Date: 20080429

Docket: T-1230-06

Citation: 2008 FC 551

Ottawa, Ontario, the 29th day of April 2008

PRESENT: THE HONOURABLE MR. JUSTICE ORVILLE FRENETTE

BETWEEN:

ROBERT SÉGUIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Robert Séguin, an inmate at Drummond Institution, is seeking to have set aside an unfavourable decision dated January 5, 2006, by Jean-Claude Lagacé, member of the National Parole Board. In that decision, Mr. Lagacé (the Chairperson) found the applicant guilty of an offence under paragraph 40(*j*) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act).

I. The facts

[2] The applicant has been incarcerated since around 1998. He has not been the subject of any sanctions during his incarceration.

[3] On November 4, 2005, a search was conducted in the block in which the applicant's cell is located. Three cells were chosen at random and searched by two officers. No information concerning the search was provided to the applicant by the institution officers before an "Inmate Offence Report and Notification of Charge" was given to him four days later. The report stated that the officers found in the applicant's cell two 25 mg tablets of Seroquel in a Tylenol container, as well as white powdery substance, later identified as morphine, in the bottom of a bottle of vitamins. Since the applicant does not have a prescription for these substances, they are considered to be contraband. The applicant was charged under paragraph 40(*j*) of the Act with having unauthorized items in his possession.

[4] The disciplinary system in force at Drummond Institution is governed by the *Corrections and Conditional Release Regulations*, SOR/1992-620 (the Regulations), as well as by the following sections of the Act:

Discipline	Régime disciplinaire
Purpose of disciplinary system	Objet:
38. The purpose of the disciplinary system established by sections 40 to 44 and the regulations is to	38. Le régime disciplinaire établi par les articles 40 à 44 et les règlements vise à encourager chez les détenus

encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community.

un comportement favorisant l'ordre et la bonne marche du pénitencier, tout en contribuant à leur réadaptation et à leur réinsertion sociale.

System exclusive

39. Inmates shall not be disciplined otherwise than in accordance with sections 40 to 44 and the regulations.

Dispositions habilitantes:

39. Seuls les articles 40 à 44 et les règlements sont à prendre en compte en matière de discipline.

Disciplinary offences

40. An inmate commits a disciplinary offence who …

(j) without prior authorization, is in possession of, or deals in, an item that is not authorized by a Commissioner's Directive or by a written order of the institutional head;

Infractions disciplinaires :

40. Est coupable d'une infraction disciplinaire le détenu qui :

…

j) sans autorisation préalable, a en sa possession un objet en violation des directives du commissaire ou de l'ordre écrit du directeur du pénitencier ou en fait le trafic;

Informal resolution

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

Tentative de règlement informel

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

Charge may be issued

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

Accusation

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

Notice of charge

42. An inmate charged with a disciplinary offence shall be given a written notice of the charge in accordance with the regulations, and the notice must state whether the charge is minor or serious.

Avis d'accusation

42. Le détenu accusé se voit remettre, conformément aux règlements, un avis d'accusation qui mentionne s'il s'agit d'une infraction disciplinaire mineure ou grave.

Hearing

43. (1) A charge of a disciplinary offence shall be dealt with in accordance with the prescribed procedure, including a hearing conducted in the prescribed manner.

Audition

43. (1) L'accusation d'infraction disciplinaire est instruite conformément à la procédure réglementaire et doit notamment faire l'objet d'une audition conforme aux règlements.

Presence of inmate

(2) A hearing mentioned in subsection (1) shall be conducted with the inmate present unless

(a) the inmate is voluntarily absent;

(b) the person conducting

Présence du détenu

(2) L'audition a lieu en présence du détenu sauf dans les cas suivants :

a) celui-ci décide de ne pas y assister;

b) la personne chargée de

the hearing believes on reasonable grounds that the inmate's presence would jeopardize the safety of any person present at the hearing; or

l'audition croit, pour des motifs raisonnables, que sa présence mettrait en danger la sécurité de quiconque y assiste;

(c) the inmate seriously disrupts the hearing.

c) celui-ci en perturbe gravement le déroulement.

Decision

(3) The person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question.

Déclaration de culpabilité

(3) La personne chargée de l'audition ne peut prononcer la culpabilité que si elle est convaincue hors de tout doute raisonnable, sur la foi de la preuve présentée, que le détenu a bien commis l'infraction reprochée.

Disciplinary sanctions

44. (1) An inmate who is found guilty of a disciplinary offence is liable, in accordance with the regulations made under paragraphs 96(i) and (j), to one or more of the following:

Sanctions disciplinaires

44. (1) Le détenu déclaré coupable d'une infraction disciplinaire est, conformément aux règlements pris en vertu des alinéas 96i) et j), passible d'une ou de plusieurs des peines suivantes:

(a) a warning or reprimand;

a) avertissement ou réprimande;

(b) a loss of privileges;

b) perte de privilèges;

(c) an order to make restitution;

c) ordre de restitution;

(d) a fine;

d) amende;

(e) performance of extra

e) travaux supplémentaires;

duties; and	
(f) in the case of a serious disciplinary offence, segregation from other inmates for a maximum of thirty days.	f) isolement pour un maximum de trente jours, dans le cas d'une infraction disciplinaire grave.
Collection of fine or restitution	Amende ou restitution
(2) A fine or restitution imposed pursuant to subsection (1) may be collected in the prescribed manner.	(2) Le recouvrement de l'amende et la restitution s'effectuent selon les modalités réglementaires.

[5] What complicates the situation is the fact that the applicant is, for all intents and purposes, blind. The applicant told the Chairperson that he had suffered an episode of acute glaucoma in 2002, with the result of a total loss of vision in the right eye and a 90% loss of vision in the left eye. Since that time, he has needed to use a white cane in order to get around. He admitted at the hearing before the Chairperson that he had [TRANSLATION] "vision of about five to six feet", and added [TRANSLATION] "I don't remember anymore".

[6] Because of the applicant's disability, an "aide" – that is, another prisoner – cleans the applicant's cell twice a week. On Mondays and Fridays, the applicant leaves his cell in the morning to go to work. He leaves the door unlocked and the other prisoner does his cleaning while he is at work. This aide is not the only person who could have entered the applicant's cell. The applicant testified that a number of prisoners stay in the cellblock in the mornings and that therefore [TRANSLATION] "any inmate in the row could get in".

[7] The applicant admits possessing two bottles of vitamins in his cell, as well as a container of a prescription medication (phenobarbital) to control his epilepsy and a bottle of Robaxacet. However, he denies having a container of Tylenol or aspirin. In his testimony, the applicant insisted that he never takes these medications. However, the banned substances were found in a container of Vitamin C and a container of aspirin or Tylenol.

II. The Chairperson's decision

[8] The Chairperson's decision was handed down on January 5, 2006, and stated the following:

> [TRANSLATION]
> …Therefore, it seems unlikely to me that an inmate, to get revenge or for whatever reason, went into the cell to leave something in containers belonging to the accused, Séguin, on the off chance that he might be charged with a disciplinary offence. That's 1.
>
> 2, an inmate who could have done such a thing would have had to anticipate or imagine that a search would take place in Mr. Séguin's cell, which again, in my opinion, is totally illogical.
>
> You know, it is the containers that Mr. Séguin admitted owning. I can't from a logical perspective, after the entire analysis I was able to undertake, in referring to the decision that Mr. Séguin's counsel cited, the decision that everyone knows, the W.D. decision, by applying the three tests that were suggested in the D.W. (sic) decision, I can only come to the conclusion, beyond a reasonable doubt, that Robert Séguin is guilty of the offence charged.

III. The issues

[9] The applicant raised a number of issues that I have reformulated as follows so as to better analyze this application for judicial review:

(a) Did the Chairperson err in finding the applicant guilty beyond a reasonable doubt without taking into account the fact that

(i) the applicant is blind; and

(ii) anyone could have entered the applicant's cell when the applicant was working outside of the cellblock?

(b) Did the Chairperson (and/or the Drummond Institution) commit an error of law or procedural fairness by not allowing the applicant to provide a urine sample as a defence?

(c) Did the Chairperson commit an error of procedural fairness by not allowing the second officer to testify?

IV. Analysis

[10] Before *Dunsmuir v. Nouveau-Brunswick*, 2008 SCC 9 (*Dunsmuir*), the standard of review applicable to a question of mixed fact and law such as this was that of reasonableness (*Grenier v. Canada (Attorney General)*, 2005 FC 497). Mr. Justice Yves de Montigny aptly summarized the effect of *Dunsmuir* in *Campos Navarro v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 358. I have also come to the conclusion that there is no reason why the standard of review

applicable to questions of mixed fact and law should change in light of *Dunsmuir*. I must therefore determine whether the Chairperson made a reasonable decision.

[11] With regard to procedural fairness, there is no need to determine the standard of review: *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 FC 195 [*Ha*]. The issue before the Court is simply to determine whether the rules of procedural fairness were adhered to: *Ha*, at paragraph 44. *Dunsmuir* does not change this analysis: see for example *Sukhu v. Canada (Minister of Citizenship and Immigration)* 2008 FC 427 at paragraph 15.

(a) Did the Chairperson err in finding the applicant guilty beyond a reasonable doubt without taking into account the fact that
i) the applicant is blind; and
ii) anyone could have entered the applicant's cell when the applicant was working outside of the cellblock?

[12] The parties agree on the test that applies in this case and there is no reason to think that the Chairperson did not understand and apply that test. Subsection 43(3) of the Act provides that the Chairperson must be satisfied beyond a reasonable doubt that the applicant was in possession of an unauthorized item and that he had knowledge of it (see also *Williams v. Canada (Attorney General)*, 2006 FC 153, at paragraph 10, as well as subsection 43(3) of the Act). The Supreme Court determined in *The Queen v. W.(D.)*, [1991] 1 S.C.R. 742, the way in which this onus should be evaluated:

> ... If you have a reasonable doubt as to whether the accused committed the offence with which he is charged, it is your duty to give that accused the benefit of the doubt and to find him not guilty on such counts. Now let me say by way of assistance that proof beyond a reasonable doubt has been achieved when you as a juror

> feel sure of the guilt of the accused. It is that degree of proof which convinces the mind and satisfies the conscience so that you as a conscientious juror feel bound or impelled to act upon it. Conversely, when the evidence you have heard leaves you as a responsible juror with some lingering or nagging doubt with respect to the proof of some essential element of the offence with which the accused is charged so that you are unable to say to yourself that the Crown has proven the guilt of the accused beyond a reasonable doubt as I have defined those words then it is your duty to acquit the accused.

[13] For the first issue, the applicant wants the Court to again weigh the evidence adduced before the Chairperson. However, it is up to the trier of fact and not the review court to assess the evidence and determine the weight to be given to each element: see *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3. However, the administrative tribunal must provide reasons for its decision in this regard.

[14] The applicant claims that the Chairperson did not take all the relevant facts about his situation into account. Because of his very limited vision, the applicant claims that he cannot see whether items in his cell have been moved and that he has to leave the door of his cell open to let his aide in to do his cleaning in his absence. He also alleges that the Chairperson did not consider the fact that certain inmates can move around in the cellblock in the mornings because they do not work and do not go to school. He claims that the presence of these inmates means that he does not have exclusive access to his cell. Finally, the applicant claims that, because of his headaches and epilepsy, he takes only the medications prescribed by his physician.

[15] The respondent asserts that the Chairperson considered the applicant's version, but did not believe it. The respondent supports the Chairperson's finding that, logically, no one could have wanted to place these substances in the applicant's cell. The respondent argues that the Chairperson correctly applied the rules of evidence and that his finding of guilt on the part of the applicant was reasonable.

[16] I see that the relevant provision of the Act has been considered many times by the Federal Court. It is clear that there are three elements to prove: custody and control of the item(s), and knowledge of that possession: see *Taylor v. Canada (Attorney General)*, 2004 FC 1536, 65 W.C.B. (2d) 693 (*Taylor*) at paragraph 10. Thus, to demonstrate custody and control beyond a reasonable doubt, the possession must be exclusive to him: *Taylor* at paragraphs 12-14. In this case, there is no doubt that the applicant had custody and control; the question is rather one of exclusivity and knowledge.

[17] In *Williams v. Canada (Attorney General)*, 2006 FC 153, 68 W.C.B. (2d) 651 (*Williams*), the Court dealt with the evidence required to establish knowledge of possession of the unauthorized item. Mr. Justice Yvon Pinard stated that where there is no direct evidence of this knowledge, the decision-maker may look to all of the relevant facts to determine whether there is sufficient evidence to support the inference that the accused had the required knowledge (para. 12). In this case, a cellular telephone had been found in a sock under the prisoner's pillow. Another individual had tried to take responsibility, but he was unable to describe the telephone or the sock. His testimony was therefore rejected. Given the location where the telephone was found and the fact

that the testimony of both the third party and the prisoner was not credible, the Chairperson inferred that the applicant had the necessary knowledge of possession of the unauthorized item. Pinard J. upheld this decision.

[18] In *Smith v. Canada (Attorney General)*, 2005 FC 1436, 282 F.T.R. 81, the applicant had been convicted beyond a reasonable doubt of having in his possession a cellular telephone in his garbage can, together with a charger in a medicine cabinet in his cell. Although the applicant had the opportunity to possess the unauthorized items, he was not the only one who could have possession of them (para. 31). He shared his cell with another prisoner and always left the door unlocked. The Chairperson accepted that the applicant did not usually lock his cell, but found that by acting in this manner, in an environment in which contraband was omnipresent, the applicant had the obligation to search his own cell on a daily basis (para. 9). In other words, this was a case of wilful blindness.

[19] Mr. Justice Max Teitelbaum noted that, unlike *Williams*, the circumstantial evidence in *Smith* did not allow him to presume knowledge of the unauthorized items. It was possible that the applicant's cellmate possessed the items. It was also possible that another inmate placed the items in his cell to hide them. These possibilities given by the applicant as to why these items were found in his cell accorded with the evidence and were plausible. Finally, he determined that the fact he left his door unlocked and did not regularly search his cell did not constitute wilful blindness. The inmate was not obliged to search his own cell to make sure that there was no contraband.

[20] An analysis of *Williams* and *Smith* is very useful in the case at bar. Both decisions concerned the possession of unauthorized items by an inmate who shared his cell with a cellmate.

[21] In *Williams*, Pinard J. considered the circumstantial evidence to establish the accused's knowledge and upheld his conviction. In *Smith*, Teitelbaum J. reached the opposite conclusion, acquitting the inmate, because it was plausible based on the evidence that the accused could not be presumed to have exclusive knowledge of the presence of the item. The fact situation in the case at bar is very different from those in the above-mentioned judgments, in that the applicant was the sole occupant of the cell in which the unauthorized substances were found, whereas in the other two judgments, the cells were jointly occupied by two inmates.

[22] In the case at bar, the applicant was the sole occupant of the cell.

[23] The officers found two 25 mg tablets of Seroquel hidden in a container of acetaminophen, together with a white substance (identified as morphine), found in a container of vitamins.

[24] The applicant denies having possession of these substances but admitted possessing containers of vitamins, Robaxecet and a medication prescribed to control his epilepsy. The Chairperson found the applicant's explanations were not logical, reasonable or sufficient according to the rules established by *The Queen v. W. (D.)* regarding reasonable doubt. The Chairperson did not believe the applicant's version, in which his explanations were purely speculative.

V. The disciplinary court

[25] A disciplinary court is, by nature, inquisitorial. It is not subject to the same strict rules as judicial and quasi-judicial tribunals. However, a disciplinary court has a duty to act in accordance with the rules of fundamental justice (*Martineau v. Institution de Matsqui Institution* (1979), 30 N.R. 119; *Canada (Corrections Service) v. Plante*, [1995] F.C.J. No. 1509).

[26] In the case at bar, the applicant claims that the Chairperson did not provide sufficient reasons for his decision, particularly by not mentioning the fact that he is practically blind, a fact that, in his opinion, would have had a determinative effect on the decision.

[27] Certainly, it would have been preferable to elaborate a little more on certain factual characteristics of the case, but even if the Chairperson had done so, the outcome would not have changed because he did not believe the applicant's explanations and version. The circumstantial evidence placed the applicant in possession of unauthorized substances, and he admitted possessing containers of vitamins and a medication prescribed for his epilepsy.

[28] If the decision is considered as a whole, the factual interpretation falls within the standard of reasonableness permitted by *Dunsmuir*.

(b) Did the Chairperson (and/or the Drummond Institution) commit an error of law or procedural fairness by not allowing the applicant to provide a urine sample as a defence?

[29] In his memorandum, the applicant cites subsections 61(1) and (2) of the Act concerning the search of vehicles. I assume that he wished to refer to section 54 of the Act, which I cite below:

Urinalysis	Analyses d'urine
54. Subject to section 56 and subsection 57(1), a staff member may demand that an inmate submit to urinalysis	54. L'agent peut obliger un détenu à lui fournir un échantillon d'urine dans l'un ou l'autre des cas suivants :
(a) where the staff member believes on reasonable grounds that the inmate has committed or is committing the disciplinary offence referred to in paragraph 40(k) and that a urine sample is necessary to provide evidence of the offence, and the staff member obtains the prior authorization of the institutional head;	a) il a obtenu l'autorisation du directeur et a des motifs raisonnables de croire que le détenu commet ou a commis l'infraction visée à l'alinéa 40k) et qu'un échantillon d'urine est nécessaire afin d'en prouver la perpétration;
(b) as part of a prescribed random selection urinalysis program, conducted without individualized grounds on a periodic basis and in accordance with any Commissioner's Directives that the regulations may provide for; or	b) il le fait dans le cadre d'un programme réglementaire de contrôle au hasard, effectué sans soupçon précis, périodiquement et, selon le cas, conformément aux directives réglementaires du commissaire;
(c) where urinalysis is a prescribed requirement for participation in	c) l'analyse d'urine est une condition — imposée par règlement — de participation à un programme ou une activité réglementaire de désintoxication ou impliquant des contacts avec la collectivité.
(i) a prescribed program or activity involving contact with the community, or	

> (ii) a prescribed substance abuse treatment program.

[30] The applicant claims that the evidence that he was not a drug addict is relevant to prove his innocence concerning the charge of possessing unauthorized items. On a number of occasions, he asked officers and employees of Drummond Institution if he could undergo a urine test to prove that he had not ingested morphine or Seroquel, but no one administered the test. He states that he does not drink alcohol, does not smoke and takes only the medications prescribed by his physician. He adds that, in the past, when he received prescribed medications that he did not want to take, he would return them to his physician.

[31] The respondent submits that drug use is not a relevant fact.

[32] Regarding the right to undergo a urinalysis, I see no error in the decision made. The applicant was not accused of taking unauthorized substances (which would be an offence under paragraph 40(*k*) of the Act). Instead, he was accused of having unauthorized items in his possession (in violation of paragraph 40(*j*) of the Act). This subsection does not mention drug use. It clearly pertains to simple possession of a wide range of items that are not, for one reason or another, permitted in the institution. Refusing to give a urine test to a person accused of possessing an unauthorized item does not constitute a breach of procedural fairness because the ingestion of drugs is not a fact pertinent to the charge.

(c) Did the Chairperson commit an error of procedural fairness by not allowing the second officer to testify?

[33] The applicant identified a number of potential problems with Officer Beauregard's testimony. He submits that the officer's testimony revealed that he did not remember the order in which they searched the three cells chosen that morning. The applicant alleges that the officers could have found the containers in another cell and therefore accused him by mistake. The applicant asserts that another inmate told him that the officers had nothing in their hands when they left the applicant's cell that day. With the other officer's testimony, the applicant submits that he could have obtained important information for his defence.

[34] The respondent claims that the applicant was free to call anyone he wished as a witness. He alleges that the applicant did not ask the other officer to testify.

[35] Subsection 31(1) of the Regulations governs the right to call and examine witnesses:

31. (1) The person who conducts a hearing of a disciplinary offence shall give the inmate who is charged a reasonable opportunity at the hearing to	31. (1) Au cours de l'audition disciplinaire, la personne qui tient l'audition doit, dans des limites raisonnables, donner au détenu qui est accusé la possibilité :
(a) question witnesses through the person conducting the hearing, introduce evidence, call witnesses on the inmate's behalf and examine exhibits and documents to be considered in the taking of the decision; and	a) d'interroger des témoins par l'intermédiaire de la personne qui tient l'audition, de présenter des éléments de preuve, d'appeler des témoins en sa faveur et d'examiner les pièces et les documents qui vont être pris en

	considération pour arriver à la décision;
(b) make submissions during all phases of the hearing, including submissions respecting the appropriate sanction.	b) de présenter ses observations durant chaque phase de l'audition, y compris quant à la peine qui s'impose.

[36] The transcripts show that the Chairperson asked the applicant if he had other witnesses to call and that his counsel said no. It was therefore not because of the Chairperson that the other officer did not testify. The evidence suggests rather that it was the applicant who decided not to call him as a witness.

[37] The applicant alleges that there is a possibility that the drugs were found in a cell other than his. He should have called as a witness the inmate who gave him that information or the other officer to corroborate this hypothesis, but he did not do so. Without additional testimony, the Chairperson was correct to rely on the evidence given by Officer Beauregard and to find that the officers had found the drugs in the cell occupied by the applicant.

VI. Conclusion

[38] Considering the foregoing, the Chairperson’s decision, although brief, complies with the reasonability criteria.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the applicant's application for judicial review is dismissed.

"Orville Frenette"
Deputy Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1230-06
STYLE OF CAUSE:	ROBERT SÉGUIN V. AGC
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 21, 2008
REASONS FOR JUDGMENT AND JUDGMENT BY:	The Honourable Mr. Justice Frenette
DATED:	April 29, 2008

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