T-2801-94

OTTAWA, ONTARIO, September 3, 1996

PRESENT: Nadon, J.

BETWEEN :

BRIGITTE MERCIER,

Applicant,

- and -

THE ATTORNEY GENERAL OF CANADA,

Respondent,

- and -

THE CANADIAN HUMAN RIGHTS COMMISSION,

Intervenor.

Notice of motion by the applicant for the issuance of a writ of *certiorari*

1.setting aside the decision rendered on October 21, 1994 by the Canadian Human Rights Commission closing the applicant's file in relation to her complaint number Q 11563,

2.returning the matter to the Commission with specific directions to constitute a human rights tribunal to hear and determine the applicant's complaint pursuant to section 49 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and,

3.issuing any other appropriate order or remedy against the decision rendered on October 21, 1994 by the Commission in relation to the applicant's complaint number Q 11563.

4.The whole with costs.

[Sections 18 and 18.1 of the *Federal Court Act* and Rules 1602 et seq. of the *Federal Court Rules*]

O R D E R

The application for judicial review is denied. The applicant shall be entitled to her costs against the Canadian Human Rights Commission.

"MARC NADON"
J.

Certified true translation

C. Delon, LL.L.

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BRIGITTE MERCIER,

Applicant,

- and -

THE ATTORNEY GENERAL OF CANADA,

Respondent,

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THE CANADIAN HUMAN RIGHTS COMMISSION,

Intervenor.

REASONS FOR ORDER

NADON J.:

This is an application by Brigitte Mercier (the "applicant") for judicial review of a decision rendered on October 21, 1994 by the Canadian Human Rights Commission (the "Commission").

The effect of the Commission's decision, rendered under subparagraph 44(3)(*b*)(i) of the *Canadian Human Rights Act*,[1] is to dismiss the complaint filed by the applicant[2] with the Commission against her former employer, the Canadian

[1]R.S.C. 1985, c. H-6 (hereinafter referred to as the "Act"). Subparagraph 44(3)(*b*)(i) states:

(3) On receipt of a report referred to in subsection (1), the Commission

(*b*) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted. . . .

[2]The applicant's complaint was filed on January 25, 1988. The complaint is summarized as follows by the investigator appointed by the Commission:

[TRANSLATION] The complainant, a living unit officer at Leclerc Institution, alleged she

Penitentiary Service (now the Correctional Service of Canada) (the "Service"), alleging that the Service had discriminated against her on the basis of sex by failing to intervene to put an end to her sexual harassment by certain inmates in the Leclerc Institution, and by refusing to continue her employment on the ground of mental disability (anxious reaction). The Commission's decision reads as follows:

> [TRANSLATION]
> The Canadian Human Rights Commission has studied the complaint (Q11563) filed by you against the Canadian Penitentiary Service on January 25, 1988, alleging discrimination based on sex and disability in employment. The Commission has also noted the comments dated August 22, 1994 and June 2, 1994, signed by Marie-Hélène Verge, and your comments dated April 28, 1994 and December 22, 1990.
>
> The Commission has decided that, in view of all the circumstances surrounding the complaint, no further action is warranted.
>
> The Commission has accordingly closed the file.

The applicant's complaint was the subject of earlier decisions by this Court, by both the Trial Division and the Court of Appeal. In fact, on April 18, 1991, the Commission dismissed the applicant's complaint in words similar to those appearing in its decision of October 21, 1994. The applicant accordingly filed, on July 2, 1991, an initial application for judicial review in the trial division of this Court. In the interval between filing her application for judicial review and the hearing[3] of her application in the presence of my colleague Pinard J., the applicant discovered that the Service had filed some comments with the Commission, but that these comments had not been communicated to her. At the hearing before Pinard J., the applicant submitted, *inter alia*, that by failing to disclose to her the comments of the Service, the Commission had breached the rules of procedural fairness[4] and that the Commission had a duty to give

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> was the victim of sexual harassment and threatening tactics on the part of inmates from November 1986 to January 26, 1987; her employer took no steps to put an end to this harassment. On January 26, 1987, after receiving a letter of a sexual nature from an inmate, she left work and wrote an occupational accident report. This occupational accident was disputed by the mis en cause, which, citing a certificate signed by a psychologist and a psychiatrist, dismissed the complainant on the ground that she had a character weakness. The complainant maintained she was fit and qualified to be a living unit officer.

The investigator, Ms. Anne-Marie Gingras, concluded her report dated October 5, 1990 with a recommendation that a conciliator be appointed to attempt to reach a settlement of the complaint.

[3]The hearing was held on September 30, 1991.

[4]*Mercier v. Commission canadienne des droits de la personne* (1991), 51 F.T.R. 205 (hereinafter

reasons for its decision. Pinard J. rejected these submissions. He held, first, that in dismissing the applicant's complaint the Commission had complied with the rules of procedural fairness, as explained by Sopinka J. of the Supreme Court of Canada in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*.[5] Pinard J. also held that the Commission had no duty to give reasons for its decision.

Pinard J.'s decision was appealed and on March 22, 1994 the Court of Appeal allowed the applicant's appeal.[6] Briefly put, the Court of Appeal held that the Commission had not complied with the rules of procedural fairness by failing to allow the applicant to respond to the Service's comments, which had not been brought to her attention. Accordingly, the Court of Appeal referred the matter back to the Commission to be re-examined taking into consideration her reply.

On May 3, 1994 the applicant's solicitors sent the Commission her reply, a letter dated April 28, 1994. On July 19, 1994 the Commission wrote to the applicant to inform her that her complaint against the Service would again be tabled with the Commission, as ordered by the Court of Appeal in its decision of March 22, 1994. The applicant was also informed that her file would be examined by the Commission at its forthcoming meeting, scheduled for September 19 and 29, 1994. Finally, the author of the letter, Mr. Alwin Child, Director, Compliance, told the applicant that she could submit written comments to the Commission, which should arrive at the Commission on or before August 22, 1994.

On July 22, 1994 Mr. Child placed in the applicant's file a memorandum for the members of the Commission. The memorandum reads as follows:

> [TRANSLATION]
> **Brigitte Mercier v. Correctional Service of Canada**

Mercier (T.D.)).

[5]*Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at pp. 902-903 (hereinafter *SEPQA*).

[6]*Mercier v. Canada (Human Rights Commission)*, [1994] 3 F.C. 3 (hereinafter *Mercier* (C.A.)).

> The Commission reviewed this file at its April 1991 meeting (3.4.01) and, deciding that no further action was warranted, closed the file. The complainant attempted unsuccessfully to learn the reasons for the Commission's decision and ultimately filed a motion in the Federal Court for the issuance of writs of certiorari and mandamus against the Commission. This motion was dismissed and the complainant appealed.
>
> On March 22, 1994 the Federal Court of Appeal found in part in favour of the complainant and referred the matter back to the Commission. The Court was of the opinion that the complainant should have had an opportunity to reply to the comments adversely affecting her credibility, filed by the mis en cause in 1991, which the Commission had examined when rendering its decision. According to the Court, the Commission should give a party an opportunity to comment on the other party's comments when those comments disclose new facts. The Federal Court of Appeal therefore referred the file back to the Commission, ordering it to allow the complainant to comment on the comments of the mis en cause.
>
> The record has again been disclosed to both parties. It is being presented to you for a decision on the appropriate follow-up.

On August 22, 1994 the applicant's solicitors sent Mr. Child the applicant's supplementary comments. On August 24, 1994 the Commission sent the said solicitors "[TRANSLATION] a complete copy of the documents that will be tabled before the Commission members during the review of the [applicant's] file". The Commission informed counsel that their comments of August 22, 1994 would be added to these documents. The Commission also informed the applicant's solicitors that they had until September 2, 1994 to submit additional comments.

On August 29, 1994 the applicant's solicitors wrote to the Commission advising it that they had no further comments to submit. Her solicitors also confirmed that the Commission had received no representations from the Service or any request for more time. They further sought the Commission's confirmation "[TRANSLATION] that if, however, overdue representations are sent to you, and are tabled with the Commission, we will be given a copy, if applicable, to enable us to respond".

On September 14, 1994 the Service sent a two-page letter to the Commission and a report prepared by Mr. Alan Arthur, Correctional Officer, Ste-Anne-des-Plaines Institution. Mr. Arthur had been the applicant's supervisor at the relevant time. The letter and Mr. Arthur's report constituted the Service's comments filed with the Commission members for their meeting of September 1994. Neither the Service nor the Commission sent a copy of these comments to the applicant or her solicitors. On

October 21, 1994 the Commission rendered the decision that the applicant is now asking me to set aside. On November 24, 1994 the applicant filed this application for judicial review. It was not until February 17, 1995, or three months after the filing of this application for judicial review, that the applicant's solicitors learned of the existence of the Service's comments. Following this discovery, the applicant filed a supplementary record alleging that the Commission had again failed to comply with the rules of procedural fairness in that the applicant had not been given an opportunity to reply to the comments of the Service.

The applicant is asking this Court to issue a writ of *certiorari* setting aside the decision rendered by the Commission on October 21, 1994, and to send the matter back to the Commission with directions to constitute a human rights tribunal to hear and determine the applicant's complaint, in accordance with section 49 of the Act. The grounds advanced by the applicant in support of her application are the following:

1. The Commission's failure to give reasons for its decision demonstrates the arbitrariness and illegality of the decision.

2. The evidence provided by the applicant is such that it warranted the constitution of a human rights tribunal to hear the complaint.

3. Accordingly, the Commission's conclusion that no further action was warranted reflects an unreasonable assessment of the evidence.

4. Since the decision rendered by the Commission on October 21, 1994 is to the same effect as the one it rendered on April 18, 1991 (this decision being the one set aside by the Court of Appeal on March 22, 1994), the applicant submits that she has cause for a reasonable apprehension of bias on the part of the Commission.

Since this application for judicial review raises, to all intents and purposes, the same points that were raised by the applicant in her initial application for judicial review, it is necessary, in my opinion, to review the judgments rendered by Pinard J. and the Court of Appeal concerning the initial application.

It should be kept in mind that it was not until a few days prior to the hearing before Pinard J. (the hearing was held on September 30, 1991) that the applicant learned of the existence of the Service's comments and the substance of those comments. In his judgment, Pinard J. states that at the hearing the applicant advanced two reasons why the Commission's decision should be set aside:

> 1.The Commission had breached the rules of procedural fairness in failing to allow the applicant to reply to the Service's comments, and
>
> 2.The Commission should have given reasons for its decision since the decision was contrary to the investigator's recommendations.[7]

Dismissing the applicant's arguments, Pinard J. stated:

> In view of all these facts, after reviewing all the relevant documentation and hearing counsel for the parties, I consider that this is a case in which the rules of procedural fairness as defined by Sopinka J., in S.E.P.Q.A. above were duly observed. It sufficed for the investigation report to be given to the applicant before the Commission's decision was made; it was therefore not necessary for the comments of Correctional Services Canada on the report to be given to her as well. Additionally, it is clear that if the legislature had intended that the Commission be required to give reasons for its decision pursuant to s. 44(3)(b)(i) of the Act when the latter was contrary to the investigator's recommendation, it would have clearly indicated this, as it expressly did in s. 42(1) for cases in which the Commission finds a complaint inadmissible on one of the grounds mentioned in s. 41. In the circumstances of the case at bar, the absence of reasons for the decision is no more a breach of procedural fairness than of the Act.[8]

Pinard J. later concludes his judgment as follows:

> In procedural terms, therefore, I consider that in the case at bar the administrative body acted fairly, and the applicant's action is accordingly without foundation. There can be no question here of any further inquiry as to the way in which the Commission exercised its discretion without giving a substantive content to the duty to act fairly which it is my function to ensure is performed. Finally, it is well established as a general rule that in the exercise of judicial review a superior court should not, where the situation simply requires an assessment of facts and credibility and there is no manifest error, assume the function of the administrative authority.[9]

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[7] *Mercier* (T.D.), *supra* note 4, at p. 209.

[8] Ibid., at p. 213.

[9] Ibid., at p. 215.

As I indicated earlier, the applicant appealed Pinard J.'s decision and the Court of Appeal allowed her appeal.[10] Décary J.A. stated the following in regard to the requirements of procedural fairness:

> As Lord Denning noted, that which procedural fairness requires depend[s] on the nature of the investigation and the consequences which it may have on persons affected by it. Fundamentally, there must be assurance in each case that the individual affected has been informed of the substance of the evidence on which the tribunal intends to rely in making its decisions and that the individual has been offered an opportunity to reply to that evidence and to present all relevant arguments relating thereto. Cory J. recently recalled the applicable principles, as follows [*Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385, at p. 402]:
>
> > This Court has repeatedly recognized the general common law principle that there is "a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual" (see *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653). It follows that the Deputy Minister was under a duty to comply with the principles of procedural fairness in the context of security clearance decision-making. Generally speaking, fairness requires that a party must have an adequate opportunity of knowing the case that must be met, of answering it and putting forward the party's own position.[11]

Décary J.A. later adds:

> Moreover, when Sopinka J. stated that he was "satisfied that [the complainant] was expressly advised of the manner in which s. 11 was being applied by the Commission" and adopted the opinion of Wilson J. that "this is an aspect of the duty of procedural fairness to inform a party of the case to be met" [SEPQA, supra note 7, at p. 903], he confirmed that a complainant is entitled to know both the rules of the game and the substance of the evidence before the Commission, which in my view includes, where applicable, additional evidence submitted by an adverse party in its comments."

Having defined the requirements of procedural fairness, Décary J.A. concluded that in the case at bar these rules had not been observed by the Commission. He stated:

> In the case at bar, the appellant certainly was never in a position to foresee, *a fortiori* to counter, the decision the Commission was going to make, nor to know or even suspect the grounds on which it would decide not to follow its investigator's recommendation. The investigation report was in fact favourable to her. The Service's comments were filed without her knowledge and outside the time limit which the Commission had imposed and described as mandatory. These comments were much more than argument based on the facts set out by the investigator in his report; on the contrary, they were replete with facts that did not appear in the file that had until then been before the Commission, and went so far as to attack the appellant's credibility [see *Labelle v. Canada (Treasury Board)* (1987), 25 Admin. L.R. 10 (F.C.A.)]. Moreover, in the

[10] *Mercier* (C.A.), *supra* note 6.

[11] Ibid., at p. 12.

> Commission's decision of April 18, 1991 it misled the appellant by suggesting to her that it had before it only the comments filed by her on December 22, 1990, so that in fact the appellant would have had to bring legal proceedings to learn what the evidence was that had apparently led to the Commission's about-face.
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> I am not saying that the rules of procedural fairness require that the Commission systematically disclose to one party the comments it receives from the other; I am saying that they require this when those comments contain facts that differ from the facts set out in the investigation report which the adverse party would have been entitled to try to rebut had it known about them at the stage of the investigation, properly speaking. I recognize that it will not always be easy to determine when comments cease to be "argument", to use the words of Sopinka J., and become new allegations that must be brought to the attention of the other party; if the Commission were to decide to continue its general practice of not disclosing comments, it will still have to examine each case individually and practice great vigilance so as to avoid a party in a particular case, such as the case at bar, not receiving disclosure of comments that are such as should have been brought to that party's attention. It would seem to me that it would be in the Commission's interest, if only to protect itself in advance from any criticism, to require that the parties exchange their respective comments. Otherwise, and here I am adopting the views of Mahoney J. in *Labelle*, the Commission will always be exposed to an application for judicial review "because it will always be *prima facie* arguable that the complainant was not made aware of, and hence was denied a fair opportunity to meet, the whole of the contrary case."
>
> I note in passing that it does not seem to me to be very useful, when the investigation report adopts the argument made by one party, to ask that party to submit its comments immediately. What kind of comments can the "winning" party make when it does not even know whether the report will be contested by the other party, and when it undoubtedly has no idea of what aspects of the report will be subject to dispute, if any? In such cases, it would seem to me to be more logical and more practical to ask the "losing" party to submit its comments first, and then to allow the "winning" party to reply.[12]

As to the applicant's argument concerning the Commission's failure to give reasons for its decision, Décary J.A. states:

> With respect to the failure to provide reasons for a decision where there is no statutory requirement to do so, the jurisprudence of this Court is to the effect that the Commission is not required to give reasons for a decision it makes under subsection 44(4) of the Act [see *Lever v. Canada (Canadian Human Rights Commission)* (1988), 10 C.H.R.R. D/6488 (F.C.A.)]. The appellant relies on the later decision of the Supreme Court of Canada in *SEPQA* in support of her argument that failure to give reasons may constitute a breach of the rules of procedural fairness.
>
> The situation presented in SEPQA was different. The Commission's refusal was based on the recommendation to that effect made by the investigator, so that the complainant was in a position, based on the investigation report that was in its hands, to understand the reasons for the decision, although reasons were not given. The Supreme Court rightly refused to decide the issue relating to the failure to give reasons. Here, the Commission's refusal is contrary to the investigator's recommendation, and in the absence of reasons the complainant, who was not aware of the existence of the Service's comments, could not even suspect what had caused the Commission not to act on the recommendation.
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> Does this mean that in the case at bar the failure to give reasons constitutes in itself a breach of the rules of procedural fairness? I do not believe so.

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[12] Ibid., at pp. 13-14.

> Had reasons been given for the Commission's decision, it would nonetheless have been fundamentally vitiated in view of the Commission's failure to inform the appellant of the substance of all the evidence in the record. If the appellant had been informed of the substance of all the evidence in the record, she could not have complained of the absence of reasons, as the Commission would presumably have rejected the investigator's recommendation for the reasons set out in the Service's comments. It does not appear to me to be possible to dissociate the failure to give reasons from the failure to inform and to make the first failure, in the absence of the second, a breach which supports an application for judicial review. The duty to give reasons has been imposed by Parliament in certain specific cases, including the situation covered by subsection 42(1) of the Act which applies where the Commission decides not to deal with a case for the reasons set out in section 41. I would hesitate to use the rules of procedural fairness to impose a burden that Parliament imposes only sparingly in very specific cases.[13]

At the hearing before me, the applicant, as she had done before Pinard J., confined her arguments to the Commission's failure to comply with the rules of procedural fairness and the lack of reasons for the decision. In my opinion, the other grounds relied on by the applicant are without foundation.

On the applicant's initial judicial review application, the Court of Appeal concluded that the Commission had breached the rules of procedural fairness by not allowing the applicant to examine and reply to the Service's final comments. The applicant submits that in this instance the Commission "[TRANSLATION] knowingly flouted the judgment rendered...by the Federal Court of Appeal...and the many requests by applicant's counsel for a copy of any representations submitted by the Service...."

In order to rule on this submission, it is necessary to examine why the Court of Appeal held that the Commission had failed to comply with the rules of procedural fairness. In the first place, Décary J.A., who wrote the reasons for the Court, notes that the Commission's practice is not to disclose the comments received by [sic] the parties. While emphasizing the difficulties that may result from this practice, and recommending a disclosure policy to the Commission, Décary J.A. clearly states that the Commission's failure to disclose the comments of one party to the other will breach the rules of procedural fairness only when "those comments contain facts that differ from the facts set out in the investigation report which the adverse party would have been entitled to

[13]Ibid., at pp. 15-16.

try to rebut had it known about them at the stage of the investigation, properly speaking".[14]

In that particular case, Décary J.A. concluded that the comments that had not been disclosed to the applicant and to which she had not been given an opportunity to reply should have been disclosed because they were "replete with facts that did not appear in the file that had until then been before the Commission, and went so far as to attack the appellant's credibility".[15] It is necessary, therefore, to examine at this point the comments submitted to the Commission by the Service on September 14, 1994, which were disclosed to the applicant only after she had filed her application for judicial review.

It will be recalled that the comments by the Service that were discussed before Pinard J. and the Court of Appeal are the comments filed with the Commission on February 14, 1991. It will be recalled as well that following the Court of Appeal judgment, the applicant had an opportunity to reply to the Service's comments. The applicant's comments were conveyed to the Commission appended to a letter her solicitors sent the Commission on May 3, 1994. The applicant submits that the Commission should have allowed her to reply to the final comments submitted by the Service. However, the respondent submits that since the Service's comments contained "[TRANSLATION] no new substantial and decisive fact in regard to the substance of the proceedings. . .", the Commission was under no obligation to disclose them to the applicant. The respondent accordingly submits that in the case at bar the Commission did not breach the rules of procedural fairness.

In my opinion, the Service's comments dated September 14, 1994 are in no way "replete" with facts that were not already in the Commission's file. In other words, it would seem to me that in its comments of September 14, 1994 the Service simply reformulated the arguments it had made earlier. In order to compare the February 1991

[14]Ibid., at p. 14.

[15]Ibid., at p. 13.

comments with those of September 1994, I prepared a table that repeats *verbatim* the Service's comments of February 14, 1991 and September 14, 1994. This table is attached to my reasons as appendix "A".

Unlike Décary J.A., I am unable to conclude that the applicant, given the non-disclosure of the Service's comments, was unable to foresee or prepare for the decision rendered by the Commission on October 21, 1994. Indeed, as I indicated earlier, the Service's comments contain no relevant fact that was not already in the Commission's file. I am of the opinion that in this case the applicant had an opportunity to present all her arguments pertaining to the facts that were relevant to the investigation and the comments made by the Service in relation to those relevant facts. I cannot conclude that the Commission failed to comply with the rules of procedural fairness by not disclosing the Service's final comments to the applicant.

The applicant also argued that the Commission had a duty to provide reasons for its decision. I am unable to accept that argument. There can be no doubt, in my opinion, as to why the Commission rejected the investigator's recommendation. As Décary J.A. stated in his reasons:

> If the appellant had been informed of the substance of all the evidence in the record, she could not have complained of the absence of reasons, as the Commission would presumably have rejected the investigator's recommendation for the reasons set out in the Service's comments.[16]

Further on in his reasons, Décary J.A. states that Parliament has imposed on the Commission a duty to give reasons in some cases, including the situation covered by subsection 42(1) of the Act. Décary J.A. concludes this part of his reasons with the statement:

> I would hesitate to use the rules of procedural fairness to impose a burden that Parliament imposes only sparingly in very specific cases.[17]

I am therefore of the opinion that the Commission had no duty to give reasons for its decision. The application for judicial review will therefore be dismissed.

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[16]Ibid., at p. 15.

[17]Ibid., at p. 16.

However, in the circumstances, I am going to order that the Commission pay the applicant's costs.

In his reasons, Décary J.A. of the Court of Appeal concluded that the rules of procedural fairness did not require that the Commission "systematically disclose" to one party the comments received from another. But he did state very clearly, as had Mahoney J.A. in *Labelle v. Canada (Treasury Board)*[18], that the Commission's practice of not disclosing to the respective parties the comments received from the others was not one that should be encouraged.[19]

On two occasions the applicant learned, after filing an application for judicial review, that the Commission had received comments from the Service, comments that had not been disclosed to her. It seems to me, therefore, that an applicant who receives a negative decision from the Commission when the investigation report was favourable to him or her would be wise to file an application for judicial review, to ensure that he or she had an opportunity to reply to the employer's comments. In my opinion, the Commission's current practice is one that can give complainants the impression — and this is certainly what happened in this case — that the Commission is not treating them fairly. It would be easy to solve this problem, and the solution is the one suggested by Décary J.A., namely, "to require that the parties exchange their respective comments".

Consequently, although I am not empowered to order the Commission to adopt a different practice, I am of the opinion that the Commission, in this instance, should pay the applicant's costs. As I indicated earlier, it is appropriate that a complainant would file an application for judicial review to ensure that he or she had an opportunity to reply to the arguments of the adverse party. Although I have concluded, in the case at bar, that the Commission did not breach the rules of procedural fairness, it seems obvious to me that if the Commission had adopted a practice along the lines suggested by Décary

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[18](1987), 25 Admin. L.R. 10 (F.C.A.).

[19]See *Mercier* (C.A.), *supra* note 6, at p. 14.

J.A., the present application for judicial review might possibly have been avoided or at least discussed in a different forum.

For these reasons, the application for judicial review is dismissed with costs to the applicant.

"MARC NADON"

J.

Certified true translation

Christiane Delon

APPENDIX "A"

Incident	**CSC Comments of February 14, 1991**	**CSC Comments of September 14, 1994**
Cartoon on a bulletin board	Paragraph 46 states that "On January 2, 1987, the complainant discovered a drawing caricaturing her, with the vulva coloured red. Written on it was: 'Bridget no tits'. She threw the drawing in the trash can...." On January 2, 1987 Brigitte Mercier was on sick leave.	At page 2 of her document, the lady claims that the CSC is now for the first time challenging the sexual existence of the inmates. I refer you to heading I <u>existence of sexual harassment of inmates toward me</u>; among other things, to point 1 concerning paragraphs 5, 46 and 47 of the investigation report. This concerns an incident reported by Ms. Mercier. While doing a round, she saw a cartoon on a bulletin board in a cell range. From what she says, it was on January 2, 1987 but according to our records she was on sick leave that day. Whatever the case, CSC and the lady do not question the fact that she saw a drawing of that type on a board. According to 46 and 47 she does not know who put it on the board. She simply removed it and destroyed it. The lady in fact took the necessary steps.

Actions of inmate C	Paragraph 6 states that "Around January 1, 1987, inmate C, normally cold, solitary and aggressive, became increasingly familiar with the complainant, greeting her all the time. He questioned her about her private life and went to the control room in his pyjamas. This conduct continued for one week, i.e. until the complainant ordered him to stop. Inmate C then became aggressive toward her." It is common for inmates to go to the common room in pyjamas. Furthermore, as a living unit officer responsible for a floor where she had to supervise inmates, Ms. Mercier surely saw inmates every day moving about with little on, if not completely naked, in order to go to the showers, an area she was also supposed to supervise. Why did Ms. Mercier wait one week before intervening? Confronted with this situation, Mr. Alan Arthur explained to Ms. Plamonde the appropriate actions he had advised Ms. Mercier to take during a meeting at that time, namely: 1. Issuing the inmate with a verbal warning about this conduct and reporting in the inmate's activity record and the log book; 2. Observation report. However, Ms. Mercier made no entry of a verbal warning in the activity record or the log book.	With regard to point 2 dealing with paragraph 6 on inmate C. CSC finds nothing exceptional in the fact that an inmate was in pyjamas. It is very frequent in the ranges that inmates who are not working walk about in pyjamas and even sometimes with little on if they are going to the showers, etc. There is nothing surprising in this kind of behaviour. If such were the case for inmate C, it would surely have been reflected in the lady's report of January 6, 1987. This is not at all the case. As to his conduct becoming increasingly familiar, I would like to clarify what she means by familiar. In her report of January 6, 1987, she explains that the inmate is constantly coming to see her to talk about himself and his past. In fact, this is precisely what inmates usually do with primary officers, i.e. they talk about themselves and what they have done. She points out that he was becoming increasingly friendly with her. He greeted her all the time, she says. This behaviour by an inmate is far from being illegal, immoral or contrary to the internal policies of the department, given that the CSC mission is to equip inmates to reintegrate society and become good citizens. In the inmate's activity records there is no reference to rudeness or impoliteness or any observation report prior to January 6 in this regard. How, then, can it be concluded that familiarity constituted harassment? ...

		On point 3, dated January 6, 1987, the lady took appropriate action in regard to inmate C. That is, she reported to me in writing about the conversation she had had with the inmate on that date. A copy of the report was given to Mr. Pineau, CMOI and Mr. Verreault. I took note of this report, which is a summary account of what happened. I note in the report that the lady decided that she would not report on it at that point, there wasn't anything sufficiently serious to warrant an offence report at that point. Ms. Mercier had previously been given some advice, i.e. steps to take, basic warnings, activity record, log book, observation reports, offence reports concerning inmates D and E. This is appropriate for any delinquent or inappropriate conduct. This advice applied equally to inmate C.

Spying by inmates D and E	This paragraph [7] reports that inmates D and E spied on Ms. Mercier and her colleague while they were stationed in front of control. Mr. Arthur had advised Ms. Mercier on how to react in such situations and had suggested she clearly document the situation. <u>Example</u> 1. Warning, order to stop; 2. Entry in activity record, log book; 3. Offence report. ... Paragraph 11 states that "Inmate D was sent back to his range and, expecting to be transferred, packed his belongings. After three days, seeing that nothing was happening, he resumed his spying behaviour." First, how can we know that the inmate thought he was being transferred? Second, if that was the case, one might conclude that the warning was quite severe. Furthermore, how can it be stated that the inmate began to spy on Ms. Mercier after three (3) days, since there is no comment in the log book and/or activity record? Finally, Ms. Mercier was off duty on January 17, 18, 19 and 20, 1987. It is incorrect to say that no action was taken in the case of inmates D and E. Mr. Arthur convened an AD HOC committee and serious warnings were issued to the inmates.	With respect to point 3 at page 3 of the document, the lady claims that CSC questioned whether there was a resumption of spying activity by inmate D. In fact, in relation to paragraph 7 of the report, we do not deny that inmates D and E spied on Ms. Mercier and her colleagues. We simply point out in the Ad Hoc Committee that there was no warning by the employees, no entry in the activity record or log book, and no intervention in relation to this spying on officers in the festive season. It is the responsibility of the living unit officer, as the first staff member to take these specific steps. Since these steps had not been taken by the living unit officers prior to the Ad Hoc committee, we gave serious warnings to the inmates at [the meeting of] this committee. The lady says that the spying resumed re: sentence paragraph 57. We cannot confirm this statement. So what is the source of this statement, since once again there is no annotation to this effect in the log book or in the activity record: clearly, the warnings had been effective. (no entry on the 13th, 14th, 16th, 16th in the activity record for inmate D and on the 17th, 18th, 19th and 20th January Ms. Mercier was off duty.)

		... In relation to point 4, again concerning spying in the unit, the lady claims to have made two confidential briefing reports, entries in the activity record. This happened seven years ago. From memory, the two confidential reports were made the day before and the entry in the activity record simply notes that these reports were made and the nature of the entries in the activity record provides no description of the inmates' conduct. The officers say the spaying itself was in a grey area that was not an offence under the code of conduct as such. We have always said that the primary workers must get control of the situation once they are aware of it, through verbal warnings, initiating cease and desist orders or performance notices. When an order has been given, disobeying the order is an offence under the code of conduct. That would have warranted an offence report. If the basic work is not done, the following work cannot be done.

		... The lady alleges that she could not report the substandard conduct of the inmates, and that it was up to the supervisor and management to impose disciplinary measures to remedy substandard conduct by inmates. The supervisors' job is to impose disciplinary measures subsequent to the actions taken by the primary staff through offence reports or unsatisfactory performance notices: this was not done. In such situations, it is up to the supervisor to require that the primary staff do their work adequately and consequently the supervisors are in a position to provide all the support the employees warrant. In the case of D and E, this did not prevent me from giving warnings to the inmates during the Ad Hoc committee, an action that should have been done long before by the primary staff. In point I: On January 12, I held an Ad Hoc meeting for the purpose of confronting inmates D and E. We learned at this interview that Ms. Mercier and Ms. Larivière had taken no decisive action prior to this meeting vis-a-vis the inmates. It was obvious to me that the conduct of inmates D and E during the committee meeting was the result of the lack of action by Ms. Mercier and her workmate in their regard. My support is normally in terms of the work that is done by these primary staffers, so one of the results of this committee is in fact to provide close follow-up on the two subjects and to draw attention to any repeat offence by them.

		Reading the activity records for inmate E, one notes that he understood the committee's warning. With regard to inmate D, he repeated his offence the following month in relation to another primary staff member. She reacted immediately, wrote up an offence report on the inmate and he was convicted by the disciplinary court. As to the complainant's statement that the inmate resumed spying on her several days later, notwithstanding all my advice, I see no entry on this in the institutional documentation.
Inmates do not act in the same way with the male officers.	This paragraph [13] reports that some inmates were following close on the heels of the complainant during head counts. The inmates act the same way (i.e. following the officer doing the count and making comments) with male officers.	At point 4 on page 3, the lady accuses CSC of falsely stating that all inmates act the same way with male officers. At no time has CSC said that all inmates acted the same way with absolutely all male officers or with all female officers. We simply point out that they sometimes act the same way with male officers. The lady cites as an example an officer, Mr. Laferrière, for whom I have great respect because he is firm, draws respect, enforces the regulations and issues offence reports. He does everything a primary staff member should do. So he knows how to gain respect in the ranges and is not dogged by inmates. Each staffer must earn respect by enforcing the regulations fairly and equitably and not by ignoring a situation. When she felt them breathing down her neck, why did Ms. Mercier not report the incident? Why did she not report the inmates?
The inmates said "pinch her, grab her."	This paragraph [14] states that some inmates allegedly said "pinch her, grab her." Mr. Alan Arthur was never informed of this fact.	The inmates stated that they were going to touch her, "pinch her, grab her," these facts were, once again, never the subject of an offence report or entry in the activity record. In the memorandum sent to me and Diane Larivière on January 26, there is a report of four inmates who are following the officer step by step when she does the count. There is no mention of the disagreeable remarks that are alleged in paragraph 14:

		“pinch her, grab her”, etc. The report simply reports the inmates’ conduct, which was tolerated by Ms. Mercier and Ms. Larivière but was not tolerated by Mr. Laferrière.

Ms. Mercier did not react adequately when sexually harassed by inmates.	This paragraph [9] states that "The investigation showed that the complainant reacted adequately to a number of incidents of a sexual nature (see paragraphs 41, 43, 44, 47, 49 and 50). The complainant filed several observation reports, confidential briefing reports, etc." This is inaccurate. For example: <u>Paragraph 41</u> No action was taken by Ms. Mercier concerning the poster. <u>Paragraph 43</u> The action was not taken by Ms. Mercier but by one of her colleagues, Dyanel [*sic*] Larivière. <u>Paragraph 44</u> Ms. Mercier would have given a warning. <u>Paragraph 47</u> Ms. Mercier did in fact remove the drawing, which management was unaware of. <u>Paragraph 49</u> An AD HOC committee was formed by Ms. Mercier's immediate supervisor. It was not Ms. Mercier who administered severe warnings to the inmates. Furthermore, Ms. Mercier did not make any annotation in the activity record or any comment in the log book. Nor did Ms. Mercier file a sexual harassment offence report, except in relation to inmate K. It was Mr. Alan Arthur, Ms. Mercier's immediate supervisor, who insisted that she file this report. As to the part on the psychological and psychiatric appraisals, it is incorrect to state that no diagnosis of any pathology was made in regard to Ms. Mercier.	In all her statements, the lady is careful to state in a general way that she filed several observation reports and confidential briefing reports. When we check the files case by case, we find a lack of annotation in the activity record, the offence report or other reports. Finally, the confidential briefing reports are intended primarily for the preventive security officer and not the current inmate file on the floor. What is more accessible for a supervisor, in order to take the pulse [*sic*] of what is happening in his unit is to consult the log book which is our on-board communication book, and the activity record for each inmate. The limited use of the log book as described by the lady, namely, to write general information such as inmate head counts, the general atmosphere in the section, was sufficient to inform the shift of what was actually happening in the range. Although a primary employee, or about 14 officers per unit [*sic*]. Well informed, the team functions marvellously. Ms. Mercier states that she could only report the substandard conduct of the inmates but had no authority, which is incorrect. She had to deal with the inmate's delinquent conduct, be fair and equitable with him while earning his respect with full authority to act when an inmate committed an offence. Normally, the different phases of a residential unit officer are, first, to restore order through a verbal warning and, in the case of repeat conduct, to issue a performance notice or, if the breach is more serious, an offence report. An offence report is in fact a charge, which is tried by the disciplinary court.

	Finally, it must be kept in mind that inmates, by definition, often have unacceptable social conduct and that the role of employees of the Correctional Service of Canada is precisely to intervene with the inmates to help them rehabilitate themselves and rejoin society as law-abiding citizens. In this regard, I refer you to page 50 of the August 26, 1988 decision of the Appeal Board of the Public Service Commission.	
Posting of a Playboy photo in inmate A's cell.	Ms. Mercier stated that "the fact that she was identified in a photo led the inmates to look at her in a funny way, and to make comments to her." Ms. Mercier took no action in relation to inmate A. Ms. Mercier, as a primary staff member, should have take direct action in relation to the inmate(s).	In the first case, the CSC does not deny the fact that the centrefold of the Playboy magazine was displayed in inmate A's cell and that the display was authorized. The employee should have taken action on what followed in relation to inmate A since it involved an offence. In paragraph 3 we are told that inmate A auctioned the object off since, it appears, it resembled a member of the staff. An inmate may not give, exchange or sell an object that belongs to him. She could have ended this unlawful activity. It is only in paragraph 3 that we are told that the inmates looked at her in a funny way. So what did she do when these words were spoken to her? Did she make an entry in the casework records? Did she file offence reports? This is where we think she did not take the necessary action. There was no action to be taken when the poster was displayed on the board authorized for that purpose. If the actions she reports in paragraph 3 warranted some action, these were situations that I was unaware of since there was no mention of it in the records, activity reports and offence reports, etc.

Love letter from inmate K.	In this paragraph [15], we read: "According to the complainant, all inmate letters are normally opened, read and censored. Inmate K's letter (see Appendix 1) reached her without interference." It is inaccurate to state that all inmate letters are normally opened, read and censored. Under Commissioner's Directive 085, entitled "Correspondence and telephone communication", letters received or sent by inmates should not as a rule be read. The envelope is checked to see whether it contains contraband. <u>In some circumstances</u>, inmates' correspondence may be read and censored. It is completely plausible that an employee would receive an unopened letter, since it can emanate from her supervisor, the regional headquarters, another employee, etc. The letter might also have been placed by the inmate on Ms. Mercier's desk. ... These paragraphs [15, 18, 19 and 59] refer to the letter that inmate K sent to Ms. Mercier. 1. The investigation report completely overlooks the meeting that occurred on January 26, 1987 between Ms. Brigitte Mercier, the interim residential unit supervisor Mr. Alan Arthur and the case management officer institution (CMOI), Ms. Manon Houle, who was also the CMSI (case management supervisor institution). Furthermore, the investigation report fails to mention the topics that were discussed at that time.	In point 2 concerning the love letter from inmate K, Ms. Mercier now says that the letter was on the desk of the institutional head. The letter was in fact opened in the office of the primary staff members, in the third ABCD. The office is accessible at all times to the inmates when an officer is occupying the office. In all other circumstances, as, for example, when the officers are absent, the office is locked. The allegations made at page 6 of the lady's complaint call for some particulars. On January 26, I was with Ms. Houle in order to meet with the case management officer to get some information on inmate K. During this meeting, Ms. Mercier broke into tears. In the circumstances, I thought it was appropriate to request the presence of Ms. Houle, who was a female officer in the Employee Assistance Program with whom Brigitte Mercier would have been more at ease. It was agreed to leave them alone to discuss the situation. Ms. Houle did indeed tell her she was an EAP officer and that the conversation was privileged. That is why I withdrew at that point. I returned to my supervisor's office. I waited for Ms. Houle's call when her interview with Ms. Mercier was finished. Following this EAP interview. Ms. Houle advised me that Ms. Mercier wished to go home. According to Ms. Houle's testimony, Ms. Mercier was urged to confront the inmate with the letter, which she refused to do.
	2. (a) No mention is made that Ms. Mercier's immediate supervisor, Mr. Alan Arthur, contemplated referring Ms. Mercier to an EAP (Employee Assistance Program) officer. Ms. Manon Houle, inmate K's case management officer, was one.	Although disagreeable, inmate A's letter is in no way embarrassing. There was no reason to place him in segregation, which in practice is done when there is a physical danger to staff or reason to believe that a situation will deteriorate. That being said, these facts were

	2. (b) Thus, in the conversation between Ms. Mercier, Mr. Arthur and Ms. Houle on January 26, 1987, Ms. Houle explicitly asked Ms. Mercier if she wanted to meet with the EAP officer. She said she did. Mr. Arthur withdrew. Ms. Houle, as the EAP officer, initiated a conversation with Ms. Mercier on what her expectations were from an EAP officer. 3. No mention is made in the investigation report of the steps taken by the CMO (case management officer) in relation to inmate K concerning the content of the letter received by Ms. Mercier (disciplinary interview, annotation in the activity record and deposit in inmate K's file, severe warning issued to inmate K by the CMOI and the LUS of K's unit to the effect that any similar repeat offence would result in his immediate transfer to a maximum security institution). 4. No mention is made in the investigation report that inmate K's CMOI invited Ms. Mercier to attend the disciplinary interview concerning him, which was held the next day, January 27, 1987, at the office of the CMOI in the presence of the LUS. When this invitation was issued, the CMOI clearly told her that her absence might be construed by the inmate as approval on her part, and that only the CMOI and the LUS disapproved of his conduct.	not reported by the lady solely in this report, since during the hearing before Pierre Baillé, chairman of the Public Service appeal board, in August 1988, the same facts came out in testimony. In the case of inmate K, he belonged to unit 1, Lucien Gagné's. In light of the facts, we know that the supervisor of this unit indeed met with the subjectand with the case management officer the very day following the offence. The gentleman was prepared to apologize to Ms. Mercier, but she did not want to hear this apology according to the testimony of Ms. Houle and she was unwilling to acquiesce in the inmate's request. It was unnecessary to hold a hearing in the disciplinary court, especially since the main witness (Ms. Mercier) was absent from work for several months. There has been no repeat offence subsequently in regard to any of the female staff. The Commission d'appel en matière de lésions professionnnelles, [in] a decision dated April 17, 1991 by board member Elaine Harvey, which was given to the complainant, cites at great length the circumstances of inmate K and the relations with Ms. Houle as EAP, etc. So it is not anything new to the lady in this case. She has been aware of this for three years and has not previously disputed it.
	5. No mention is made of the fact that, despite Ms. Mercier's refusal to attend the proposed disciplinary interview, which was held on January 27, 1987, the CMOI informed Ms. Mercier of what was said at that interview. 6. No mention is made of the fact that during the disciplinary interview held on January 27, 1987, inmate K expressed the desire to meet with Ms. Mercier to apologize,	

	that this message was orally conveyed to Ms. Mercier by the CMOI, but that she refused to meet with inmate K. The latter nevertheless expressed the desire to make a written apology to Ms. Mercier. ... These paragraphs [17 and 60] refer to the fact that Ms. Mercier asked that inmate K be placed in segregation. Under section 40 of the Penitentiary Service Regulations and Commissioner's Directive 590 on administrative segregation, an inmate may be placed in administrative segregation on particular grounds. The described situation did not fall within these grounds. ... These paragraphs [60 and 92] refer to the offence report written up by Ms. Mercier in regard to inmate K. It is incorrect to say that the report was lost or remained a dead letter. Inmate D's case was to be heard by the chairman of the disciplinary court. However, Ms. Mercier refused to testify before the disciplinary court and the chairman dismissed the matter.	

There was no training or course of action to deal with the issue of inmates' tactics of a sexual nature.	The paragraph [39] states that "Indeed, although management was aware of this fact at the time the complainant was working, no measures were provided to deal with it." By the way it is formulated, this sentence would suggest that the former residential unit manager had taken no steps to deal with the "additional difficulty", when such is not the case. A procedure had been established and explained to employees at weekly unit meetings: An inmate acting inappropriately (e.g. sexual harassment) in relation to an employee should be reported, a meeting should be organized at the earliest opportunity between the inmate, the employee, the supervisor and the case management officer, the inmate should be warned to cease his socially unacceptable conduct or, if convicted of a similar offence by an independent judge of a disciplinary court, have his case submitted to the transfer review board. All of this would be reported in the inmate's file. The report also states that "The issue of inmates' sexual tactics in relation to the officers was not covered during training." That is not correct. Sexual tactics were the subject of a presentation under inmate manipulation techniques during the new recruits initiation course, which was attended by Ms. Mercier.	It has been demonstrated at hearings before other agencies such as the CSST review board that primary workers are trained to deal with all manipulative and delinquent tactics by the prison population. During initial training of employees at the staff college, inmates' sexual tactics are discussed as one of these manipulative tactics and the tools we have at hand are adequate to frustrate these tactics if they are set up properly. Verbal notices of offence reports, etc. However, the Correctional Service has developed training on the sexual harassment that sometimes exists between management and employees, supervisors and officers, and this is referred to in the minutes of the labour-management meeting of June 2, 1987. Training that was held the following September. As to sexual harassment by inmates, it is true that in the occupational accident report, I stated that it would be useful if more specific training (update) were given to the officers concerning this matter. That it be clear and precise to everyone how to act in such circumstances. This was covered in a general way at the college. I was asking that it be more specific in the institution. At the time there was a residential unit manager with unit supervisors under him. In the supervisors' meetings, when a procedure was established, it was explained to the employees at weekly meetings of the units.
		When the new management made room for unit managers rather than unit supervisors at a unit meeting on November 18, unit number 3, the question was brought up again to ensure that the new unit managers do the same thing as the supervisors previously. The procedure to be followed seems clear to me in the report on the meeting of unit no. 3, as described by Ms..... I attended this meeting.

		Although the tools are there for everyone, each person uses them differently according to his or her personality. During this meeting, I made the request that it would be worthwhile providing specific training on this subject, given the experience I had had in the past. A well-prepared program with an offence observation report and teamwork. A well-prepared program has always produced good results. The past has shown this. Those that have not been well prepared have had the results we know.
Rumour of Ms. Mercier's lesbianism circulated by inmate B.		Concerning item 2, Ms. Larivière called inmate B into the office of the fourth ABCD and after a discussion she put an end to all the rumours of lesbianism circulated by this inmate. She was in fact the residential unit officer responsible for this inmate. Ms. Larivière is also a primary worker.

Certified true translation

Christiane Delon

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

FILE NO.:T-2801-94

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PLACE OF HEARING:MONTRÉAL, QUEBEC

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REASONS FOR JUDGMENT OF NADON J.

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