

**Date: 20090601**

**Docket: T-1539-08**

**Citation: 2009 FC 564**

**Vancouver, British Columbia, June 1, 2009**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**PAUL SPANEVELLO**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] Paul Spanevello and Charles Bickford are incarcerated at Mountain Institution in British Columbia. Commencing in the evening of March 29, 2008 and continuing into the next day there was a riot at the institution. Following that event, both were charged with “disobeying a justifiable order of a staff member.” Neither was directly involved in the riot.

[2] It was alleged that both refused the directions to return to their living units. Both claim that Corrections Officer Anna English entered the unit at the time the disturbance began, after which the

unit's doors were locked. They both further maintain that Officer Gunner Cordsen, who was out of doors at the time, recognized that they had been locked out of the unit and gave them an order as to where they were to stand, and that they did so.

[3] These gentlemen were charged on April 18, 2008, and the first hearing date for the charge was May 26, 2008. That hearing was adjourned due to unavailability of Officers and witnesses. The hearing resumed June 9, 2008, but was later adjourned due to the unavailability of witnesses. There had been a number of remands due to the unavailability of witnesses and, in one instance, the unavailability of counsel. The hearings were finally scheduled to be heard and were heard on September 4, 2008.

[4] Throughout, these inmates made it clear that Officers English and Cordsen were necessary witnesses in support of their position that they had not disobeyed an order. They requested that they appear and provide evidence. The Independent Chairperson (ICP) hearing these matters refused to order those Officers to appear and give evidence. The inmates had no independent way to otherwise require their attendance.

[5] Prior to the final hearing of these charges, counsel for the applicant asked the ICP to dismiss the charges on the basis of delay. The governing legislation and Commissioner's Orders makes it clear that these disciplinary matters are to be heard in a prompt and expeditious manner and that dismissal may result from delay. The ICP refused to entertain that motion. Both were convicted of the charges and sentenced to five (5) days segregation time, suspended.

[6] Both commenced an application for judicial review (Court files T-1539-08 and T-1540-08).

[7] The respondent brought a motion, returnable on June 1, 2009, seeking an order allowing these applications for judicial review, setting aside the decisions of the ICP and ordering that the charges be determined before a different ICP. The respondent quite properly concedes that the ICP erred in failing or refusing to call these specific eyewitnesses requested by these inmates.

[8] The applicant, while accepting the respondent's concession, asks that this Court direct an acquittal with respect to the charges.

[9] After reviewing the material before the Court, I am not satisfied that this is an appropriate case to direct that the matter be remitted back with directions that direct a specific decision. The criteria set out in *Johnson v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262 at paragraph 20, are not established. In particular, I am of the view that the evidence on the record is not so clearly conclusive that only one possible conclusion is available.

[10] I am satisfied, however, that a referral back with some direction is appropriate in light of the conduct of the ICP which the Court considers to have been scandalous. His refusal to consider a motion to dismiss for delay, and his refusal to call the witnesses that are now conceded to have been material, brings into question the fairness of the process and the independence of the ICP.

[11] Accordingly, this matter will be remitted for a redetermination by a new ICP, who is to be named without delay. If the applicant wishes to bring a motion to dismiss for delay, he is at liberty to do so upon advising the ICP within 15 days hereof. The ICP shall consider all of the evidence of delay from the date of the initial infraction forward. In light of the requirement that such hearings be done promptly, the ICP is directed to determine the motion, if brought, and render a decision within 30 days of the date hereof. If the charge is not dismissed due to delay, the ICP shall convene a hearing and shall render a decision on the charge within 60 days of the date hereof. The ICP shall compel Officers English and Cordsen to give evidence at the hearing. Should either be unavailable or fail to attend the hearing, the charges against the applicant should be dismissed by the ICP as their evidence is material to the applicant's defence.

**ORDER**

**THIS COURT ORDERS that:**

1. This application for judicial review is allowed;
2. The decision of the ICP rendered September 4, 2008, is quashed and all reference thereto is to be removed from the applicant's record; and
3. The matter is remitted for determination by another ICP who is directed to conduct the hearing in accordance with these reasons and to conclude the hearing and render a determination no later than 60 days from the date hereof.

“Russel W. Zinn”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1539-08

**STYLE OF CAUSE:** PAUL SPANEVELLO v. AGC

**PLACE OF HEARING:** Vancouver, BC

**DATE OF HEARING:** June 1, 2009

**REASONS FOR ORDER  
AND ORDER:** ZINN J.

**DATED:** June 1, 2009

**APPEARANCES:**

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Susanne Pereira FOR THE RESPONDENT

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