

Federal Court



Cour fédérale

**Date: 20110114**

**Docket: T-146-10**

**Citation: 2011 FC 38**

**Ottawa, Ontario, January 14, 2011**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**ESMOND JACK YU**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA  
(REPRESENTING CORRECTIONAL  
SERVICE OF CANADA)**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] Mr. Esmond Jack Yu (the “Applicant”) seeks judicial review of the decision of Marc-Arthur Hyppolite (the “Senior Deputy Commissioner”), Correctional Service Canada (“CSC”).

[2] The Applicant seeks the following relief in this application:

- a. A writ of certiorari that the decision of the Senior Deputy Commissioner be set aside and remitted back for reconsideration by a differently constituted panel;
- b. A declaration that CSC has a legal obligation to consider his claim against the Crown;
- c. An order declaring the correct interpretation of certain Commissioner's Directives, and the appropriate protocol in handling inmate property and investigating grievances relating to inmate property damage;
- d. Any order this Honourable Court may deem appropriate; and
- e. Costs.

### Background

[3] The Applicant is serving a life sentence at Matsqui Institution. He commenced his sentence on May 17, 1995. In June 2007, he purchased a guitar for the sum of \$299 plus taxes. The Tribunal Record contains a purchase record in this regard.

[4] In November 2007, the Applicant was placed in segregation and transferred to the Kent Institution on December 13, 2007. He was transferred back to the Matsqui Institution on August 22, 2008.

[5] The Applicant requested the return of his guitar in September 2008 but it was missing. CSC located the guitar in January 2009.

[6] On January 14, 2009, while retrieving his guitar, the Applicant noted that it was damaged. According to his affidavit, he was informed by Officer Susan Christian, the attending Admissions

and Discharge officer (the “A&D Officer”) to inspect the guitar in his cell and file a complaint from there. As a result, the Applicant did not make any record of this damage on his Inmate Personal Property Record. He took the guitar to his cell with the intention of photographing the damage. For various reasons, it took more than a month to obtain photographs.

[7] The Applicant submitted an inmate claim for loss or damaged property on March 18, 2009 in the amount of \$300. He received a decision with respect to that claim on May 13, 2009. The claim was denied on the grounds of the Applicant had failed to submit a claim for more than two months and had failed to note the damage on his Inmate Personal Property Record.

[8] The Applicant filed an Inmate Grievance Presentation (Second Level) on June 4, 2009. Mr. Alex Lubimiv, Assistant Deputy Commissioner, Institutional Operations, denied the grievance on July 29, 2009. He found that there was no reference on the Offender Personal Property Record of damage to the guitar. The Applicant had signed that record. According to Commissioner’s Directive 566-12 (“CD 566-12”), paragraph 16, the Applicant bore the responsibility to make sure that his record was accurate.

[9] The Applicant submitted an Inmate Grievance Presentation (Third Level) on August 12, 2009, again claiming the cost of the guitar plus \$37, representing the cost of making his complaint. This amount represented the cost of \$17.00 for photographs of the guitar and \$20.00 for stationery.

[10] An investigation into this third level grievance was conducted by Ms. Katherine Robertson. She prepared an executive summary of the case for the Senior Deputy Commissioner. According to

her report, Ms. Robertson contacted the A&D Officer. The A&D Officer did not recall the interaction in detail but noted that the Applicant “was quite a bug about a number of things”.

[11] The Senior Deputy Commissioner delivered an Offender Grievance Response (Third Level) on November 26, 2009, denying the grievance. In that decision, the Senior Deputy Commissioner noted that the Applicant did not keep a proper personal property record describing the damage to his guitar. The Senior Deputy Commissioner also noted that the Applicant could have refused to accept the guitar until the damage had been addressed but failed to do so. Although the A&D Department did not take photographs of the guitar when it is was placed in storage, as per the practice for items valued over \$100, the lack of photographs did not implicate CSC for the damage done to the guitar. In the result, the Senior Deputy Commissioner found that there was no evidence to support the Applicant’s claim that the CSC was responsible for the damage to his guitar.

[12] Three issues arise in this application:

- a. What are the appropriate standards of review?
- b. Did the CSC breach the duty of fairness?
- c. Was the Senior Deputy Commissioner’s decision reasonable?

### Discussion and Disposition

[13] According to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, two standards of review apply to decisions of administrative decision-makers, that is correctness or reasonableness. The standard of correctness applies to questions of law and to

issues of procedural fairness. The standard of reasonableness applies to questions of fact and questions of mixed fact and law.

[14] Insofar as the present application raises an issue of breach of procedural fairness, that issue is reviewable under the standard of correctness. The substance of the decision which involves the weighing of evidence, is reviewable on the standard of reasonableness.

[15] The Applicant's arguments concerning breach of the duty of fairness relate to the manner in which the investigation was carried out by the CSC and to the substance of the executive summary that was prepared by Ms. Robertson. With respect to the investigation, the Applicant argued that its conduct was contrary to the protocol set out in *Guidelines 234-1, Claims Administration Instructions* ("GL 234-1") and *Commissioner's Directive 234, Claims against the Crown and the Offender Accident Compensation Program* ("CD 234"). He submits that paragraph 27 of CD 234 requires that CSC must show that it took all reasonable steps to protect the inmate's property and CSC provided no evidence that it had done so.

[16] The Applicant complains that the investigation proceeded too slowly and that the A&D Officer should have been questioned earlier. He also claims that the questioning of the A&D Officer was inadequate since the questions did not consider the most important issue, that is whether reasonable steps were taken to protect the guitar. He claims that this oversight is contrary to Annex B of GL 234-1.

[17] Further, the Applicant argues that the executive summary removed all the supporting exhibits and failed to address many arguments. He said that the summary omits several key facts and contains edited statements.

[18] Finally, he submits that the investigation was conducted in a manner that was contrary to CD 566-12. He said the investigator failed to conduct a thorough examination and speculated the lack of evidence to substantiate negligence.

[19] I will first address the alleged breaches of procedural fairness.

[20] The entirety of the CSC process, not just the decision made by the Senior Deputy Commissioner, is to be considered when allegations of breach of procedural fairness are raised.

[21] In *Sweet v. Canada (Attorney General)* (2005), 332 N.R. 87, the Federal Court of Appeal held that the level of procedural fairness owed to inmates subject to administrative decisions is relatively low. At paragraph 40, the Federal Court of Appeal comments as follows on the requirement of procedural fairness in such circumstances:

During the investigation into the alleged incident, Mr. Sweet was informed that a recommendation for his return to Warkworth Penitentiary was being considered and he was provided with the opportunity to respond. In my analysis, providing the appellant with an opportunity to confront the allegations made against him prior to the decision being made and an opportunity to make further representations by way of a grievance process is sufficient to ensure that the requisite level of procedural fairness was provided.

[22] The opportunity to make submissions is not the sole criterion of procedural fairness in this type of decision. In *Yu v. Canada (Attorney General)* (2009), 356 F.T.R. 312, Justice Snider acknowledged the low level of procedural fairness described in *Sweet* but also found that there was a duty to provide relevant documents during the course of prisoner grievances involving claims against the Crown for damaged inmate property.

[23] An adequately thorough investigation is also required in order to meet the requirements of procedural fairness. In judicial review of a decision of the Canadian Human Rights Commission not to refer a grievance to the Canadian Human Rights Tribunal, this Court held in *Grover v. National Research Council of Canada* (2001), 206 F.T.R. 207, that the Commission need not interview every individual named by a complainant, but that judicial intervention is warranted where an investigation is clearly deficient. In my opinion, this standard applies in the context of inmate grievances as well.

[24] The Applicant submitted his first claim regarding the damaged guitar on March 18, 2009. The A&D Officer was not contacted until October 20, 2009. By that time, the A&D Officer had little recollection of the Applicant retrieving his guitar. This is clear from her e-mail to Ms.

Robertson on October 21, 2009:

Hi Katherine

I don't remember the exact details as it was 10 months ago. He was quite a bug about a number of things. I am pretty sure though that if his guitar was damaged it would have been noted on his effects sheet when he signed for it. Sonja and I generally did this to prevent these claims. I don't remember him ever contacting us at a later date in A&D regarding his guitar being damaged.

What does he say was damaged on his guitar? Does his effects sheet say if he had a case for the guitar?

Susan

[25] This case involves a situation where damage to inmate property was not properly recorded as per CSC guidelines and practices. This means that the evidence of those present when the Applicant retrieved his guitar from A&D is crucial to determining what happened. In my opinion, the 10 month delay of the CSC in contacting the A&D Officer means that the best evidence was not sought at the earliest opportunity. The decision in the first level grievance decision dated May 13, 2009 said that the Applicant's claim was "thoroughly reviewed". This is not the case.

[26] In addition to a thorough investigation, adequate reasons are also required to meet the standards of procedural fairness. In the context of another inmate grievance, Justice Zinn in *Charalambous v. Canada (Attorney General)*, 2009 FC 1082, discussed the reasons provided to the inmate in that case:

[19] The Commissioner did more than merely recite evidence and submissions....

[20] The reasons are adequate enough to allow a reviewing court to understand the evidence that was considered, to ascertain whether each of the complaints was touched upon, and to analyze the decision-maker's reasoning. In the context of the offender grievance procedure, this is all that the duty of fairness required. The reasons are sufficient to allow the Applicant to attack the decision on its merits.



[27] As well, credibility was a key component in this case, that is the credibility of both the Applicant and employees at the Matsqui Institution. The Senior Deputy Commissioner makes no finding as to credibility whatsoever. In that regard, he failed to give adequate reasons.

[28] In view of the breaches of procedural fairness, the decision of the Senior Deputy Minister will be quashed. I do not need to address the reasonableness of the Senior Deputy Commissioner's decision. However, the appropriate remedy in this case warrants comment.

[29] The Applicant also seeks to have the decision remitted for reconsideration by a differently constituted panel. Subsection 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, sets out the remedies available on judicial review:

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

[30] In my opinion, no benefit will be served by remitting this matter back for re-investigation and re-determination because the key witness, that is the A&D Officer, will have no better memory if a re-investigation is conducted now than she had in October 2009.

[31] The further remedies that the Applicant seeks, namely a declaration that the CSC is legally required to consider his claim against the Crown and an order interpreting certain Commissioner's Directives, are inappropriate. They will not be addressed.

[32] This judicial review is allowed and the decision of Marc-Arthur Hyppolite, Senior Deputy Commissioner, is quashed. In the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/98-106, the Applicant is awarded costs in the amount of \$200.00, inclusive of fees and disbursements.

**ORDER**

**THIS COURT ORDERS** that the application for judicial review is allowed and the decision of Marc-Arthur Hyppolite, Senior Deputy Commissioner, is quashed. In the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/98-106, the Applicant is awarded costs in the amount of \$200.00, inclusive of fees and disbursements.

“E. Heneghan”

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Judge

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

**DOCKET:** T-146-10

**STYLE OF CAUSE:** ESMOND JACK YU v. ATTORNEY GENERAL OF CANADA (REPRESENTING CORRECTIONAL SERVICE OF CANADA)

**PLACE OF HEARING:** Vancouver, BC

**DATE OF HEARING:** December 14, 2010

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

**DATED:** January 14, 2011

**APPEARANCES:**

Esmond Jack Yu  
(By Videoconference)

FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Aman Sanghera

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

N/A

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