidavit, Dr. Fraser described the urine testing method in accordance with SAMHSA standards, which were introduced in the United States in the late 1980s; these standards are now considered to be the strictest in North America.

[28] The Program Manager noted the importance and reliability of the Program, which helps minimize drug use in prisons.

[29] In this same testimony, she discussed her previous position in her February 26, 2018, email and stated that a [TRANSLATION] “retest” in a laboratory other than Dynacare was possible, as long as the laboratory was SAMHSA certified.

[30] For his part, Mr. Jamokha gave written testimony describing the testing services of the Dynacare laboratory and the steps in analyzing urine samples according to SAMHSA standards.

[31] The evidence filed by the Attorney General was the subject of preliminary discussions at the hearing on June 20, 2018. The Attorney General admitted that the Dynacare laboratory was the only SAMSHA-certified laboratory in Canada with the necessary equipment for analyzing urine samples; it appears that there is another laboratory in the United States that could retest urine samples in accordance with SAMHSA standards.

[32] The independent chairperson gave the parties his understanding of the issues to be discussed at the hearing on the preliminary issue of the second opinion and ordered that the production of affidavits be postponed.

[33] On July 9, 2018, the Attorney General sent the Program Manager's answers to her written examination to counsel for Mr. Perron; the disciplinary court set a trial date of September 12, 2018.

[34] A written communication dated September 6, 2018, from the Dynacare laboratory to the Program Manager reveals that the quantitative level of THC carboxylic acid detected was 44 nanograms per millilitre (ng/mL). It is at this time that the quantitative level of the urinalysis was disclosed to counsel for Mr. Perron.

[35] Mr. Perron did not avail himself of the possibility of having the urine sample retested, be it at the Dynacare laboratory or at U.S. laboratory MEDTOX Scientific Inc., which is also SAMHSA-certified.

IV. Decisions of the administrative tribunal

[36] The trial was held before the disciplinary court at the Archambault Institution on September 12, 2018, and the decision was taken under advisement. At the trial, the disciplinary court heard the testimony of Dr. Fraser and that of Dr. Pierre-Olivier Hétu, the respondent's expert.

[37] In his testimony, Dr. Fraser stated that the SAMHSA program was established to ensure defensible test results in the event of a court challenge and to eliminate the possibility of false positive test results. According to him, the SAMHSA program is recognized as the "gold standard" in the industry.

[38] Dr. Hétu's testimony focused on the relevance of the quantitative levels of detected substances. According to him, for the purposes of a second opinion, these levels can be useful in determining the time at which the inmate may have taken the substance. However, Dr. Hétu confirmed that SAMHSA standards are very strict, and that they eliminate any possibility of positive tests by contamination attributable to second-hand smoke inhalation. He stated that when samples are entrusted to the Biron laboratory for analysis in accordance with SAMHSA standards, those analyses would necessarily be subcontracted to Dynacare or another SAMHSA-certified laboratory, located in the United States.

[39] On December 17, 2018, the disciplinary court issued an interlocutory decision, which stated, among other things, that the procedure established under the Program ensures respect for inmates' right to procedural fairness in the disciplinary context in correctional facilities.

[40] In addition, the disciplinary court found that authorizing a second opinion outside the provided mechanisms and full control over second opinions on urinalyses went beyond the requirements of procedural fairness.

[41] Finally, the disciplinary court concluded that the Service is not required to systematically disclose quantitative levels when disciplinary charges are laid under paragraph 40(k) of the Act, and that it is for the defendant to establish that this information is relevant in each case and for the independent chairman to make a decision on this.

[42] On February 21, 2019, Mr. Perron was found guilty of taking an intoxicant into his body, contrary to paragraph 40(k) of the Act, and was sentenced to a $10 fine and 2 days' segregation without privileges, subject to a 90-day suspension. (The provision of the Act allowing the disciplinary court to order the segregation of an inmate has since been repealed.)

[43] At issue in this application for judicial review are the interlocutory decision of December 17, 2018, and the final decision of February 21, 2019.

V. Issues

[44] This matter raises three issues:

A. Did the disciplinary court err in allowing the Attorney General of Canada to intervene?

B. Did the disciplinary court err in law in concluding that the Correctional Service of Canada is not required to systematically disclose quantitative levels for disciplinary charges laid under paragraph 40(k) of the Act and that the onus is on the defendant to establish the relevance of this information?

C. Did the disciplinary court err in law in concluding that allowing the applicant to seek a second opinion, other than by using the remedies enshrined in the Act and the Regulations, goes beyond the requirements of procedural fairness?

VI. Standard of review

[45] The parties agree that the standard of reasonableness applies to all three issues *(Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]). I agree with them on Issues A and B, but not on Issue C.

[46] Issue A concerns the way in which the disciplinary process should unfold. This issue is clearly within the jurisdiction of the independent chairperson and brings the standard of reasonableness into play (*Swift v Canada (Attorney General)*, 2014 FC 1143 at paras 30–31 [*Swift*]; *Boucher-Côté v Canada (Attorney General)*, 2014 FC 1065 at para 16 [*Boucher-Côté*]; *Vavilov* at para 23).

[47] Similarly, Issue B concerns whether, under the disciplinary system set out in sections 38 to 44 of the Act, the Service is obliged to systematically disclose to the defendant information that is not immediately available, even though it can be obtained by the Service. This turns on the interpretation of the home statute by the independent chairperson (*Boucher-Côté* at para 16; *Vavilov* at para 23).

[48] Issue C, however, it is not a matter of determining whether the process followed by the independent chairperson complied with the rules of procedural fairness; rather, it is a matter of defining the limits of those rules and, as such, the standard that is as close as possible to the

standard of correctness applies (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79 [*Khela*]; *Canada (Attorney General) v Blackman*, 2016 FC 488 at para 11 [*Blackman*]; *Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 at para 54 [*Canadian Pacific*]; see also *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51–54).

[49] As the Supreme Court of Canada teaches us in *Vavilov*, "[w]here a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances" (*Vavilov* at para 77, citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 21 [*Baker*]).

[50] With respect to procedural fairness, the Court must apply a standard that is as close as possible to the standard of correctness; in practical terms, it must determine whether the procedure was fair in light of all the circumstances. As the Federal Court of Appeal stated in *Canadian Pacific* at paragraph 54:

> A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at para. 20) that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.

VII. Discussion

[51] The parties essentially diverge on the nature of the disciplinary proceeding and the role of the Attorney General in this type of proceeding. That said, before reviewing the arguments relating to the nature of the disciplinary proceeding and the safeguards of procedural fairness applicable in the disciplinary system set out in sections 38 to 44 of the Act, I propose articulating the principles of procedural fairness applicable in disciplinary proceedings.

[52] In *Hendrickson v Kent Institution*, [1990] FCJ No 19, 32 FTR 296, 9 WCB (2d) 131 [*Hendrickson*], Judge Denault presented a summary of the principles applicable to the prosecution of disciplinary offences in prison:

> The principles governing the penitentiary discipline are to be found in *Martineau (No. 1)* (*supra*) and *No. 2; Re Blanchard and Disciplinary Board of Millhaven Institution*; *Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution*, 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. <u>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.</u>

> 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" [Footnotes omitted]
>
> [Emphasis added]

[53] The case law since has endorsed these principles, which set out the state of the law applicable to judges hearing applications for judicial review (*Pontbriand v Canada (Attorney General)*, 2003 FCA 334 at para 2 [*Pontbriand*]; *Ross v Canada*, 2003 FCA 296 at para 30 [*Ross*]; *Ayotte v Canada (Attorney General)*, 2003 FCA 429 at para 9 [*Ayotte*]; *Forrest v Canada (Attorney General)*, 219 FTR 82, 2002 FCT 539 at para 16 [*Forrest*]).

[54] To begin with, the disciplinary process is inquisitorial in nature: it involves examining both sides of the question (*Hendrickson*; *Ayotte* aux paras 9–10, 19; *Boucher-Côté* at para 27; *Swift* at para 68). The proceedings are not adversarial, judicial or quasi-judicial (*Forrest* at para 16; *Hendrickson*). The disciplinary process is flexible when it comes to the presentation of evidence (*Boucher-Côté* at paras 28–29; section 37 of *Commissioner's Directive 580 (Discipline of Inmates*) [Directive 580]).

[55] In addition, the inquisitorial nature of the process involves an obligation for the independent chairperson to question witnesses, including the inmate charged with the offence (*Ayotte* at para 10).

[56] Because of the inquisitorial nature of the process, the independent chairperson has considerable flexibility in procedural matters. For example, the independent chairperson has discretion in the presentation of evidence, provided that it is done flexibly and in a manner consistent with the principles of natural justice and procedural fairness (*Campbell v Canada (Attorney General)*, 2017 FC 971 at para 19 [*Campbell*]; *Hendrickson* at pp 298–299; *Brennan v Canada (Attorney General)*, 2009 FC 40 at paras 30–31 [*Brennan*]). In addition, the disciplinary court has the discretion to order or deny an adjournment, as long as the principles of fairness are respected (*Breton v Canada (Attorney General)*, 2016 FC 76 at para 41 [*Breton*]).

[57] That being said, the independent chairperson must balance the two primary objectives applicable. On the one hand, a fast and efficient disciplinary proceeding is an important objective since it ensures the maintenance of order and discipline in the correctional system (*R v Shubley*, 1990 CanLII 149 (SCC), [1990] 1 SCR 3 at p 20 [*Shubley*]; *Ayotte* at para 7; section 38 of the Act).

[58] On the other hand, the independent chairperson has an obligation to act fairly in conducting proceedings and to comply with the requirements imposed by Act and its regulations (*Ayotte* at paras 8, 11; *Martineau v Matsqui Institution*, 1979 CanLII 184 (SCC), [1980] 1 SCR

602 at p 631 [*Martineau* No 2]; *Cardinal v Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 SCR 643 [*Cardinal*]; *Campbell* at para 19).

[59] In particular, the independent chairperson must respect the inmate's right to make full answer and defence against the allegations, without, however, elevating the disciplinary hearing to a criminal or quasi-judicial proceeding (*Caisse v Saskatoon Provincial Correctional Centre*, 2020 SKQB 105 (CanLII) at para 56 [*Caisse*]; *Boudreau v Canada (Attorney General)*, 2000 CanLII 16709 (FC) at paras 7–8 [*Boudreau*]).

[60] This right includes the opportunity to make representations and question witnesses (*Ross* at para 12) and the obligation to provide the inmate with a summary of the evidence to be presented in support of the charge (*Savard v Canada (Attorney General)*, 1997 CanLII 16695 (FC); subsection 25(1) of the Regulations).

[61] Charges that are excessively vague or insufficiently supported by the evidence are unreasonable (*Langlois v Canada (Attorney General)*, 2004 FC 702 at paras 25–28 [*Langlois*]; *Beaudoin v William Head Institution*, 1997 CanLII 5866 (FC) at para 11 [*Beaudoin*]).

[62] Similarly, the failure to disclose evidence to the inmate in support of the charge is a violation of the right to make full answer and defence (*Langlois* at para 12).

[63] Although a breach of procedural fairness or another reviewable error may constitute grounds for judicial intervention, the reviewing court must still accord deference to the decision

since its intervention is only justified in cases of "serious injustice" *(Hendrickson; Pontbriand* at para 2; *Barnaby v Canada*, [1995] FCJ No 1541, 105 FTR 64 [Barnaby]; *Chshukina v Canada (Attorney General)*, 2016 FC 662 at paras 19–21 [*Chshukina*]; *Beaudoin* at para 7; *Richer v Saskatchewan Penitentiary*, 2006 FC 1188 at para 11).

[64] In summary, in disciplinary matters, care must be taken not to impose procedural safeguards stemming from the criminal context where the objective and the role of proceedings are different from those of disciplinary proceedings. On this point, I agree with the independent chairperson when he notes that the procedural fairness requirements are less stringent for disciplinary offences in correctional facilities.

A. Did the disciplinary court err in allowing the Attorney General of Canada to intervene?

[65] Mr. Perron does not dispute the right of the Attorney General to intervene in the proceeding before the disciplinary court, but rather the manner in which he intervened.

[66] He submits that the Attorney General's intervention almost four weeks after he entered his guilty plea was not only late, but also transformed the nature of the disciplinary proceeding by turning it into a long, adversarial proceeding, which is contrary to the principles of procedural fairness and the objectives of the Act (*Brennan* at para 30; *Forrest* at para 16).

[67] Mr. Perron also submits that the Attorney General's persistence in wanting to maintain the charge more than a year after the offence distorts the objective of disciplinary measures, which, according to section 38 of the Act, 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" (see also section 4 of Directive 580).

[68] Before me, Mr. Perron argued that the independent chairperson should have managed the Attorney General's intervention better so that it be more in keeping with the expeditious, informal and inquisitorial nature of the disciplinary process. In addition, Mr. Perron contended that notice should at least be given within a reasonable time before the scheduled date of the disciplinary hearing, and that interventions should not be made when a case is about to be heard on its merits and should not be used to supplement the evidence that has already been produced.

[69] First, as argued by Mr. Perron, it is true that the excessive delays attributable to an institution or a late intervention by the Attorney General can, in some cases, undermine the expeditious nature of the disciplinary process, which could result in charges against an inmate being dismissed (*Eakin v Canada (Attorney General)*, 2019 FC 1639 at para 73; *Shubley* at p 20; *Tehrankari v Canada (Correctional Service)*, 2000 CanLII 15218 (FC) at para 53; section 30 of Directive 580).

[70] However, I believe that the disciplinary court did not err in allowing the Attorney General to intervene. The law does not circumscribe the manner, time or requirements for giving notice when the Attorney General wishes to intervene in a given case.

[71] The Attorney General of Canada "shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada", and may exercise jurisdiction in any litigation where the Crown, its agents and the departments are parties, be it before an administrative tribunal or in a private law context (paragraph 5(d)) of the *Department of Justice Act*, RSC, 1985, c J-2; *Auer v Auer*, 2018 ABCA 409 at paras 6 and 10; *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 at paras 23–32; *R v Cawthorne*, 2016 SCC 32, [2016] 1 SCR 983 at paras 23–24; *R v Power*, 1994 CanLII 126, [1994] 1 SCR 601 at pp 621–623).

[72] The Attorney General has the constitutional mission of guarding the rule of law and the public interest in the administration of justice, and must assist the court in rendering a decision in accordance with the law (*Cosgrove v Canadian Judicial Council*, 2007 FCA 103, [2007] 4 FCR 714 at para 51 [*Cosgrove*]).

[73] In this case, the Attorney General's intervention focused on general issues related to the sampling procedure and not on the applicant's specific case. It applied to intervene in order to produce scientific and administrative information regarding urinalysis.

[74] Mr. Perron notes that the Attorney General should have intervened at the March 1, 2018, appearance; the Attorney General intervened on March 28, 2018, and only informed Mr. Perron's counsel of its intentions the day before.

[75] Mr. Perron argues that at issue is more than a four-week delay. Mr. Perron's case is not an isolated case, and the independent chairperson wanted to resolve the issue of requests for second opinions on the taking of urine samples, which had been going on for several months in the Service, in a number of other cases and which had resulted in the suspension of urinalyses across Quebec.

[76] In fact, it appears that a number of charges relating to urine samples had been [TRANSLATION] "dropped" following high demand for second opinions. Consequently, Mr. Perron argues that this was not the first case of this type to raise this issue and that the Attorney General's taking four weeks to intervene was therefore unreasonable.

[77] As for the timing of the intervention, I do not think the delay was unreasonable; four weeks in the present circumstances does not seem to be a huge amount of time to me.

[78] First, apart from references to [TRANSLATION] "other" files in the transcripts of the hearings, and the submissions of counsel, I have no evidence before me of any previous cases in which this issue was raised, or of to what extent the Attorney General, as opposed to the Service, was involved. The Attorney General states that it intervened immediately after it was instructed to do so by its client, the Service. I have no reason to doubt that.

[79] Furthermore, and even though I accept the idea that the speed and efficiency of the disciplinary process is an important objective, I cannot agree that the Attorney General's

intervention had the effect of transforming the nature of the disciplinary proceeding by turning it into a long, adversarial proceeding.

[80] I think it is important to understand the nature of the Attorney General's intervention. In agreeing to the Attorney General's intervention, the independent chairperson noted that it could shed light on an issue of a certain complexity that could have an impact on other files.

[81] The delays that were incurred in this case were granted to allow the Attorney General to prepare affidavits on the urinalysis program by officials and scientific experts. It is true that the process was made more complicated and that it took more than a year to complete, but not by the respondent's intervention, but rather by the nature of the issues themselves.

[82] In the end, the information produced by the Attorney General was relevant. As the independent chairperson noted, it helped resolve the issues raised by this disciplinary proceeding and a multitude of other similar cases. Had the Attorney General not intervened, the independent chairperson would have been less informed about the sampling procedure and the method used by the authorized laboratory.

[83] I also cannot find that the Attorney General's intervention had the effect of distorting the administrative process before the disciplinary court since the independent chairperson is master of their own proceedings and the inquisitorial nature of the disciplinary process is not an obstacle to the admission of evidence by affidavit when more complex issues are raised (*Brennan* at para 30).

[84] On the contrary, I note that the Attorney General's intervention in the file, in accordance with its mission, informed the disciplinary court of a tendency among inmates to request a second opinion on urine samples at the laboratory of their choice.

[85] The Attorney General's intervention was also useful in that it enlightened the disciplinary court on questions requiring scientific expertise. Given the importance of the issue raised in this case, one that seems to have arisen in a number of other cases, the Attorney General's intervention in this case was entirely consistent with its mission.

[86] Indeed, the Attorney General's intervention safeguarded the integrity of the urine sample system. In light of this, I see no reason to depart from the presumption that the Attorney General acted in good faith and in the public interest (*Cosgrove* at para 51; *Douglas v Canada (Attorney General)*, 2013 FC 451, [2014] 4 FCR 494 at para 69; *Kinghorne v Canada (Attorney General)*, 2018 FC 1060 at para 33).

[87] In addition, I cannot say that the independent chairperson made a reviewable error in managing the Attorney General's intervention. In disciplinary offences, the accused's right to defend themselves is not the same as in criminal matters; it is assessed against the requirements of procedural fairness.

[88] The independent chairperson gave the applicant a number of opportunities to produce his evidence, in full awareness of his right to make full answer and defence. As master of the proceedings, the independent chairperson set reasonable time limits for the admission of expert

affidavits in order to be able to fully understand both sides of the issue at hand in this and other similar cases (*Brennan* at para 30; *Hendrickson*; *Ayotte* at paras 9–10, 19; *Boucher-Côté* at para 27; *Swift* at para 68).

[89] In short, the independent chairperson's behaviour with regard to the Attorney General's intervention constituted a reasonable exercise of the flexibility conferred on him in the context of an inquisitorial proceeding (*Hendrickson*; *Boucher-Côté* at paras 28–29; section 37 of Directive 580; *Ayotte* at para 10).

[90] Even though the Attorney General must comply with certain formalities before intervening and substituting itself for the decision maker, I think it is preferable to leave this question to the independent chairperson in the context of the independent chairperson's role as master of proceedings. In this case, I find that the Attorney General's intervention did not result in an injustice that would justify the Court's intervention.

B. Did the disciplinary court err in law in concluding that the Service is not required to systematically disclose the quantitative levels to all inmates in respect of disciplinary charges laid under paragraph 40(k) of the Act and that the onus is on the defendant to establish the relevance of this information?

[91] As I noted, Mr. Perron requested, and obtained, the quantitative level of his urine sample. He chose not to use the results as a defence. Consequently, the systematic disclosure of this information is somewhat moot here.

[92] However, the question would also have been moot had Mr. Perron chosen not to request the information, or had his request been denied, because the issue then would simply have been

whether there had been a breach of procedural fairness as a result of the Service's rejection of his request.

[93] In any event, the independent chairperson found it necessary to discuss the issue of the systematic disclosure of quantitative levels, in particular because this could have implications for other pending cases. Consequently, the Court must rule on the reasonableness of this decision.

[94] Subsection 27(1) of the Act provides as follows:

27(1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.	27(1) Sous réserve du paragraphe (3), la personne ou l'organisme chargé de rendre, au nom du Service, une décision au sujet d'un délinquant doit, lorsque celui-ci a le droit en vertu de la présente partie ou des règlements de présenter des observations, lui communiquer, dans un délai raisonnable avant la prise de décision, tous les renseignements entrant en ligne de compte dans celle-ci, ou un sommaire de ceux-ci.
[Emphasis added]	[Je souligne]

[95] Subsection 27(1) of the Act provides that the inmate has the right to have "all the information to be considered in the taking of the decision". This provision imposes an onerous disclosure obligation to assure procedural fairness and the accused's right to make full answer and defence (*May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809 at paras 94–96 [*May*]; *Khela* at paras 81–84).

[96] However, and apart from the exceptions codified in subsection 27(3) of the Act, which are not applicable in this case, this right to disclosure has two important limitations.

[97] First, how much information needs to be provided must be determined in light of the context, the circumstances and the defence that could be raised by the inmate (*Obeyesekere v Canada (Attorney General)*, 2014 FC 363 at paras 26–27). In some cases, the requirements of subsection 27(1) of the Act can be met by providing a summary of the information (*Khela* at para 81; *Flynn v Canada (Attorney General)*, 2007 FCA 356 at para 30; *R v Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326).

[98] Furthermore, the very text of subsection 27(1) of the Act does not justify the disclosure of information that was not considered by the decision maker in the taking of the decision (*Khela* at para 82; *May* at para 91; *Cain v Springhill Institution*, 2017 NSCA 75 at para 10). As Justice LeBel noted in *Khela* at paragraph 83:

> Section 27 [of the *Corrections and Conditional Release Act*] does not require the authorities to produce evidence in their possession that was not taken into account in the transfer decision; they are only required to disclose the evidence that was *considered*.
>
> [Underlining added]

[99] Sections 68 and 69 of the Regulations provide as follows:

Reporting of Test Results	**Rapports des résultats d'analyses**
68 (1) A laboratory shall submit to the urinalysis program co-ordinator a certificate and, where requested by the institutional	68 (1) Le laboratoire doit remettre une attestation du résultat de l'analyse au coordonnateur du programme de prises d'échantillons d'urine

head, an electronically transmitted copy of the certificate, that states the results of the test.	et, sur demande du directeur du pénitencier, en fournir une copie par transmission électronique.
(2) The urinalysis program co-ordinator shall give the donor a copy of the laboratory certificate respecting the sample.	(2) Le coordonnateur du programme de prises d'échantillons d'urine doit remettre une copie de l'attestation du laboratoire à la personne qui a fourni l'échantillon d'urine.
Consequences of Positive Test Results	**Conséquences des résultats positifs**
69 For the purposes of a hearing of a disciplinary offence referred to in paragraph 40(k) of the Act, a certificate referred to in subsection 68(1) that states that the result of a urinalysis test is positive establishes, in the absence of evidence to the contrary, that the inmate who provided the sample has committed the offence.	69 Aux fins de toute audition d'une infraction disciplinaire visée à l'alinéa 40k) de la Loi, l'attestation visée au paragraphe 68(1) portant que le résultat de l'analyse d'échantillon d'urine est positif établit, jusqu'à preuve contraire, que le détenu qui a fourni l'échantillon a commis l'infraction en cause.
[Emphasis added]	[Je souligne.]

[100] In accordance with section 69 of the Regulations, a positive test result gives rise to the presumption that the inmate did indeed take the prohibited substance into the inmate's body, and the certificate provided for in section 68 of the Regulations, stating that the sample is positive, is sufficient to establish that the inmate committed the offence under paragraph 40(k) of the Act.

[101] Directive 566-10 provides as follows:

Reporting of Test Results	**Rapports des résultats**

	d'analyses
54. Positive test results, refusals or tampered samples will be forwarded to the Parole Officer immediately and recorded in OMS within three working days.	54. Les résultats positifs, les refus ou les échantillons altérés seront transmis immédiatement à l'agent de libération conditionnelle et enregistrés dans le SGD dans un délai de trois jours ouvrables.
. . .	. . .
56. If an offender disputes a positive test result and wishes to have a retest of the same sample, the offender must submit a written request within 30 calendar days to the Urinalysis Program Coordinator who will contact the laboratory to process the request.	56. Si le délinquant conteste le résultat positif d'une analyse et souhaite que le même échantillon fasse l'objet d'une seconde analyse, il dispose de 30 jours civils pour en faire la demande par écrit au coordonnateur du Programme de prise d'échantillons d'urine, lequel communiquera avec le laboratoire pour donner suite à la demande.
57. Payment for a retest is the responsibility of the offender and will be paid in advance.	57. Les frais d'une seconde analyse incombent au délinquant qui doit les payer d'avance.
ANNEX A **CROSS-REFERENCES AND DEFINITIONS** **CROSS-REFERENCES**	**Annexe A** **RENVOIS ET DÉFINITIONS** **DEFINITIONS**
. . . Laboratory: a laboratory contracted by SCC to analyze samples is an authorized laboratory for the purposes of section 60 of the CCRR.	. . . Laboratoire: un laboratoire dont le SCC a retenu les services par contrat pour analyser des échantillons est un laboratoire autorisé aux fins de l'article 60 du RSCMLC.
. . .	. . .

Positive test results: a urine sample containing concentrations that are equal to or above cut-off levels.	Résultats positifs: échantillon d'urine présentant des concentrations égales ou supérieures aux seuils établis.
. . .	. . .
Retest: a second confirmatory test performed from the original urine sample.	Seconde analyse: seconde analyse de confirmation effectuée sur l'échantillon d'urine original.
. . .	. . .
Cut-off level: the concentration of a drug in the urine that determines if the test will be considered positive or negative in accordance with Annexes B and C.	Seuil de concentration: la concentration d'une drogue dans l'urine qui détermine si le résultat de l'analyse d'urine sera jugé positif ou négatif conformément aux annexes B et C.
[Emphasis added]	[Je souligne.]

[102] The SAMHSA approach consists of a two-step analysis method: an "initial screening test" using a method based on immunology principles to screen and exclude negative samples, followed by a "confirmation test" if the concentration level is above the established cut-off level; this is a highly precise process that traces the characteristics of the various drugs and metabolites in the urine.

[103] Both the initial screening test and the confirmation test include the cut-off levels set out in Directive 566-10, which are established so as to be able to detect recent drug use. The cut-off level for the initial screening test is higher than that established for the confirmation test in order to avoid incriminating those exposed to second-hand smoke and to ensure that only samples with presumed positive test results are submitted for confirmation tests.

[104] In other words, the cut-off levels are established for the benefit of the inmate. Even though the Act reflects a zero-tolerance policy against drug use, a sample may therefore contain a certain concentration of a drug, but will not be submitted for confirmation testing if the level detected in the initial screening test is below the established cut-off level, in which case the result is reported as negative.

[105] The laboratory reports the test results. In this case, the applicant's report stating merely a "positive test result", but not the quantitative level of the result, was sent to the Program Manager.

[106] Mr. Perron submits that both the Regulations and Directive 566-10 provide that a positive test result is a urinalysis test result that indicates concentrations of an intoxicant equal to or greater than the cut-off levels established in accordance with the tables in Annexes B and C to the Directive. According to Mr. Perron, in comparison with these cut-off levels, the quantitative level then becomes relevant information for determining the difference between a positive or negative sample in any case.

[107] I accept the idea that quantitative levels may be relevant to the nature of the test performed, as would be any other scientific data emerging from the test.

[108] However, relevance is not a requirement for disclosing information under section 27 of the Act.

[109] The obligation imposed on the Service by section 27 of the Act is to disclose to the inmate all "the information to be considered" in "a decision to be taken . . . about the offender". Determining which information the Service is required to give depends on the information that was taken into account in the decision to charge Mr. Perron.

[110] According to the Service, the quantitative level of concentration in urine is not that type of information. In fact, the certificate stating the results of the test submitted by the laboratory does not provide quantitative levels, and they are therefore not taken into account when making the decision as to whether or not to charge an inmate.

[111] In fact, according to the Service, given the test parameters for eliminating the risk of false positives, such as the cut-off levels to eliminate false positives or positives that simply result from second-hand smoke, there are good reasons not to disclose this information, in particular to avoid a debate on the relevance of a quantitative level barely above or below the cut-off level, a debate that would be pointless given the nature of the offence which reflects a zero-tolerance policy against drug use in prisons.

[112] The concept of relevance relates to the inmate's defence. The quantitative level is not relevant to all defences. And if an inmate knows that they have been exposed to conditions in which the quantitative level may be relevant for their defence, they can request that information from the Service. In such a case, refusal to provide the information would constitute a decision that is amenable to judicial review.

[113] It should be clear that this question only arises in the case of positive tests. It seems to me that negative tests trigger a privacy concern. An inmate who has tested negative is likely not to want the Service to be informed of the quantitative level. Negative results do not mean that no drugs have been detected in the inmate, only that the level is below the cut-off level. It seems to me that inmates with negative test results may very well wish to let sleeping dogs lie.

[114] In these circumstances, I reject the position that not disclosing the quantitative level to an inmate without a specific request from the inmate is a violation of the right to make full answer and defence.

[115] However, there is more to it.

[116] The laboratory submits the quantitative level to the Service and the Service discloses it to the inmate on request when the inmate demonstrates to the Service that the quantitative level in question may be relevant to the inmate's defence.

[117] It should also be borne in mind, furthermore, that the disciplinary court is not limited to the evidence disclosed by the Service under subsection 27(1) of the Act. As part of the investigation, the independent chairperson has the discretion to order the production of additional information (in addition to any information disclosed to the inmate under subsection 27(1) of the Act) if they consider it relevant to the defence the inmate plans to make.

[118] In this case, contrary to the conclusion that it is for the defendant to establish that the quantitative levels are relevant in order for it to receive this information, Mr. Perron submits that the independent chairperson was wrong to impose on him the burden of proving the relevance of the quantitative level in the disciplinary proceeding.

[119] Citing the principles of administrative law, Mr. Perron argues that the threshold for procedural fairness is high, and that this threshold requires the systematic disclosure of quantitative levels in disciplinary charges laid under paragraph 40(k) of the Act (*Khela*; *Baker*).

[120] According to Mr. Perron, the refusal deprived him of full answer and defence and was a violation of the principles of procedural fairness.

[121] As Mr. Perron correctly states, the right to make full answer and defence is well established for charges applying to disciplinary proceedings (*Caisse* at para 56; *Boudreau* at paras 7–8; *Amos v Canada (Attorney General)*, 2018 FC 1242 at para 77 [*Amos*]).

[122] In this case, Mr. Perron wishes to impose on the Service the systematic obligation to disclose information which it was not even in possession of when the decision to charge him was made. Indeed, in the context of a disciplinary charge under paragraph 40(k) of the Act, the Service does not rely on the precise figure of the quantitative level, but rather on the final test result, that is, whether it is positive or negative.

[123] The question regarding the need to disclose quantitative levels was partially answered by this Court in the case of *Smith v Canada (Attorney General)*, 2002 FCT 2003 [*Smith*]. The applicant, who received an offence report under paragraph 40(k) of the Act, asked the independent chairperson to order the Service to disclose to him the numerical result of the urinalysis. The applicant speculated that second-hand smoke explained the positive test result. The chairperson ultimately found the applicant guilty, even though he and the applicant never received the numerical result.

[124] During the judicial review proceeding, Judge Pinard found that there was no provision in the Act or the Regulations requiring the chairperson to wait for the numerical result requested by an applicant before rendering a decision. In addition, Judge Pinard concluded that procedural fairness had been complied with since the chairperson had examined the two divergent expert reports and the parties' submissions on the impact of second-hand smoke.

[125] In his decision dated September 12, 2018, the independent chairperson found that there was no right to demand the systematic disclosure of the quantitative level. Noting the teachings of the *Smith* case, the independent chairperson stated that the precise quantitative level was not relevant since section 69 of the Regulations specifically provides that a simple certificate stating that the urinalysis test result is positive establishes, in the absence of evidence to the contrary, that the inmate who provided the sample has committed the offence, regardless of the specific level.

[126] In short, Mr. Perron did not persuade me that it is necessary to disclose the precise quantitative level systematically in all cases, especially in light of the presumption enshrined in section 69 of the Regulations. In the end, the "evidence to the contrary" referred to in the provision does not relate to the question of whether the sample tested positive, but rather that of whether the inmate took "an intoxicant into the inmate's body".

[127] I see no breach of procedural fairness in disciplinary hearings when inmates are required to justify the need to receive information that was not taken into account in the decision to charge them. The scope of the information disclosure depends on what the inmate needs to know in order to make full answer and defence, and it is up to the inmate to explain this in a disciplinary hearing.

[128] In fact, the absence of an obligation to systematically disclose the quantitative levels creates a barrier to strategies by which inmates can attempt to develop a random defence system based on the disclosure of the precise level in order to avoid a penalty.

[129] I believe that the disciplinary court made no reviewable error in this regard in its decision, especially considering the deference owed to the independent chairperson when it comes to assessing the evidence (*Crews v Canada (Attorney General)*, 2003 FC 1144 at paras 17–24; *Hendrickson*; *Pontbriand* at para 2; *Barnaby*; *Chshukina* at paras 19–21).

[130] In the circumstances, I do not see anything unreasonable in the disciplinary court's decision on this issue.

C. Did the disciplinary court err in law in concluding that allowing the applicant to seek a second opinion, other than by using the remedies enshrined in the Act and the Regulations, goes beyond the requirements of procedural fairness?

[131] Subsection 31(1) of the Regulations reads as follows:

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, call witnesses on the inmate's behalf and examine exhibits and documents to be considered in the taking of the decision; and	a) d'interroger des témoins par l'intermédiaire de la personne qui tient l'audition, de présenter des éléments 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) make submissions during all phases of the hearing, including submissions respecting the appropriate sanction.	b) de présenter ses observations durant chaque phase de l'audition, y compris quant à la peine qui s'impose.
[Emphasis added]	[Je souligne.]

[132] It should also be recalled that section 69 of the Regulations recognizes a simple presumption of guilt of an offence under paragraph 40(k) of the Act "in the absence of evidence to the contrary" (*Smith*).

[133] In order to introduce evidence to the contrary, Mr. Perron requested a urine sample and asked to have it analyzed by a laboratory not authorized by Directive 566-10. A result that is

inconsistent with that of the authorized laboratory could cast reasonable doubt on the accused's guilt (subsection 43(3) of the Act).

[134] The Attorney General submits that the Regulations and Directive 566-10 already provide for the possibility of a "retest" that aims to safeguard the rights of inmates to challenge initial results.

[135] However, a retest has its own constraints:

> [TRANSLATION]
>
> i. the retest must be performed by a SAMHSA-certified laboratory;
>
> ii. the urine sample is not given to the inmate, but sent directly to the laboratory chosen by the inmate;
>
> iii. although the method and quality control parameters for retests are the same as those that apply to the first test, the laboratory performing the retest can only use the confirmation test to reconfirm the first test result;
>
> iv. a retest will not necessarily give the same drug concentration, for chemical reasons and reasons related to the freezing and aging of the sample. However, the detection cut-off levels are lower than for the first test; and
>
> v. despite any objections from the inmate, the reported result, which would be marked as [TRANSLATION] "reconfirmed" or [TRANSLATION] "not reconfirmed", is disclosed directly to the Service rather than to the inmate despite the fact that it is the inmate who pays for the retest.

[136] In support of its argument, the Attorney General referred to the expert evidence filed at the disciplinary hearing stating that the Program is reliable and meets industry standards, and that the test results are reliable beyond a reasonable doubt. Therefore, according to the Attorney

General, the independent chairperson was right to reject Mr. Perron's request for a second opinion, especially considering the fact that Mr. Perron did not pursue the possibility of having his sample retested.

[137] The Program Manager initially refused Mr. Perron's request on the grounds that only Dynacare can do this type of urinalysis. Sometime later, she changed her position to say that another laboratory could be tasked with the retest provided that it was SAMHSA-certified.

[138] However, Mr. Perron submits that subsection 31(1) and section 69 of the Regulations allow the inmate to introduce evidence and this includes the possibility of introducing a second opinion on the urine sample in question other than as specified in the Service's regulations and directives.

[139] Mr. Perron submits that the Service cannot limit the second opinion to its own laboratory and to its own rules. According to him, the obligation to respect SAMHSA procedures for the second opinion has no legal basis, since this obligation appears only in the Service's internal directives, and is contrary to the rules of evidence recognized by the Regulations (*Martineau* No 2 at p 614).

[140] In addition, Mr. Perron argues that a request for a "retest" subject to the constraints of the Regulations and Directive 566-10 is not equivalent to a second opinion—it is not a second opinion to have to pay for a retest, the full results of which, including quantitative levels, cannot be obtained.

[141] In short, he states that the Service is asking inmates to close their eyes and to trust it, with the Service controlling the analysis, the second opinion and the internal inspection system it manages. Mr. Perron is seeking transparency from the Service and invokes his right to full answer and defence.

[142] There is no doubt that an inmate who is charged with a disciplinary offence has the right to introduce evidence in their defence—a positive urinalysis test result establishes, in the absence of evidence to the contrary, that the inmate who provided the sample has committed the offence in question (section 69 of the Regulations) [emphasis added].

[143] The question is rather whether the right to make full answer and defence is an absolute right, and if the answer is no, to what extent the law limits the scope of evidence that inmates can introduce in their defence.

[144] First, the right to make full answer and defence has never been absolute. Even in criminal law, the presentation of evidence is limited by certain criteria, and the presiding judge has some discretion to allow or refuse evidence a defendant is seeking to adduce (*R v RV*, 2019 SCC 41 at para 40; *R v Mills*, 1999 CanLII 637 (SCC), [1999] 3 SCR 668 at para 61).

[145] In addition, as already mentioned, procedural fairness requirements are less stringent when it comes to disciplinary offences in correctional facilities.

[146] Mr. Perron submits that the obligation to comply with the SAMHSA process for second opinions is only set out in the Service's internal directives, and not in any legal text, and that it is contrary to the rules of evidence recognized by the Regulations.

[147] I agree with Mr. Perron, to a certain extent.

[148] First, even though it does not have the force of law, Directive 566-10 can be a relevant source as regards the standards applicable in prison settings (e.g., *Gendron v Canada (Attorney General)*, 2009 FC 1136 at paras 4–5; *Blackman* at para 11).

[149] However, neither the Regulations nor Directive 566-10 provide for the obligation to comply with the SAMHSA process, be that for the first test (initial screening test with confirmation test) or the retest.

[150] For the purposes of the Regulations, section 60 defines "laboratory" as a "laboratory authorized by Commissioner's Directives to analyse samples". For the purpose of performing urinalyses, Directive 566-10 states that "a laboratory contracted by [the Service] to analyze samples is an authorized laboratory for the purposes of section 60 of the [Regulations]".

[151] In addition, regarding the right to request a retest if an inmate disputes a positive test result, according to section 56 of Directive 566-10, the inmate "must submit a written request within 30 calendar days to the Urinalysis Program Coordinator who will contact the laboratory to process the request".

[152] Section 56 of Directive 566-10 only mentions the laboratory without distinguishing between the laboratory where the first test was carried out and the one where the retest should be performed. In fact, none of the parties cited a provision of the Act, the Regulations or the directives specifically imposing the obligation to use only SAMHSA-certified laboratories under the Program.

[153] I therefore find that the Service is interpreting section 56 of Directive 566-10 as meaning that inmates may request that retests be carried out in the laboratory of their choice provided that the laboratory is SAMHSA-certified.

[154] Leaving aside the question of whether Directive 566-10 should be amended to make this interpretation clear, at issue here is whether the independent chairperson's decision, which had the effect of imposing on inmates the obligation to use only SAMHSA-certified laboratories, and which prohibited inmates from producing second opinions other than by using the mechanism of a retest performed within the framework of the restrictions already noted, is within the limits of procedural fairness with respect to disciplinary offences in the prison setting.

[155] In other words, does the independent chairperson's decision to deny Mr. Perron's request for a second opinion to challenge the results of the first test constitute a "reasonable opportunity . . . to . . . introduce evidence" in his defence in a disciplinary hearing under the Program (subsection 31(1) of the Regulations)?

[156] My answer is yes.

[157] The Service ensures the reliability of the results of the tests carried out under the Program by using the services of a SAMHSA-certified laboratory, a program set up in the United States as part of a federal employee drug testing program to ensure that test results are defensible in the event of a court challenge and to eliminate the possibility of false positive test results.

[158] According to the evidence presented to the disciplinary court, SAMHSA certification reflects the highest standard in the industry and the strictest standard in North America, with strict forensic standards applied at each stage of the analysis process and a legally defensible chain of custody program for the samples tested.

[159] Directive 566-10 establishes standards for taking and analyzing urine samples to ensure the integrity of the disciplinary system and the integrity of the drug-control program. The exclusive jurisdiction of the approved laboratories favours neither inmates nor the Service. The Service's policy ensures that urine samples are analyzed by SAMHSA-certified laboratories, which, according to the expert evidence, are recognized as models of excellence. The use of less qualified laboratories could result in less credible analyses.

[160] In my opinion, these directives as to which laboratories to use constitute a reasonable limit on the right to introduce a second opinion (subsection 31(1) of the Regulations) or on the rules of natural justice (*Williams v Canada (Regional Transfer Board)*, 1993 CanLII 2927 (FCA), [1993] 1 FC 710; *Martineau* No 2 at p 614).

[161] Requiring that any outside laboratory used in connection with the Program, including in the context of a disciplinary hearing, be SAMHSA-certified is a reasonable measure to maintain the same degree of reliability in test results, by excluding the results of laboratories whose analytical protocols and procedures are inferior or less reliable because they could muddy the waters.

[162] This is important, because the burden of proof to find an inmate guilty is beyond a reasonable doubt, and therefore the risk of having less reliable test results create "reasonable doubt" is a risk that must be managed with great care.

[163] As for the constraints imposed on the manner in which retests are carried out, I do not see how they would unduly impair the capacity of an inmate who has been charged under paragraph 40(k) of the Act to prepare a defence.

[164] The fact that an inmate is not fully in control of the second opinion is not unduly prejudicial in itself, as long as the testing process performed has been shown to comply with scientific standards. In this case, expert evidence shows that SAMHSA standards are at the highest level and the strictest drug testing standards in North America.

[165] Ultimately, procedural fairness is not determined in a factual vacuum, and the environment and context must be taken into account. I agree with the independent chairperson when he stated that [TRANSLATION] "the requirements relating to procedural fairness are less stringent for disciplinary offences in correctional facilities" insofar as the disciplinary process

must be compatible with the concern that the "process of prison administration, because of its special nature and exigencies, should not be unduly burdened or obstructed by the imposition of unreasonable or inappropriate procedural requirements" (*Cardinal* at para 22).

[166] Having also considered the nature and objectives of the Program, as well as the number of urine samples that are tested, with the corresponding significant number of positive test results for THC carboxylic acid, the independent chairperson stated as follows:

> [TRANSLATION]
>
> If all inmates were to be allowed to require that quantitative levels be systemically disclosed to them and they then request independent second opinions, the disciplinary process might be significantly slowed, which would clearly go against the sought-after objective and the applicable rules.

[167] Upon review of the impugned decisions, I note that the independent chairperson balanced the two primary objectives, namely the speed and efficiency of the disciplinary process, and conducted the proceedings fairly, in compliance with the requirements imposed by the Act and its regulations (*Ayotte* at paras 8, 11; *Martineau* No 2 at p 631; *Cardinal*; *Campbell* at para 19).

[168] As Judge Denault noted in *Hendrickson*, it is not up to the Court to review the evidence as it might do in a case of a judicial review or a decision by a judge or quasi-judicial tribunal, but merely to consider whether there has in fact been a breach of the general duty to act fairly.

[169] I see no breach of procedural fairness in the independent chairperson's decision.

[170] This begs one more question. Mr. Perron submits that the Service failed to fulfill these duties by refusing to disclose the quantitative level not only of the first test, but also of the second opinion (referring to the decisions of *Amos v Canada (Attorney General)*, 2018 FC 1242 [*Amos*]; *Ayotte*; *Zanth v Canada (Attorney General)*, 2004 FC 1113; and *Akhlaghi v Canada (Attorney General)*, 2017 FC 912 on the importance of disclosing evidence).

[171] Given my decision on the issues concerning the quantitative level as well as Mr. Perron's insistence on filing second opinions, it goes without saying that my conclusions concerning the issue of disclosing the quantitative level also apply to the request for a retest.

VIII. Conclusion

[172] For these reasons, the application for judicial review is dismissed.

[173] The parties agree that no costs will be awarded in this case.

JUDGMENT in docket T-494-19

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No costs.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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