Date: 20060616

Docket: T-1888-03

Citation: 2006 FC 775

[ENGLISH TRANSLATION]

BETWEEN:

JEAN-CLAUDE BOUCHARD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

GAUTHIER J.

[1] Jean-Claude Bouchard is an inmate presently incarcerated at the Federal Training Centre in Laval (FTC), a reinforced minimum-security institution. He asks the Court to review the legality of the decision by the Assistant Commissioner of Correctional Service Canada (CSC) that dismissed the third-level grievance in which he challenged his involuntary segregation, the increase of his low-security rating to moderate, and his involuntary transfer to a medium-security institution.

[2] Mr. Bouchard also seeks an order to strike the reports prepared by the respondent of which the list is attached as an appendix in his memorandum of fact and law. He also asks the Court to declare that several of his constitutional rights were violated (sections 2(b), 7, 8, 9, and 12 of the Canadian

Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), 1982, c. 11 (the Charter)).

[3] Relying on subsection 24(1) of the Charter, the applicant asks the Court to order CSC to send a recommendation for day parole at a house or full parole to the NPB, and order the NPB to approve his application for day parole or full parole within twenty (20) days of service of the order.

Background

[4] Even though the Court has very carefully reviewed all the extensive documentation supporting this application, it is not necessary to make a detailed account. However, it is important to properly situate the impugned decision in context.

[5] The applicant has been incarcerated for the last twenty-three (23) years for first-degree murder. He was given a life sentence with eligibility for full parole after twenty-five (25) years. However, on December 12, 2002, he received a ruling reducing the deadline for his eligibility for full parole. The NPB recalculated his date for eligibility for day parole on December 12, 1999 and for eligibility for full parole on December 12, 2002.

[6] According to the applicant, this favourable judgment was founded on ample evidence of good behaviour and on the fact that after having given up drugs and alcohol since 1984-85, he participated in several rehabilitation programs and completed more than ninety (90) escorted

temporary absences. He was incarcerated at Ste-Anne-des-Plaines Institution (SAPI), a minimum-security institution, since 1998.

[7] He was therefore expecting to receive the support of CSC when he asked Mr. Matteau, his new parole officer (PO), to meet with him to plan his hearing before the NPB, which he wanted to schedule as soon as possible. In this regard, on January 15, 2003, the applicant personally sent a letter to the NPB requesting a hearing date. He would inform Mr. Matteau of this on January 16, 2003.

[8] However, before this date, Mr. Bouchard had met with Mr. Paquette, his former PO, on multiple occasions to discuss his problems with an inmate in his living unit and reassured him that the situation was not serious.[1]

[9] In any event, on January 17, 2003, the case management team (CMT) responsible for Mr. Bouchard met to discuss his file. According to them, Mr. Bouchard's behaviour had deteriorated in the previous year, particularly in December 2002 and January 2003. He did not involve himself in the programs and reportedly had problems during his absences.[2] He also allegedly threatened a fellow inmate. The team found that he had to set new objectives for his Correctional Plan and that his hearing before the NPB had to be postponed six months.

[1] Even if Mr. Paquette was no longer the applicant's PO, he continued to be involved in the applicant's case management team.

[2] According to the applicant, he allegedly had a problem only one time. The reports on file seem to corroborate this position.

[10] Mr. Matteau and Ms. Brunelle, the unit manager responsible for Mr. Bouchard, met with the applicant on February 5, 2003, to give him an official warning regarding his behaviour, as well as to inform him that he had to change his objectives and that his CMT recommended postponing his hearing before the NPB.

[11] Mr. Bouchard reacted poorly to what he saw as an attempt to deprive him of the benefit of the judgment obtained in December 2002. He refused to postpone his hearing and felt treated unfairly. He did not understand why he had to change his Correctional Plan. He did not change his position when meeting with Mr. Matteau on February 6 and 14, 2003. After the last meeting, the PO noted:

> [TRANSLATION]
> Unscheduled meeting with the subject. Still finds our way of seeing things just as ridiculous. He rationalizes and understates the incidents that prompted the current actions. He defines CSC's position as a roadblock and an exaggeration of his behaviour. At least would like us to recommend him for UTAs. He wants a transition and "we will see who will win at the hearing". And so, few new elements in his reflection. Waits until February 25, during his next UTA for family contact to discuss with his brother and the ALII, who will be on location. To be continued...

[12] On or about February 15, 2003, Mr. Bouchard sent a new letter to the NPB in which he included submissions justifying his parole (P-38). His submissions contained a section, bearing the confidential stamp, in which he describes certain inmate activities that he wished to report and that, according to him, emphasized the fact that less deserving inmates benefited from privileges that should be granted to him. He also commented on the unreasonable attitude from certain caseworkers at SAPI.

[13] On February 20, 2003, the NPB acknowledged receipt of this letter and informed the applicant that his submissions would be sent and considered at the hearing on May 20, 2003.[3]

[14] On February 21, 2003, Mr. Bouchard's letter to the NPB was received at SAPI. A few hours later, Mr. Gougeon, the warden of the institution, authorized Mr. Bouchard's involuntary placement in administrative segregation.

[15] The report prepared for that purpose was submitted to the applicant who refused, however, to acknowledge receipt. It is clearly indicated therein that the decision is based on the reasons stated in paragaph 31(3)(a) of the *Corrections and Conditional Release Act*, S.C. 1992 c. 20 (the Act), which reads as follows:

31. (3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head believes on reasonable grounds	**31**.(3) Le directeur du pénitencier peut, s'il est convaincu qu'il n'existe aucune autre solution valable, ordonner l'isolement préventif d'un détenu lorsqu'il a des motifs raisonnables de croire, selon le cas :
(*a*) that	
(i) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person, and	*a*) que celui-ci a agi, tenté d'agir ou a l'intention d'agir d'une manière compromettant la sécurité d'une personne ou du pénitencier et que son maintien parmi les autres détenus mettrait en danger cette sécurité;

[3] For the applicant, this letter was not received on Februrary 21 by the NPB, but rather on February 28. Given the description of Exhibit P-38 in Mr. Bouchard's affidavit, claims at paragraph 30-31 of his factum, and Ms. Brunelle's testimony confirmed by the wording in several document effectively dated on February 21, 2003, the Court is satisfied that Exhibit P-38 is, in fact, the document mentioned in the February 20 letter to the NPB.

[16] The decision was justified by referring to various meetings mentioned above (those on January 17 and on February 5, 6, and 14), as well as the fact that the applicant refused to change his behaviour and to recognize his difficulties and relational conflicts with both the caseworkers and fellow inmates. For CSC, the information contained in the written submissions to the NPB confirmed that the applicant was in a situation of [TRANSLATION] "serious personal disorganization". This state, as well as the conflicts with certain fellow inmates, contributed to increasing the level of risk for the institution.

[17] The report went on to note the need to investigate the entire situation and reassess the risk in the context of a minimum-security institution.

[18] At 17:30, the applicant was handcuffed and transferred to the FTC in segregation (23 out of 24 hours in the cell). He would stay there for seventy (70) days, until his transfer to Cowansville, a medium-security institution, on May 2, 2003.

[19] As prescribed in the applicable rules and policies, the decision to continue this administrative segregation was reviewed several times. On February 28, a segregation committee, essentially composed of the same caseworkers, reassessed the need to continue the segregation.[4]

[20] No additional information was shared with the applicant on this occasion; however, he was advised that a Mr. Larouche was investigating the allegations that he made to the NPB concerning his fellow inmates. It was also pointed out to Mr. Bouchard that there were still some concerns

about his refusal to acknowledge the severity of his misconduct and the need to [TRANSLATION] "develop realistic objectives regarding his problem interrelating with others".

[21] The Board found:

> [TRANSLATION]
> ...The reasons for the placement are still present and the subject's reflection must result in visible changes before we can consider the risk to be acceptable in a minimum-security institution.
>
> There are currently no other alternatives. (emphasis added)

[22] It is appropriate to note that, on that same date, Mr. Larouche recommended in a security intelligence report that Mr. Bouchard be assessed for a transfer outside of SAPI (Respondent's record page 134). This report was also signed by Mr. Gougeon, the warden of the institution, on February 28.

[23] On March 21, the segregation committee met with the applicant once again and recommended:

> [TRANSLATION]
> The subject's security classification is currently in the process of reassessment. The current orientation is toward a transfer to a medium-security institution. The reasons for the subject's placement in segregation are still present. Through his attitude, the subject does not demonstrate any change regarding his reconsideration and openness to his team. We therefore recommend maintaining the subject in segregation.

[24] On March 13, eight (8) days prior, the computerized calculation of the applicant's security classification had been done, and confirmed a medium security rating. However, the assessment

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[4] Ms. Brunelle, Mr. Matteau, Mr. Paquette, and in their absence, their assistants or replacements.

report to officially modify the applicant's security classification and his involuntary transfer to an appropriate higher-security institution, was not completed until April 11, 2003.[5]

[25] On April 11, Mr. Matteau also finished writing Mr. Bouchard's Correctional Plan Progress Report in preparation for the transfer recommendation and to review the possibility of day parole and full parole. He indicated therein that the CMT did not see fit to positively recommend any form of parole to the NPB.

[26] Copies of the documents were given to the applicant on April 2003, with a notice that the next meeting with the segregation committee was scheduled for April 22, 2003.

[27] On April 18, Mr. Bouchard filed a complaint, challenging his transfer and security classification increase, as well as the merits of the assessment of his file. He indicated his desire for the observation reports to be [TRANSLATION] "expunged". His complaint was dismissed a few days later because it was premature, considering that a final decision was not yet made regarding his transfer and security classification increase.

[28] On April 22, the NPB advised Mr. Bouchard that the May hearing had to be postponed by sixty (60) days because the documents required from SAPI were not received in the prescribed time limit, i.e. before April 18, 2003. Ms. Brunelle testified that she was not aware of this deadline. Further, it appears that the regional assessment report of the segregation status and a complete psychological assessment had been scheduled for the May hearing, but this had not been completed.

[5] Ms. Brunelle confirmed during her examination that no offence reports were considered during the assessment and computerized calculation of the security classification.

[29] On April 22, 2003, more than sixty (60) days after the placement in administrative segregation, Mr. Bouchard refused to meet with the segregation committee. In its report, the Committee found:

> [TRANSLATION]
> The subject's already low cooperation with his caseworkers seems to deteriorate, since he refuses to meet with the CECI. He recently received the documents concerning the recommendation for involuntary transfer to Cowansville Institution. He sent his complaints and various documents. A decision will be made after these documents have been considered. The reasons for the subject's placement in segregation are still current. His security classification was reassessed to medium. We recommend that the subject remain in segregation since he compromises the security of the institution "para 31.3.a". (sic)

This report was countersigned by Ms. Savard who, in the absence of the warden of the institution, acted as acting warden.

[30] In the report, it was noted that Mr. Bouchard received a document entitled, "Assessment for Decision" (A4D). Various information on Mr. Bouchard's file was summarized therein for the year 2002-2003. More specifically, it dealt with two protected information reports, dated July 30 and August 5, concerning an incident where Mr. Bouchard allegedly threatened a fellow inmate for an unknown reason and allegedly made [TRANSLATION] "a gesture to punch him". Following this, Mr. Bouchard reportedly offered this inmate a sum [TRANSLATION] "so he can recant the threatening information against him".

[31] There was also reference to the twelve observation reports on file dating from May, June, August, and September 2002. Seven of these reports mentioned that Mr. Bouchard allegedly abused his status as Chair of the Inmate Committee, did not listen to the instructions given, and constantly

attempted to circumvent them to his advantage by interpreting them incorrectly. In July 2002, three inmates, including the applicant, allegedly conducted a smear campaign against a fourth inmate and received a warning on the matter.

[32] Lastly, in January 2003, four reports mentioned verbal altercations and death threats that persisted between the applicant and another inmate staying in his living unit. It was noted that since the success of his judicial review, Mr. Bouchard seemed to not need anyone and bragged about the fact that no one could make him cave in. It was also indicated that, in the previous year, the applicant was so involved in the judicial review process that he forgot everything else, had no consideration for others, and dismissed all bothersome factors by all means.

[33] It was found that SAPI could not give the supervision that the applicant's behaviour required and that the medium-security Cowansville Institution met those needs in terms of security and programs.

[34] The final decision regarding transfer and increase to medium security classification was signed on April 24 by Ms. Savard, acting warden of SAPI (Applicant's record page 59).

[35] The same day, having been advised the night before by Ms. Brunelle that she had to forward his representations to Ms. Savard, counsel for the applicant submitted written representations. She highlighted that the events related in the various observation reports, which were mentioned in the April 2003 assessment, dates back to summer 2002 and were therefore not deemed serious enough

to trigger a reclassification. It should be noted that neither Mr. Bouchard nor his counsel asked for copies of the reports or additional explanations on the facts contained therein.

[36] Regarding the applicant's behaviour, his counsel explained this due to his significant involvement in the judicial review (he represented himself at the hearing). She submitted that his recent behaviour was due to him being in [TRANSLATION] "a bubble inflated by his personal success" and he did not have the benefit of advice from counsel or his family to temper his enthusiasm. She noted that, despite this, his demands were always polite, as noted by the CMT in their reports. She argued that the applicant could once again continue his progress at another minimum-security institution, such as the one at Montée St-François. She also noted that Mr. Bouchard's psychological assessment was still unavailable and was surprised that the applicant's computerized classification was calculated at 23, even though it had been minimum for five (5) years.[6]

[37] There are comments about these representations by counsel for Mr. Bouchard in the final decision regarding the applicant's involuntary transfer to Cowansville. It is clear that the CMT did not agree with the applicant's analysis and that the letter to the NPB had an important, if not crucial, impact on the decisions made concerning him.

[6] Standard Operating Procedure (SOP) 700-14, dated April 30, 2001 (revoqued April 10, 2006), deals with the offender's security classification. According to the Security Reclassification Scale (SRS), it seems that a result between 0 and 15.5 results in a minimum-security classification. For a score between 16 and 16.5, CSC has the discretion to establish a minimum or medium classification. With a score between 17 and 25.5, the classification is medium. It is not clear that such a system existed in 1998 when Mr. Bouchard's security classification was calculated for the last time. See *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 at paras 102-114. The SOP 700-14, as well as the Functional

[38] On May 2, Mr. Bouchard was transfered to Cowansville and remained there until early October 2003. In September 2003, his security classification was reassessed to minimum, even though his computerized classification was calculated at 17.5. In fact, the Cowansville case management team recommended an override to his classification and the applicant was accepted for a voluntary transfer to a minimum-security institution.

[39] For various reasons, the transfer that was originally scheduled to Montée St-François Institution could not be completed. According to Mr. Bouchard, he was ready to return to SAPI, but he was not wanted there. He accepted a transfer to the FTC, even though it was a reinforced minimum-security institution which, according to him, made his access to full parole even more difficult.

[40] On May 13, 2003, Mr. Bouchard submitted a high priority second level grievance in which he asked for [TRANSLATION] "his rights and privileges to be reinstated". He asked for corrections to be made as soon as possible and assumed that the reports in his file would be corrected. The subject complained that he received the most severe sentence possible and reiterated that he spent five (5) years without any disciplinary reports in a minimum-security institution. He asked for explanations regarding the increase in his security classification.

[41] On June 13, 2003, the CSC informed him that, given the volume of grievances received, a decision could not be made before July 16, 2003. The grievance was dismissed on July 3, 2003, but

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Specifications of the SRS, were filed by the applicant. However, there was no evidence indicating when and how these documents were obtained.

the decision was only submitted to the applicant on July 22, 2003. According to the second-level decision-maker, the three impugned decisions were justified.

[42] On June 20, 2003, Mr. Bouchard's CMT at SAPI prepared an assessment for the NPB in anticipation of a decision for the applicant's day parole or full parole. Included therein, *inter alia*, was a summary of the applicant's various psychological assessments. Even though they were generally positive, it seems that, in the past, at least one psychologist noted that the applicant's positive path was intellectualized instead of internalized, which, according to the CMT, would explain the applicant's recent "slip". No conditional release measures were recommended to the NPB.

[43] On July 23, 2003, Mr. Bouchard turned to the third-level grievance process. He complained about the delay in the assessment for his second-level grievance. The subject also indicated that accusations were made against him without making "offence reports", which should be done under Directive No. 580.[7] He challenged the logic to declare him an undue risk for a minimum-security institution, considering that he already spent five (5) years there and that his history was already favourably assessed during the December 2002 judicial review. Mr. Bouchard indicated that the warning he received was, in reality, a threat to force him to postpone his request to the NPB by six months. He requested an investigation and an adequate response to all the points raised at the second level.

[7] In fact, as indicated in note 5, no disciplinary offences were considered when the impugned decisions in the grievance were made.

[44] In the acknowledgement of receipt for this national grievance, it was indicated that the grievance was received on August 7, 2003, and that the assessment should be completed by August 28, 2003. In fact, Sharon Fraser, the CSC Assistant Commissioner, made a decision on the grievance on August 25, 2003. However, this was not communicated to the applicant until September 10, 2003.

[45] Ms. Fraser indicated that the reasons justifying the applicant's segregation, the change in his security classification and transfer, were sufficiently explained in the CSC caseworkers' documents and in the second-level decision.

[46] After having [TRANSLATION] "carefully reviewed all available documents", she found that the decisions made regarding the applicant were consistent with the relevant rules, i.e. section 28 and paragraph 31(3)(a) of the Act and sections 17 and 18 of the *Corrections and Conditional Release Regulations*, S.O.R./92-620 (the Regulations), as well as the SOP 700-14 (Security Classification of Offenders).

[47] The affidavit of Ms. Myre, the analyst responsible for reviewing the file at the third level, and her examination on affidavit indicate that the decision-maker did not have the applicant's complete file before her. Mr. Bouchard's letter to the NPB (P-38), as well as the observation and preventive security reports, to which the various assessment reports mentioned above refer, were not consulted. All the documents before the second-level decision maker were also not sent to Ms. Myre. More specifically, regarding the administrative segregation, the third-level decision-maker only had the status assessment report dated April 23, 2003.

[48] The hearing before the NPB, which was postponed from May to August, was once again adjourned at Mr. Bouchard's request because, according to him, since his classification was still medium, he had little chance of obtaining any privileges whatsoever.

[49] In January 2004, the FTC prepared an assessment in preparation for his hearing before the NPB, which was then scheduled for February 25, 2004. It recommended denying the regular pre-release parole, as well as day parole, and to not authorize any pre-release unescorted absences for family contact.

[50] In February 2004, the NPB dismissed Mr. Bouchard's request and indicated that he could not represent himself before them for two years.

Issues

[51] The respondent argued in his factum that, considering the situation today, the application for review has become moot and irrelevant.[8]

[52] At the hearing, he agreed, however, that it is clear the impugned decisions still have an impact on Mr. Bouchard's chances of obtaining a full parole, which he still awaits.[9]

[8] Paras 38, 39 *supra*.
[9] Paras 42, 48, 49, 50 *supra*.

[53] Applying the analysis set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, I have decided to exercise my discretion and to resolve the issues raised in this application.

[54] That being said, it is difficult to clearly see and correctly identify the real issues to be determined in this case.

[55] In fact, surely for the sake of not forgetting anything and because of a certain misunderstanding of the judicial review process, the applicant raised many issues and submitted lots of evidence on subjects on which the Court does not have jurisdiction to consider as part of this application. For example, all issues related to other grievances (loss of salary, seizure in his cell, grievance against a CSC officer, etc.), allegations concerning seizures and unreasonable searches in violation of section 8 of the Charter, the violation of his right to freedom of expression (paragraph 2(b) of the Charter), as well as attacks on the NPB's decision and CSC's recommendations on the basis of section 12 of the Charter, were not before Ms. Fraser.

[56] Ms. Fraser was clearly entitled the consider the legality of the decisions challenged by the applicant in his grievance. She could also consider whether the constitutional rights protected in sections 7, 9, and 12 of the Charter were violated (*Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504; *Veley v. Warden of Fenbrook Institution*, [2004] F.C.J. No. 1902, 2004 FC 1571).

[57] Mr. Bouchard did not specifically state before Ms. Fraser that:

i) Ms. Savard did not have the authority to make decisions concerning the increase in his security classification and his transfer;

(ii) the FTC failed in its duty of disclosure to him. First, because all the necessary information to challenge the increase in security classification and transfer had not been communicated to him, such as the observation and security reports. Second, because the reasons for his segregation were not sufficiently and clearly communicated so that he could validly challenge them, because even if the warden invoked paragraph 31(3)(a) of the Act, he had also been advised that he needed protection against potential reprisals from fellow inmates and that his segregation was necessary for an internal investigation to be completed. Lastly, because the reasons justifying the increase in his security classification were belatedly communicated to him and beyond the time limit set out in the regulations and to the applicable directive, as that decision had, according to him, been made before March 27, 2003 (see letter by the Correctional Investigator, Émile Robert, Exhibit T-5 of Mr. Bouchard's affidavit).

[58] As I explained at the hearing, in *Toussaint v. Canada (Labour Relations Board)*, [1993] F.C.J. No. 616 (F.C.A.), Justice Robert Décary said that it [TRANSLATION] "has been clearly established that in the context of an application for judicial review this Court cannot decide a question which was not raised before the administrative tribunal". See also *Society of Composers, Authors and Music Publishers of Canada*, [2001] F.C.J. No. 166 (F.C.A.) at para 12; *Regional Cablesystems Inc v. Wygant*, [2003] F.C.J. No. 321, 2003 FCT 236 at para 12.

[59] Many documents that were not before the decision-maker (even if they were available in the applicant's record), as well as documents concerning the events arising after Ms. Fraser's decision, are part of the applicant's record.

[60] During a judicial review, the Court can only consider the evidence that was in the decision-maker's record in which the decision is subject to the application for review. However, the Court may consult additional evidence to decide issues of procedural fairness or jurisdiction (*Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, [2003] 1 F.C. 331, 2002 FCA 218 at para 30; *McFayden v. Canada (Attorney General)*, [2005] F.C.J. No. 1897, 2005 FCA 360 at para 14; *Khawaja v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 703, 2006 FC 522 at para 13).

[61] That being said, the respondent has oversimplified the issues in saying that the Court had to limit itself to reviewing whether CSC had carried out its duty of disclosure when the impugned decisions were made, and further, whether Ms. Fraser's decision was arbitrary or patently unreasonable. In his written submissions, he does not respond specifically to each of the applicant's allegations.

[62] After the hearing, the Court allowed the respondent to file additional submissions regarding the role of the third-level decision-maker and the force of the directives, particularly in the Offender Complaint and Grievance Procedures Manual, published in 2002 (the Manual), which addresses the thorough investigation done during a grievance assessment.

[63] The Court is satisfied that the arguments that it could review are grouped as follows:

i) Ms. Fraser failed in her duty to act fairly by not conducating a thorough review of the file and not consulting the most relevant evidence in the grievance, such as the observation reports in the applicant's file;

ii) Ms. Fraser did not consider all the issues that were submitted to her, such as the impact of the delay in the decision-making at the second level, and the fact that the applicant received the most severe measure;

iii) the third-level decision was unfounded, since the impugned decisions by the warden or acting warden at SAPI were flawed due to the violation of the rules of procedural fairness applicable to this decision-making process and the fact that two decisions were made by someone who lacked jurisdiction (the acting warden);

iv) the decision is without merit.

[64] If, as submitted by the applicant (63 ii) above), the decision-maker did not exercise his jurisdiction and failed to respond to an issue raised by Mr. Bouchard, the Court cannot do it in his stead. It will have to return the file so that this issue is considered by Ms. Fraser.

[65] As for Ms. Fraser's potential failure in her duty to act fairly, it is not appropriate to proceed with a pragmatic and functional analysis to determine the standard of review. Indeed, where there is a breach of procedural fairness or a principle of natural justice, except in certain exceptional circumstances, the Court must intervene and set aside the decision.

[66] As for the issue described at paragraph 63 iv), that of the impugned decision being unfounded in regard of the evidence on record, as indicated by the Federal Court of Appeal in *Canada (Attorney General) v. Boucher*, F.C.J. No. 352, 2005 FCA 77, it is essentially a question of facts. Adopting the reasoning of Justice Gilles Létourneau, the Court would have normally reviewed it by applying the standard of patent unreasonableness. However, for the reasons stated below, it will not be necesary to consider this issue. In fact, it would even be inappropriate to do so because the decision-maker will have to reassess the grievance.

[67] The Court included in the issues to be determined at paragraph 63 iii) above the arguments stated at paragraph 57 above because, even if these issues were not explicitly before the decision-maker, they could have questioned the legality of the third-level decision regarding the Charter (*May*, above at footnote 6, at para 57). However here as well, for the reasons stated below, it will ultimately not be necessary for the Court to review them because I found that the decision had to be set aside for other reasons.

[68] Nonetheless, the Court notes that the decision-maker should reconsider these during the reassessment because, as I have mentioned, they can call into question the legality of its own decision having regard to the Charter. All these issues concern, in fact, the legality of the decisions that were impugned before Ms. Fraser.[10]

Analysis

[69] I will therefore analyze the first two arguments stated at paragraph 63.

[70] Mr. Bouchard argues that the third-level decision-maker failed in her duty to conduct a thorough investigation of his grievance, since extremely relevant documents were not brought before her and were not considered. In this case, he refers to the Manual, more specifically Appendix C, which describes in a non-comprehensive manner the documents that should normally accompany the grievance.

[71] The Manual indicates:

> [TRANSLATION]
>
> Normally, all the documents stated above, along with the Act, the policies and relevant operational procedures, must be gathered to make a thorough investigation of a complaint or grievance. These documents should also accompany the grievance when submitted to the higher levels. The list shown below is not necessarily complete...
>
> 1. Segregation and conditions of detention
>   - Assessment by the warden of the institution (on the following work day)
>   - Copy of the last Assessment for Decision submitted to the Segregation Review Board.
>   - Copy of the minutes from the Segregaton Review Board's last meeting.
>   - Observation reports
>   - Security intelligence reports
>   - Submission of reasons to the inmate
>
> 8. Penitentiary placement and transfers
>   - Assessment for Decision, related reports, or reference numbers (SIR)
>   - Copy of notice of intent
>   - Copy of the decision
>   - Copy of the inmate's response, where applicable
>   - Copy of the application
>   - Copy of the minutes of the Review Board's meeting – SHU
>
> 11. Case management
>   - Activity files

[10] This must not be interpreted as an indication regarding the merit of these arguments.

- Reports whose content is challenged
- Written decisions communicated to the offender

(emphasis added)

[72] There is no doubt that CSC had the duty to act fairly when the decisions to segregate the applicant, to increase his security classification, and to transfer him to a higher-security institution were made. In fact, these measures, particularly the segregation and transfer, constituted a deprivation of his residual liberty (*May*, above, at para 76).

[73] The respondent submitted that the directives or publications, such as the Manual, do not create any legal obligation for CSC. According to the respondent, a simple breach of these administrative rules is not sufficient to have the decision set aside.

[74] Since the decision of the Supreme Court of Canada in *Martineau v. Matsqui Institution*, [1978] 1 S.C.R. 118, it is established that the Commissioner's Directives are more administrative than legislative in nature. See also *Inmate Welfare Committee William Head Institution v. Canada (Attorney General)*, [2003] F.C.J. No. 1137, 2003 FC 870; *Miller v. Canada*, [1999] F.C.J. No. 477; *Canada (Correctional Service) v. Plante*, [1995] F.C.J. No. 1509; *Leprette v. Canada (Correctional Service, Regional Transfer Board)*, [1992] F.C.J. No. 1023; *Kelly v. Canada (Solicitor General)*, [1992] F.C.J. No. 407.

[75] Howevev, this does not mean that the Court should not consider the violation of these types of rules. Directives, such as the one invoked by the applicant, can still be relevant if violating them leads to an unfair situation.

[76] In *Leprette*, James A. Jerome A.C.J., after acknowledging that the Directives have no force of law, made the following comment at paragraphs 15 and 16 in his decision:

> However, this does not mean that Commissioner's Directives can be disregarded without consequence. In *Buyens v. Rippon*, (T-2986-91, February 10, 1992), Muldoon, J. made the following comments in this regard:
>
> > Could the C.S.C.'s sloppy failure to abide strictly by the Commissioner's Directive 580(13) be the sufficient ground upon which to quash the respondent's decision? Yes, indeed. Truly, the respondent himself might have legitimately dismissed the charge on that ground. . . However, this Court concludes that, in this instance, compliance with [Commissioner's Directive] 580(13) would not have brought about a different verdict. There appears to have been no substantial wrong or miscarriage of justice. This is not to say that the Commissioner's Directives are to be flouted . . . but rather to say that the Court, for the reasons given, declines to exercise its discretion in the applicant's favour in this regard.
>
> Had I reached the conclusion as did my colleague Muldoon, J. that there was any risk of unfairness or denial of justice to the applicant, then I would have made the same decision. On the facts of the present case, however, I do not reach that conclusion. Strict compliance with the time limit would have made no substantial difference here. In my view, the transgression is of a technical nature only and results in no failure to comply with the duty to act fairly to this applicant.

[77] In *William Institution*, above, Justice Danièle Tremblay-Lamer also indicated that the Directives are useful for determining if CSC acted fairly (See also *Plante*, above; *Sweet v. Canada (Attorney General)*, [2003] F.C.J. No. 1845, 2003 FC 1438 at para 21; *Lee v. Canada (Deputy Commissioner, Correctional Service, Pacific Region)*, [1994] 1 F.C. 15 at para 13).

[78] As noted by the Federal Court of Appeal in *Sweet*, above, and the Supreme Court of Canada in *May*, above, at paragraph 90, one must always consider the content of the decision-maker's duty in

its context, while keeping in mind the five factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[79] It is clear that the grievance mechanism is an important component of the decision-making system put in place by Parliament. The Act contains little detail on how to proceed during these grievances, but it gave the Commissioner the power to issue directives for that purpose (subsection 98(1) of the Act). It is in this context that the Manual becomes relevant. As indicated by Justice Brian Malone in *Sweet*, above at para 38, the promises and usual practices as part of the decision-making process and proceedings can be considering in the analysis of the content of the duty to act fairly.

[80] In the case at hand, there is no doubt the third-level decision was important for Mr. Bouchard and he expected the decision-maker to conduct a thorough investigation.

[81] Without defining the exact parameters of the Commissioner's duty, it seems to me that if we want to give some meaning to this grievance process, the decision-maker must review the most relevant evidence on file, given the allegations in the grievance.

[82] The warning given on February 5 and the letter to the NPB are two elements that had the most impact on the initial decision to segregate the applicant. They also strongly influenced the subsequent decisions made by the acting warden (see, in particular, the notice of involuntary transfer recommendation at page 78 in the applicant's record and second-level decision).

[83] In his third-level grievance, the applicant specifically mentioned that the February 2003 warning was, in fact, a threat to force him to postpone his hearing before the NPB by six months. Such an allegation necessarily jeopardized the merits of this warning. Under the circumstances, as set out in the Manual regarding administrative segregation grievances, it seems that the observation and security intelligence reports should have been reviewed before dismissing the applicant's allegation as unfounded, and finding that the segregation was justified, as well as the other decisions made later.

[84] Furthermore, even if the second-level decision specifically mentioned that a thorough review of the file was conducted and refers, inter alia, to the letter to the NPB, the Court notes that this letter was not reviewed by the decision-maker, with Ms. Fraser's knowledge (see page 101 of the respondent's record). She also did not have the letter at her disposal when she made the third-level decision.

[85] Further, in her decision, Ms. Fraser found that the reasons justifying the placement in administrative segregation were sufficiently explained to the applicant and that, after a careful review of all the information available, she was of the opinion that the involuntary placement on February 21, 2003 was consistent with subsection 31(3)(a) of the Act. In other words, Ms. Fraser was satisfied that there was no alternative solution to administrative segregation on February 21, 2003. Yet, the Court recalls that the decision-maker did not have the report dated February 21 that explained the warden's decision in her file.

[86] As mentioned above, the applicant alledged that the most severe sentence had been imposed on him and that he was being harassed. According to subsection 31(2) of the Act, where an inmate is in administrative segregation, he must be returned to the general inmate population of the penitentiary where he is incarcerated or in another institution as soon as possible. Furthermore, in order to maintain an inmate in administrative segregation, the warden must be satisfied that there are no other viable solutions (subsection 31(3)) each time he reviews his decision.

[87] The warden had received the first transfer recommendation on February 28, 2003, and the applicant's computerized classification was recalculated to medium on March 13 (see paras 22 and 24 above). Therefore, there was a lengthy delay between these events and the decision to increase the security classification and transfer the applicant, as well as in carrying out this decision.

[88] Nothing indicates that Ms. Fraser had considered these issues to determine whether the seventy (70) day retention in segregation was justified and whether the explanations given were sufficient, considering the circumstances. Her analyst does not address this in his report and it is clear that she did not have information in her file that would allow her to adequately review these issues. Even though the second-level decision-maker had reviewed the February 21 report, as well as those that followed, this documentation, as I have mentioned above, was not sent to Ms. Fraser. Further, the second-level decision-maker gave no explanation in this regard.

[89] The presumption that a decision-maker considered all the evidence on record can only apply when, as in the case at hand, the respondent filed an exhaustive list of all the documents before the decision-maker and that important items are missing from that list.

[90] In this context, the Court must therefore find that the decision-maker breached her duty to act fairly when she did not consider the relevant evident in the CSC file. In the absence of this documentation, the Court is satisfied that Ms. Frase was not able to complete her analysis of the legality of the impugned decisions.

[91] Further, the Court notes that she also failed to consider the issue of the timeframe in which the second-level decision-maker made her decision. This issue was raised in the grievance.

[92] The Court must not decide these issues is Ms. Fraser's stead. The grievance must be reconsidered by the third-level decision-maker. It is quite clear that subsections 31(2) and (3) of the Act were enacted to ensure that administrative decisions comply with the Charter, sections 7 and 12 in particular. It will therefore be important for the decision-maker to consider these provisions during the grievance review. She will also have to consider recent jurisprudence such as *May*, above, when she reconsiders the sufficiency of the information and explanations given regarding the increase in security classification.

[93] At the hearing and after, the existence of the observation reports that were mentioned above at paragraph 31 was the subject of controversy. Counsel for the applicant said that she requested, as part of the application for judicial review, the filing of those reports. Only one protected information report was filed. She then argued that the reports did not exist and that Ms. Brunelle had confirmed that the observations that they supposedly contained were not recorded in writing (page 4 of the

supplementary record). She asked the Court to require that those documents be filed before making its decision.

[94] The Court did not agree to this request because, after checking the transcript of Ms. Brunelle's examination on affidavit, the Court was satisfied that she had never indicated that those reports were verbal. Furthermore, even though these requests for documents by counsel for the applicant can be interpreted to include observation reports, she never clearly requested the "observation reports".

[95] In any case, the Court is satisfied that she did not need these reports to make her decision.

[96] In terms of the remedies sought, it would be premature to strike any information whatsoever from the applicant's record until Ms. Fraser has reconsidered the grievance. Further, the Court has serious doubts about it power to issue such an order. As this issue does not need to be determined today, there is no need to discuss it any further.

[97] As I have indicated previously, the applicant also asks that the Court order CSC to send a precise recommendation in his favour to the NPB and that it order the NPB to approve his application for day parole or full parole. On this matter, the applicant argues that he no longer benefits from his incarceration and any extension of time in the institution without release or day parole contravenes section 12 of the Charter. He indicates that the decision of the Supreme Court of Canada in *Steel v. Mountain Institution*, [1990] 2 S.C.R. 1385, supports his position.

[98] This application for judicial review does not deal with the legality of a decision made by the NPB. Nor does the applicant's grievance, which was before Ms. Fraser, deal with the assessment prepared by SAPI on June 20, 2003 (para 42 above), nor with the one by the FTC in January 2004 (para 49 above). The NPB's decisions, as well as the reports and actions of CSC in this regard, are subsequent to the filing of the national grievance.

[99] The finality of decisions principle requires that the possibilities for indirect challenges of an administrative decision be limited and circumscribed, especially when Parliament has opted for a procedure for direct challenge of the decision within defined parameters (*Canada v. Grenier*, [2005] F.C.A. 1778).

[100] Further, the Court notes that in *Steel*, above, the issue before the Supreme Court of Canada was whether the NPB had committed an error in refusing the respondent day parole.

[101] In this case, the Court does not have jurisdiction to issue any order to CSC or to the NPB regarding the applicant's full parole.

[102] The Court is satisfied in the case at hand that the appropriate remedy is to set aside Ms. Fraser's decision.

JUDGMENT

[103] The application is allowed in part with costs.

[104] Ms. Fraser's decision is set aside. The applicant's national grievance must be reassessed in light of the reasons accompanying this judgment.

"Johanne Gauthier"

Judge

Annex 1

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK), 1982, c. 11

2. Everyone has the following fundamental freedoms:

a) freedom of conscience and religion;
b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
c) freedom of peaceful assembly; and
d) freedom of association.

2. Chacun a les libertés fondamentales suivantes :

a) liberté de conscience et de religion;
b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
c) liberté de réunion pacifique;
d) liberté d'association.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

8. Everyone has the right to be secure against unreasonable search or seizure.

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Annex 2

Corrections and Conditional Release Regulations, S.O.R./92-620

17. The Service shall take the following factors into consideration in determining the security classification to be assigned to an inmate pursuant to section 30 of the Act:

(*a*) the seriousness of the offence committed by the inmate;

(*b*) any outstanding charges against the inmate;

(*c*) the inmate's performance and behaviour while under sentence;

(*d*) the inmate's social, criminal and, where available, young-offender history;

(*e*) any physical or mental illness or disorder suffered by the inmate;

(*f*) the inmate's potential for violent behaviour; and

(*g*) the inmate's continued involvement in criminal activities.

17. Le Service détermine la cote de sécurité à assigner à chaque détenu conformément à l'article 30 de la Loi en tenant compte des facteurs suivants :

a) la gravité de l'infraction commise par le détenu;

b) toute accusation en instance contre lui;

c) son rendement et sa conduite pendant qu'il purge sa peine;

d) ses antécédents sociaux et criminels, y compris ses antécédents comme jeune contrevenant s'ils sont disponibles;

e) toute maladie physique ou mentale ou tout trouble mental dont il souffre;

f) sa propension à la violence;

g) son implication continue dans des activités criminelles.

18. For the purposes of section 30 of the Act, an inmate shall be classified as

(*a*) maximum security where the inmate is assessed by the Service as

(i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or

(ii) requiring a high degree of supervision and control within the penitentiary;

(*b*) medium security where the inmate is assessed by the Service as

(i) presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or

18. Pour l'application de l'article 30 de la Loi, le détenu reçoit, selon le cas :

a) la cote de sécurité maximale, si l'évaluation du Service montre que le détenu :

(i) soit présente un risque élevé d'évasion et, en cas d'évasion, constituerait une grande menace pour la sécurité du public,

(ii) soit exige un degré élevé de surveillance et de contrôle à l'intérieur du pénitencier;

b) la cote de sécurité moyenne, si l'évaluation du Service montre que le détenu :

(i) soit présente un risque d'évasion de faible à moyen et, en cas d'évasion, constituerait une menace moyenne pour la sécurité du public,

(ii) requiring a moderate degree of supervision and control within the penitentiary; and

(*c*) minimum security where the inmate is assessed by the Service as

(i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and

(ii) requiring a low degree of supervision and control within the penitentiary.

(ii) soit exige un degré moyen de surveillance et de contrôle à l'intérieur du pénitencier;

c) la cote de sécurité minimale, si l'évaluation du Service montre que le détenu :

(i) soit présente un faible risque d'évasion et, en cas d'évasion, constituerait une faible menace pour la sécurité du public,

(ii) soit exige un faible degré de surveillance et de contrôle à l'intérieur du pénitencier.

Schedule 3

Corrections and Conditional Release Act, S.C. 1992 c. 20

17. The Service shall take the following factors into consideration in determining the security classification to be assigned to an inmate pursuant to section 30 of the Act:

(*a*) the seriousness of the offence committed by the inmate;

(*b*) any outstanding charges against the inmate;

(*c*) the inmate's performance and behaviour while under sentence;

(*d*) the inmate's social, criminal and, where available, young-offender history;

(*e*) any physical or mental illness or disorder suffered by the inmate;

(*f*) the inmate's potential for violent behaviour; and

(*g*) the inmate's continued involvement in criminal activities.

18. For the purposes of section 30 of the Act, an inmate shall be classified as

(*a*) maximum security where the inmate is assessed by the Service as

(i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or

(ii) requiring a high degree of supervision and control within the penitentiary;

(*b*) medium security where the inmate is assessed by the Service as

(i) presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or

28. Le Service doit s'assurer, dans la mesure du possible, que le pénitencier dans lequel est incarcéré le détenu constitue le milieu le moins restrictif possible, compte tenu des éléments suivants :

a) le degré de garde et de surveillance nécessaire à la sécurité du public, à celle du pénitencier, des personnes qui s'y trouvent et du détenu;

b) la facilité d'accès à la collectivité à laquelle il appartient, à sa famille et à un milieu culturel et linguistique compatible;

c) l'existence de programmes et services qui lui conviennent et sa volonté d'y participer.

31. (1) L'isolement préventif a pour but d'empêcher un détenu d'entretenir des rapports avec l'ensemble des autres détenus.

(2) Le détenu en isolement préventif doit être replacé le plus tôt possible parmi les autres détenus du pénitencier où il est incarcéré ou d'un autre pénitencier.

(3) Le directeur du pénitencier peut, s'il est convaincu qu'il n'existe aucune autre solution valable, ordonner l'isolement préventif d'un détenu lorsqu'il a des motifs raisonnables de croire, selon le cas :

a) que celui-ci a agi, tenté d'agir ou a l'intention d'agir d'une manière compromettant la sécurité d'une personne ou du pénitencier et que son maintien parmi les

(ii) requiring a moderate degree of supervision and control within the penitentiary; and

(*c*) minimum security where the inmate is assessed by the Service as

(i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and

(ii) requiring a low degree of supervision and control within the penitentiary. Annex 3

autres détenus mettrait en danger cette sécurité;

b) que son maintien parmi les autres détenus peut nuire au déroulement d'une enquête pouvant mener à une accusation soit d'infraction criminelle soit d'infraction disciplinaire grave visée au paragraphe 41(2);

c) que le maintien du détenu au sein de l'ensemble des détenus mettrait en danger sa sécurité.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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