Date: 20060907

Docket: T-1613-05

Citation: 2006 FC 1064

Ottawa, Ontario, September 7, 2006

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

WILLIAM ROBINSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of an August 24, 2005 decision of the Independent Chairperson (Chairperson) at Mountain Institution (Mountain) which convicted William Robinson (Applicant) of a serious disciplinary offence pursuant to subsection 40(j) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (CCRA) for possession of an unauthorized item.

I. Facts and History of the Case

[2] William Robinson arrived at Mountain, a medium security federal institution on March 23, 2005.

[3] On March 26, 2005, and again on April 6, 2005 due to the misplacement of his initial application, the Applicant applied for admission into Mountain's Methadone Maintenance Treatment Program (Methadone Program).

[4] While being interviewed for admission into the Methadone Program, the Applicant was advised that he would only be admitted into the Methadone Program if he was currently using heroin on an ongoing basis. More specifically, the Applicant would have to test positive for heroin on three occasions before being admitted into the Methadone Program (Applicant's Record, Applicant's Affidavit, Exhibit A, page 34). In response to this information, the Applicant advised the interviewers that he was engaged in obtaining and injecting heroin and that he was using a home-made injection rig to use heroin at Mountain (Applicant's Record, Applicant's Affidavit, Exhibit A, page 34).

[5] On or about April 29, 2005, the Applicant alleges that an unknown Correctional Service Canada (CSC) Officer (unknown Officer) visited his cell to inquire about his injection rig (Applicant's Record, Applicant's Affidavit, Exhibit A, page 34). At that time, the Applicant states he admitted to being in possession of an injection rig and produced it to the unknown Officer. The Applicant alleges the unknown Officer advised him that he was there to see the injection rig on the instructions of Mark Buddha, a Methadone Program Staff Member, but that

the Applicant could keep the injection rig (Applicant's Record, Applicant's Affidavit, Exhibit A, page 34).

[6] On May 5, 2005, CSC Officers MacDonald and Vizina acting on information that the Applicant was in possession of an injection rig searched the Applicant's cell and found the injection rig in a smoke detector. On that same day, an officer decided that an informal resolution in accordance with section 41 of CCRA would not be appropriate (see Respondent's Record, Inmate Offence Report and Notification of Charge, page 5). On May 9, 2005, the Applicant was charged under subsection 40(j) of the CCRA for possession of an unauthorized item, namely for being in possession of the injection rig. Three weeks later on May 31, 2005, the Applicant was charged with a separate offence under subsection 40(k) of the CCRA for injecting heroin into his body.

[7] On May 31, 2005, the Applicant was accepted into the Methadone Program and treatment began on June 10, 2005. On June 27, 2005, Jay Jones, a legal advocate with the Prisoners' Legal Services (PLS), wrote a letter to the Warden of Mountain fully explaining the

Applicant's situation and asking that the subsection 40(j) and 40(k) charges against the Applicant be withdrawn on a number of grounds, including that the Applicant was now attending the Methadone Program ("the letter").

[8] On July 20, 2005 the Applicant attended a disciplinary hearing for the subsection 40(k) charge for injecting heroin. The Applicant, who was self-represented at the hearing, advised the hearing's Chairperson that he had not received a response to the letter to the Warden asking that the charges against him be withdrawn. The Applicant therefore asked the Chairperson to adjourn the hearing pending the Warden's response. The Chairperson refused to grant the adjournment and continued with the hearing. The Chairperson found the Applicant guilty of the subsection 40(k) charge.

[9] On August 24, 2005 a hearing was held for the subsection 40(j) charge for possession of an unauthorized item. Once again the self-represented Applicant informed the Chairperson of the letter written to the Warden.

[10] At the hearing, the Applicant submitted as a defence to the subsection 40(j) charge that he was implicitly authorized to be in possession of the injection rig by the actions of the unknown Officer who visited his cell on or about April 29, 2005. The Applicant could not identify the unknown Officer but stated that Mr. Mark Buddha could testify to confirm the unknown Officer's visit. The Chairperson refused to call Mr. Buddha as a witness. At the conclusion of the hearing, the Chairperson found the Applicant guilty of the subsection 40(j) charge for possession of an unauthorized item.

[11] This judicial review only demands a reconsideration of the finding of guilt on the section 40(j) charge for possession of an unauthorized item. The finding of guilt on the section 40(k) charge is not being challenged as part of this judicial review.

II. Issues

[12] The issues are the following:

1. What is the standard of review to be applied to decisions of the Chairperson at a disciplinary hearing conducted under the CCRA?

2. Did the Chairperson breach section 31 of the *Corrections and Conditional Release Regulations*, S.O.R./92-620 (CCRR) and thus violate procedural fairness by failing to

require the attendance of Mr. Buddha at the hearing for the section 40(j) charge for possession of an unauthorized item?

3. Did the Chairperson adequately consider whether CSC took all reasonable steps to resolve the matter informally pursuant to section 41 of the CCRA? If not, did the Chairperson err in law by failing to consider whether appropriate informal resolution was attempted?

4. Did the Chairperson err in law in convicting the Applicant of a disciplinary offence contrary to subsections 40(j) and 43(3) of the CCRA?

III. Analysis

1. What is the standard of review to be applied to decisions of the Chairperson at a disciplinary hearing conducted under the CCRA?

[13] The proper standard of review for decisions made pursuant to hearings conducted under the CCRA has been addressed by the Federal Court of Appeal in *Sweet v. Canada (Attorney General)*, 2005 FCA 51. In *Sweet*, Justice Malone found that the correctness standard applied to questions of law which include issues of procedural fairness, whereas the reasonableness standard would apply to the application of legal principles to fact and the

standard of patent unreasonableness would apply to pure findings of fact (*Sweet v. Canada (Attorney General)*, above, at paragraphs 14-16).

> ¶ 14 In assessing the standard of review for prisoners' grievance decisions, the Applications Judge adopted the analysis set out by Lemieux J. in Tehrankari v. Correctional Service of Canada (2000), 188 F.T.R. 206 (T.D.) at paragraph 44. After conducting a pragmatic and functional analysis, Lemieux J. concluded that a correctness standard would apply if the question involved the proper interpretation of the legislation, a standard of reasonableness simpliciter would apply if the question involved an application of the proper legal principles to the facts, and a patently unreasonable standard would apply to pure findings of fact.
>
> ¶ 15 The Applications Judge determined that the issues in this case required the proper interpretation of the Act and Regulations before that interpretation could be applied to the facts of the situation. This suggests review on a correctness standard and I am in agreement with that assessment.
>
> ¶ 16 An issue not specifically dealt with by the Applications Judge is whether the appellant was afforded the benefits of natural justice and procedural fairness with regard to the decision to discharge him from the RTC Programme. Questions of procedural fairness are questions of law and require review on a correctness standard (see C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539 at paragraph 100).

[14] Consequently, in the case at hand, the standard of review of correctness will be applicable to the issue of the violation of procedural fairness as well as the issue of the proper interpretation of section 41 of the CCRA.

2. Did the Chairperson breach section 31 of the CCRR and thus violate procedural fairness by failing to require the attendance of Mr. Buddha at the hearing for the subsection 40(j) charge for possession of an unauthorized item?

[15] At the hearing for the subsection 40(j) charge for being in possession of the injection rig, the Applicant submitted as a defence that an unknown Officer who visited his cell on or about

April 29, 2005 authorized him to be in possession of the rig. The letter written by PLS to the Warden of Mountain explains this defence as follows:

> **1) Implicit Authorization**
> We submit that the injection right did not constitute an 'unauthorized item' as it had been implicitly authorized as an expected and necessary criterion for obtaining methadone treatment. In broad terms, the existence of the methadone treatment program's criteria acknowledges that prisoners will possess rigs and consume heroin. In more narrow terms, Mr. Robinson's injection rig and use of heroin had been implicitly authorized by the methadone intake staff and that authorization was later confirmed by the officer who came to see it but decline to take it on or about April 29, 2005.
>
> [Applicant's Record, Letter to Warden, page 35]

The letter was submitted to the Chairperson and thus the Chairperson at the hearing for the section 40(j) charge was aware of the defence that the applicant was attempting to mount. At the hearing, although the Applicant could not name the unknown Officer, he submitted to the Chairperson at numerous times that Mr. Buddha could support his claim that an unknown Officer visited his cell and authorized him implicitly to possess the injection rig.

[16] In addition to confirming the visit by the unknown Officer to the applicant's cell and the unknown Officer's reasons for doing so, Mr. Buddha's testimony would be helpful in explaining the Methadone Program and the use of the three positive tests as an admission criterion to the

program as was explained in the letter. Thus, the testimony of Mr. Buddha would serve a treble purpose: 1) to help identify the anonymous Officer 2) explain the reasons for the Officer's visit to the applicant's cell and, 3) explain the Methadone Program and its admission criteria.

[17] The Applicant made his desire to have Mr. Buddha testify at his hearing on at least three occasions. Among the requests was the following exchange with the Chairperson:

> MR. ROBINSON: I don't know the name of the officer. That's what we went through before. Mark Buddha's the one who told the officer –
>
> CHAIRPERSON: Yeah, I cannot – I cannot accept as evidence that someone told you – we don't know who that someone is ...
>
> MR. ROBINSON: I know, but –
>
> CHAIRPERSON: But we went throught this before.
>
> ...
>
> MR. ROBINSON: And I told you to get a hold of him.
>
> CHAIRPERSON: Well, we through the same thing. I'm not changing my mind about – about –
>
> MR. ROBINSON: I'm just saying if we got a hold of Mark Buddha –
>
> ...
>
> CHAIRPERSON: ... You are saying officer told you some things. Without the name of the officer to whom I like to ask questions, I cannot accept as evidence that someone actually told you, although negatively ...
>
> MR. ROBINSON: But you can accept that evidence when I tell you that Mark Buddha's the one who had the officer come to my house. Now that there's where Mark Buddha turned around and phoned the officer and had the officer ...
>
> CHAIRPERSON: He said he said that. I don't want hearsay.
>
> MR. ROBINSON: No, it isn't he said he said that. Mark Buddha --
>
> [Applicant Record, Llanes Affidavit, transcript of the proceeding, page 17-18]

Each of the Applicant's requests for Mr. Buddha's presence were either ignored by the Chairperson or were denied by the Chairperson on the basis that it was the unknown Officer and not Mr. Buddha who should be summoned as a witness as only he could confirm the facts the Applicant was alleging.

[18] Paragraph 31(1)(a) of the CCRR states the following:

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 (*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;	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*) 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;

Paragraph 31(1)(a) of the CCRR establishes some of the procedural entitlements guaranteed to inmates at hearings for a disciplinary offence. In addition, the Federal Court of Appeal in *Ayotte v. Canada (Attorney General)*, 2003 FCA 429 (paragraph 9), adopts the six principles listed by Justice Denault

in *Hendrickson v. Kent Institution Disciplinary Court* (1990), 32 FTR 296, to further explain the procedural entitlements that are owed to an inmate at a hearing for a disciplinary offence:

> In *Hendrickson v. Kent Institution Disciplinary Court (Independent Chairperson)* (1990), 32 F.T.R. 296 (F.C.T.D.), the Honourable Mr. Justice Denault identified the following six principles based on the *Martineau case, supra*, in particular, that apply to the prosecution of disciplinary offences in the prison environment:
>
> 1. A hearing conducted by an independent chairperson of the disciplinary court of an institution is an administrative proceeding and is neither judicial nor quasi-judicial in character.
>
> 2. Except to the extent there are statutory provisions or regulations having the force of law to the contrary, there is no requirement to conform to any particular procedure or to abide by the rules of evidence generally applicable to judicial or quasi-judicial tribunals or adversary proceedings.
>
> 3. There is an overall duty to act fairly by ensuring that the inquiry is carried out in a fair manner and with due regard to natural justice. The duty to act fairly in a disciplinary court hearing requires that the person be aware of what the allegations are, the evidence and the nature of the evidence against him and be afforded a reasonable opportunity to respond to the evidence and to give his version of the matter.
>
> 4. The hearing is not to be conducted as an adversary proceeding but as an inquisitorial one and there is no duty on the person responsible for conducting the hearing to explore every conceivable defence, although there is a duty to conduct a full and fair inquiry or, in other words, examine both sides of the question.
>
> 5. It is not up to this Court to review the evidence as a court might do in a case of a judicial tribunal or a review of a decision of a quasi-judicial tribunal, but merely to consider whether there has in fact been a breach of the general duty to act fairly.
>
> 6. The judicial discretion in relation with disciplinary matters must be exercised sparingly and a remedy ought to be granted "only in cases of serious injustice" (Martineau No. 2, p. 360).
>
> [Emphasis in original]

[19] Moreover, in *Armstrong v. Canada*, [1989] 28 F.T.R. 89, Justice Teitelbaum interpreted the procedural fairness guarantees found in the *Penitentiary Act*, R.S.C. 1985, c. P-5 as rep. by *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s.214 and the *Penitentiary Service Regulations*, C.R.C. 1978, c. 1251 (repealed), legislation which predeceased the CCRA and the CCRR respectively. In what concerned an inmate's ability to summon witnesses at a disciplinary offence hearing, Justice Teitelbaum found that (*Armstrong v. Canada*, 28 F.T.R. 89 at paragraph 50):

> In cases where a witness or witnesses are readily available to be questioned and a request to have the witness testify is made by an inmate, the request should normally be granted if it is determined that what the witness would testify to could or would be a significant factor in determining the guilt or innocence of the inmate.

[20] In the situation at hand, the Chairperson failed to permit Mr. Buddha to be called as a witness, even though the Applicant continually alleged that Mr. Buddha could testify as to the

unknown Officer's visit to the Applicant's cell and the nature of this visit, testimony which could potentially permit the Applicant to mount a full defence to the disciplinary charge he was facing. Furthermore, Mr. Buddha's testimony could have supported some of the argumentation made in the letter on the Methadone Program. The only reason stated by the Chairperson for not having Mr. Buddha's testimony was that it would be hearsay of comments made by the unknown Officer (Applicant's Record, Llanes Affidavit, transcript of the proceeding, page 17). That is not a proper refusal in the present circumstances. The Chairperson was aware of the defence of implicit authorization that the Applicant was trying to mount as he had read the letter and had acknowledged the arguments that it contained (Applicant's Record, Llanes Affidavit, transcript of the proceeding, page 17-18).

> CHAIRPERSON: ... Then your lawyer raised four points. One, implicit authorization: "We submit that the injection rig did not constitute an unauthorized item as it had been implicitly authorized as [indiscernible] necessary criteria for obtaining methadone treatment." And it was implicitly authorized by the methadone intake staff. I don't accept this face that were authorized...

Given that having the name of the anonymous Officer from Mr. Buddha could have allowed the unknown Officer to testify in support of the Applicant and Mr. Buddha's testimony could have given support to the applicant's defence that he was implicitly authorized to be in possession of the injection rig so as to satisfy the Methadone Program's admittance criteria, the Chairperson should have permitted Mr. Buddha to testify.

[21] In the situation at hand, as mentioned above, Mr. Buddha's testimony was potentially pivotal to the Applicant establishing a full defence to the disciplinary charge in question. Consequently, the Chairperson's failure to call Mr. Buddha as a witness is a violation of the procedural fairness entitlements guaranteed to inmates at disciplinary offence hearings under paragraph 31(1)(a) of the CCRR.

3. Did the Chairperson adequately consider whether CSC took all reasonable steps to resolve the matter informally pursuant to section 41 of the CCRA? If not, did the Chairperson err in law by failing to consider whether appropriate informal resolution was attempted?

[22] Subsection 41 of the CCRA states that:

41. (1) Where a staff member believes on reasonable grounds that an inmate has committed or is committing a disciplinary offence, the staff member shall take all reasonable steps to resolve the matter informally, where possible.

(2) Where an informal resolution is not achieved, the institutional head may, depending on the seriousness of the alleged conduct and any aggravating or mitigating factors, issue a charge of a minor disciplinary offence or a serious disciplinary offence.

41. (1) L'agent qui croit, pour des motifs raisonnables, qu'un détenu commet ou a commis une infraction disciplinaire doit, si les circonstances le permettent, prendre toutes les mesures utiles afin de régler la question de façon informelle.

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

[23] The Federal Court of Appeal in *Laplante v. Canada (Attorney General)*, [2003] 4 F.C. 1118 at paragraph 11, found that as a corollary to the section 41 obligation that Correctional Service staff take reasonable steps to resolve disciplinary matters informally, is the right of inmates to demand that steps be taken, where reasonably possible, to resolve the matter informally.

> The obligation found in section 41 is an obligation imposed on an officer of the Correctional Services and not the Board. Corresponding to this obligation on the officer is a right of the inmate to demand of the Correctional Services that steps be taken, where possible, to resolve the matter informally, that is, in a dejudicialized way [...] Suffice it for me to say at this point that this obligation to dejudicialize where possible is an important component of the disciplinary system established by the Act and its purposes, as set out in section 38, to "encourage inmates to conduct themselves in a manner that promote the good order of the penitentiary, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community". In this context, a policy centered on informal resolution rather than excessive judicialization can be readily understood.

Moreover at paragraph 13 of the Laplante decision, Justice Létourneau writing for the panel states:

> In practice, this power of the Board to ensure compliance with the rights of an inmate charged with disciplinary offences means this in case of a breach of the duty under subsection 41(1). When informed of a violation of the inmate's right under subsection 41(1), and satisfied that the duty imposed by that provision has not been respected, the chairperson of the Board may suspend the hearing of the complaint and return the matter to the institutional head so that the latter can evaluate the appropriateness of attempting an informal resolution. I hasten to explain that the role of the Board chairperson is limited to this referral back. It is not his role to interfere in the negotiation of an informal settlement that Parliament has imposed on the Correctional Services, which are responsible therefore. Similarly, it is not the chairperson's job to substitute his opinion for that of the institutional head who, before laying a charge of disciplinary offence, concluded that an informal resolution could not be achieved or was not possible in the circumstances. Should an attempt at an informal resolution prove to be appropriate, the institutional head to whom the matter was returned takes reasonable steps to that end. If this is successful, the institutional head may withdraw the complaint he had filed. If this is unsuccessful

> or if an informal resolution is not possible in the circumstances, the head so informs the chairperson of the Board who then proceeds with the hearing of the complaint. (My emphasis)

[24] In the case at hand, the Applicant attempted to resolve matters informally by writing the letter to the Warden with aid of the PLS. The Warden, at the time of both of the Applicant's hearings, had failed to respond to the letter. At the hearing for the section 40(k) charge for injecting heroin, the Applicant formally requested that the hearing be adjourned until a response from the Warden was received. The Chairperson refused to grant the adjournment. The interchange between the Chairperson and the Applicant was the following (Applicant's Record, tab 2, Llanes Affidavit, Exhibit B, pp.23-24):

> CHAIRPERSON: Well let me put that straight here. I'm going to read it, but before I do, I want to explain to you, the fact that your lawyer's communicating with the warden on two charges, one of them is related to this hearing, that's not preventing me from proceeding.
> ...
> CHAIRPERSON: Unless the institution's not ready, we're going to proceed.
> ...
> CHAIRPERSON: How it make sense to you when I mention that well that communication, you, your lawyer, and the warden is going on, does not mean that I have no jurisdiction to proceed.

[25] The same issue, namely the consequences of the attempt at informal resolution through the writing of the letter, was brought up by the Applicant at his second hearing for the section 40(j) charge for being in possession of an unauthorized object. At this second hearing the Chairperson stated (Applicant's Record, Llanes Affidavit, transcript of the proceeding, page 19):

> CHAIRPERSON: ... The informal resolution is something to be achieved before a charge was laid. It is not after that after the fact the situation is corrected, and I'm happy for you. You get what you want, I guess. But that is not an informal resolution thing. The statute's there for everyone to read. Not, I if the entirety of your defence is based on this letter, I mean, I cannot, I do not find anything that is legally sound. Informal resolution should be ahead, not before... [sic]

[26] In the *Laplante* decision, Justice Létourneau explained that the obligation to take reasonable steps to resolve matters informally, where possible, is an obligation of the officers of Correctional Services and not the obligation of the Board hearing the disciplinary offence. However, Justice Létourneau also found that "the Board has the power to satisfy itself that the inmate's rights under the disciplinary system have been respected and, if need be, to take steps to safeguard them" (*Laplante v. Canada (Attorney General)*, above, at paragraph 11 and 13).

[27] Justice Létourneau further explains the Chairperson's powers in what concerns section 41 of the CCRA in the *Laplante* decision (*Laplante v. Canada (Attorney General)*, above, at paragraph 20):

> In short, the chairperson of a Board plays an important role in the administration of the disciplinary system. His duties and powers are conditioned by the objectives and principles of this system. Sometimes his powers are explicit, sometimes they are implicit. On other occasions, they flow from his function and his jurisdiction as a disciplinary tribunal. In order to maintain the integrity of the disciplinary system, its ultimate purpose and its objectives, and to ensure enforcement of an inmates right to have an attempt made at informal resolution, the chairperson who is satisfied that the mandatory provisions of section 41 have not been complied with has, in my opinion, the power to return the matter for this purpose to the institutional head. This is an effective and inexpensive way of

> guaranteeing compliance with an obligation imposed on the Correctional Services and the correlative right conferred on the inmate.

Thus, the Board or in the case at hand the Chairperson, has the power to ensure CSC Officers comply with the rights of an inmate charged with an offence to have matters resolved informally. If convinced that an inmate's right under section 41 to have matters settled informally has not been respected, then the Board, as per Justice Létourneau, "may suspend the hearing of the complaint and return the matter to the institutional head so that the latter can evaluate the appropriateness of attempting an informal resolution" (*Laplante v. Canada (Attorney General)*, above, at paragraph 12).

[28] The Respondent states that the Chairperson's duty to refer matters back to the institutional head for informal resolution is a discretionary step. In support of this statement, the Respondent refers to *Knight v. Canada*, 2005 FC 727 at paragraphs 14-16, where Justice Blais states:

> ¶ 14 The applicant submits that a duty existed on behalf of the Chairperson to refer the matter to the Kent Institutional Head to consider informal resolution and to review the charge. Both parties agree that the Chairperson does indeed have that authority, but disagree as to whether that power is discretionary or mandatory.
>
> ¶ 15 The empowering section in this case is 41 of the CCRA which states that:
> 41.(1) Where a staff member believes on reasonable grounds that an inmate has committed or is committing a disciplinary offence, the staff member shall take all reasonable steps to resolve the matter informally, where possible.
>
> ¶ 16 It is quite clear that the informal resolution of disciplinary offences is an important aspect of dealing with the offence, but is not a mandatory step.

[29] I agree with the reasoning of Justice Blais that there is no obligation on the Chairperson to refer the matter back to the Institution Head where informal resolution has not been

attempted. This being said, the issue in the case at hand, unlike that in *Knight*, is not the Chairperson's failure to send the matter back so that it could be resolved informally, but whether the Chairperson failed to properly consider whether the inmate's section 41 rights were respected.

[30] In the case at hand, the Chairperson did not consider or properly understand what was owed to the inmate under section 41, as the Chairperson failed to consider the Applicant's section 41 rights at all. The Chairperson during the hearing explains to the Applicant that as a Chairperson he has no role to play in the informal resolution process as it is a process that is to be undertaken before any charges are laid (see quotation at paragraph 25 of the present decision).

[31] The Chairperson's explanation of the informal resolution process is erroneous as it cannot be reconciled with the decisions in *Laplante* and *Knight*. In *Laplante,* Justice Létourneau addresses the issue of whether section 41 of the CCRA can be raised at any point. He finds that (*Laplante v. Canada (Attorney General)*, above, at paragraph 21):

> ... subsection 41(1) gives an inmate a relative right (where possible) to have all reasonable steps taken to resolve the issues in dispute informally. This right must be cited at the earliest opportunity before the chairperson of the Board, failing which, like the other rights of an inmate, it is subject to the waiver principle...

In the case hand, the Applicant did bring the letter to the attention of the Chairperson at both his hearings. The Chairperson in both cases refused to consider the inmate's section 41 rights, as he wrongly believed that informal resolution under section 41 of the CCRA could only occur in the time period before disciplinary charges were laid.

[32] Consequently, the Chairperson's interpretation of section 41 would void the section of meaning. If section 41 only imposed an obligation that informal resolution be attempted before a charge was laid, Justice Létourneau's finding in *Laplante* that the Chairperson plays an important role in ensuring the enforcement an inmate's right to informal resolution would be meaningless as the Chairperson is not involved in the penitentiary disciplinary system until charges are laid and thus could never actual play a role in safeguarding an inmate's right to informal resolution.

[33] The Chairperson's failure to understand the importance of informal resolution at all stages of the penitentiary disciplinary process resulted in his failure to consider whether CSC had properly met their obligation to attempt to resolve the matter informally. Although the Chairperson was not obliged to take action to have the matter settled informally, the

Chairperson is required to at minimum to turn his mind to the issue of whether the Applicant's right under section 41 were respected, something that was never done in the case.

[34] The failure of the Chairperson to understand section 41 and to properly consider whether the Applicant's right to informal resolution was respected constituted an error of law.

IV. Costs

[35] The Applicant has asked for costs. Since the Applicant brought forward issues of importance that have been found to have been wrongly addressed by the Chairperson, I will grant costs in his favour in accordance with Rule 400 of the *Rules for Regulating the Practice and Procedure in the Federal Court of Appeal and the Federal Court*, S.O.R./98-106.

V. Conclusion

[36] I will not deal with the remaining issue as I am of the opinion that the decision of the Chairperson in what concerns the section 40(j) charge for being in possession of an unauthorized item should be quashed as the procedural fairness guarantees established in the CCRR were violated and the Chairperson erred in law in his interpretation of the CCRA. Consequently, I have no way of determining whether the finding of guilt on the section 40(j) charge was appropriate.

JUDGMENT

THE COURT ORDERS THAT:

- The application for judicial review is allowed with costs and the decision of the Chairperson dated August 24, 2005 is quashed.

"Simon Noël"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1613-05
STYLE OF CAUSE:	WILLIAM ROBINSON v. ATTORNEY GENERAL FOR CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	August 30, 2006
REASONS FOR JUDGMENT AND JUDGMENT	**Mr. Justice Simon Noël**
DATED:	September 7, 2006

APPEARANCES:

Mr. Mark A. Redgwell	for Applicant
Mr. Edward Burnet	for Respondent

SOLICITORS OF RECORD:

Barrister/Solicitor Abbotsford, British Columbia	for Applicant
John H. Sims, Q.C. Deputy Attorney General of Canada	for Respondent