Federal Court  Cour fédérale

Date: 20100215

Docket: T-1936-08

Citation: 2010 FC 153

Ottawa, Ontario, February 15, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

NICHOLAS BONAMY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This concerns an Application for Judicial Review submitted by Mr. Nicholas Bonamy (the "Applicant"), a self-represented litigant, challenging a decision dated October 29, 2008 of the Assistant Commissioner, Policy and Research of the Correctional Service of Canada, and seeking the following declaratory relief: a) that the current correctional grievance process of the Correctional Service of Canada is not an adequate substitute to judicial review; b) that Commissioner's Directive 580 does not permit the informal discipline of an offender by staff members; and c) that the Applicant should not have been subjected to negative consequences as a result of his use of the offender grievance process.

Background

[2] The Applicant was sentenced to 4 years incarceration on May 17, 2006 and was subsequently incarcerated at Saskatchewan Penitentiary. He has since benefited from a statutory release.

[3] During his stay at Saskatchewan Penitentiary, the Applicant became the representative of a group of inmates for the purpose of a group grievance alleging harassment of inmates by correctional staff.

[4] This group grievance proceeded up the grievance process and finally resulted in a third level response dated March 11, 2008 from Senior Deputy Commissioner Don Head, (now the Commissioner of the Correctional Service of Canada) who rejected most of the allegations set out in the grievance. However, Senior Deputy Commissioner Head did uphold one of the issues raised by the grievance in the following terms:

> Issue 5- Lock Up on 2007-07-12
>
> You allege that on 2007-07-12 at 0715h, CO Brown refused to unlock four (4) offenders in cells A4-24, 25, 26 and 27 for an additional thirty (30) minutes. You allege that CO Brown would not offer an explanation for this behaviour and refused to speak with the Range Representative. You state that CO Brown eventually indicated that the four (4) offenders had been late locking up on the previous evening, which you claim is incorrect.
>
> The *CCRA* [*Corrections and Conditional Release Act*], section 40 (a) states:
>
> > 40. An inmate commits a disciplinary offence who
> > (a) disobeys a justifiable order of a staff member;

> (r) wilfully disobeys a written rule governing the conduct of inmates;
>
> 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.
>
> (2) Where an informal resolution is not achieved, the institution 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.

You are correct that on the morning of 2007-07-12, four (4) offenders on your unit were unlocked late. These offenders were unlocked late because they had been late locking up on a number of evenings. Staff are permitted to resolve such matters informally; however, they are not permitted to informally discipline offenders. If it is not possible to resolve the matter informally then the Institutional Head (IH) may decide to formally discipline the offenders. Given that staff acted beyond their authority by disciplining offenders on your unit, this part of your grievance is **upheld.**

[…]

Given the above information, your grievance is **upheld in part.**

As corrective action, the IH of Saskatchewan Penitentiary will remind his staff of the proper means of informally resolving issues within the institution.

[5] The Applicant alleges that as a result of this grievance and the third level response from Senior Deputy Commissioner Head upholding in part the grievance, he was subjected to negative consequences, including an involuntary transfer from the unit within Saskatchewan Penitentiary for which he was the representative, and a refusal to allow him to occupy the functions of inmate

grievance coordinator. Moreover, the Applicant was unsatisfied as to how the corrective action provided in the above response from Senior Deputy Commissioner Head had been implemented.

[6] Consequently, on May 26, 2008, the Applicant submitted directly at the third level, a new grievance raising various issues, including allegations that the corrective action promised by Senior Deputy Commissioner Head had not been taken, and that the Applicant had been the subject of various negative consequences as a result of his involvement in the group grievance.

[7] This May 26, 2008 third level grievance was *de facto* rejected on August 14, 2008 by the Assistant Commissioner for Policy and Research of the Correctional Service of Canada (the "Assistant Commissioner"). In so doing, the Assistant Commissioner effectively overturned the prior decision of Senior Deputy Commissioner Head on the collective grievance. The pertinent extracts from the document explaining the *de facto* rejection are the following:

> Issue 1: Third-Level Corrective Action
>
> You state that the corrective action from your third-level grievance (V50A00019438) was not completed. As corrective action, the Institutional Head of SP [Saskatchewan Penitentiary] was required to remind his staff of the proper means of informally resolving issues within the institution. You claim that this reminder was not completed, as informal discipline is still an issue at SP. You provide two (2) examples in which other offenders were allegedly informally disciplined.
>
> During the analysis of this grievance, it came to my attention that the restriction of an offender's movement to his cell is permitted, as per Commissioner's Directive (CD) 580, *Discipline of Inmates*, at paragraph 13, which states:

> 13. Restriction of movement to a particular area or cell may be used as a type of informal resolution of a disciplinary infraction (section 41 of the CCRA) and shall:
>
> a. not exceed eight (8) hours unless approved by the Institutional Head; and
> b. be immediately reported to the Correctional Supervisor/Assistant Team Leader or Unit Manager/Team Leader.

Although your third-level grievance response (V50A00019438) contained incorrect information, the corrective action was completed. During pre-shift briefings, the Correctional Manager reviewed and discussed the proper means of informally resolving issues as outlined in policy. This had been done while Correctional Officers commenced their shifts on duty from 2008-04-16 to 2008-04-23.

The Correctional Manager of Operations has met with you to discuss the implications of CD 580, paragraph 13 and you agreed that the practice of restricting offenders to their cells as informal resolution is in accordance with this policy. Given that incorrect information was provided to you in your third-level response (V50A00019438), this part of your grievance is **upheld in part.**

Issue 2: Involuntary Movement to Unit 4

You allege that as a result of your third-level grievance (V50A00019438), you were moved from Unit 2 to Unit 4. You state that you lost your program assignment as the Range Cleaner and were denied the position of Inmate Grievance Clerk. This grievance was coded as Discrimination and was addressed at the first level in grievance (V50A00020559), which was denied. If you are not satisfied with your first-level response, you may submit a grievance to the second level. This part of your grievance is **rejected.**

[8] The Applicant wrote back on September 5, 2008 by alleging several irregularities regarding this rejection from the Assistant Commissioner, and seeking an answer concerning these irregularities. On October 29, 2008, the Assistant Commissioner answered by acknowledging that, contrary to what he had noted in his prior correspondence, the Applicant had not agreed with the

Correctional Manager that the practice of restricting offenders to their cells as a form of informal resolution was in accordance with applicable policy. However, save this correction, the answer of October 29, 2008 reiterated the Assistant Commissioner's prior rejection of August 14, 2008, and informed the Applicant that he could pursue the matter before the Federal Court should he choose to do so.

Position of the Applicant

[9] The Applicant, a self-represented litigant, submitted an affidavit explaining a grievance he made challenging the refusal to transfer him from Saskatchewan Penitentiary to the Dorchester Institution in New Brunswick as recommended by the judge who had sentenced him following a plea bargain. This grievance was eventually denied, and the record does not show that this denial was the object of any challenge before this Court. However, the Applicant uses this grievance as an example of the long delays inherent in the offender grievance procedure. In the case of this specific transfer grievance, a first level response was only provided more than six months after the complaint had been made.

[10] The Applicant thus argues that the existing inmate grievance procedure is neither fair nor expeditious, and consequently seeks a declaration that it does not constitute an adequate alternative precluding judicial review until the grievance procedure is completed. In essence, the Applicant seeks direct access to the Federal Court through judicial review from decisions of the Correctional Service of Canada concerning offenders. The Applicant asserts that the offender grievance

procedure is a fundamentally unfair system staked against offenders and replete with exaggerated delays serving as an impediment to court access for offenders.

[11] The Applicant finds support for his argument in the decisions of the Supreme Court of Canada in *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 and *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602, and in the 2004-05, 2005-06, 2006-07 and 2007-08 annual reports of the Correctional Investigator of Canada.

[12] Moreover, the Applicant argues that because of the innate unfairness of the offender grievance procedure, this Court should show no deference when reviewing decisions of the correctional authorities resulting from this procedure.

[13] Concerning the collective grievance, the Applicant argues that Senior Deputy Commissioner Head was correct when he upheld the grievance by finding that staff members are not permitted to informally discipline offenders through involuntary lock up. The Applicant asserts that this approach is consistent with paragraphs 4 and 11 of Commissioner's Directive 580 providing that informal resolution is an alternative to the disciplinary process which requires the agreement of the parties involved.

[14] The Applicant further argues that the Assistant Commissioner had no authority to overrule Senior Deputy Commissioner Head, a superior officer in the Correctional Service of Canada, on this point.

[15] Finally, the Applicant argues that, as a result of the collective grievance, he was moved involuntarily from the unit for which he was the representative, and was refused a position associated with the grievance procedure. He seeks a declaration confirming these negative consequences. The Applicant also seeks to be "granted leave to file an action in tort against the Commissioner of the Correctional Service of Canada."

Position of the Respondent

[16] The Respondent asserts that the October 28, 2008 decision from the Assistant Commissioner must be reviewed in this application together with his third level grievance decision dated August 14, 2008.

[17] The Respondent further argues that the standard of review applicable in this case should be that of reasonableness, as this standard is usually applied to reviews of third level decisions in the offender grievance procedure.

[18] The Respondent further asserts that the Application for judicial review in this case is moot since the Applicant benefited from a statutory release on January 15, 2009. The Respondent recognizes that the Applicant is still under sentence until May of 2010, and that he was incarcerated when he initiated this Application for judicial review. However, since the Applicant has since been released, the Respondent argues that the remedies the Applicant seeks from this Court would have no practical effect on the rights of the parties, that the issues raised by the Application could readily

be brought before the Court by another inmate in the context of a live controversy, and that the Application does not raise issues of public importance or public interest.

[19] Addressing the merits of the Application, the Respondent argues that the Applicant misconstrues the decision of *May v. Ferndale Institution*, above, which confirmed the jurisdiction of the provincial courts in *habeas corpus*, and, in so doing, did not suggest that the offender grievance procedure was not an adequate alternative to judicial review. Judicial review in the Federal Court may be sought if a griever is not satisfied with the final decision resulting from the offender grievance procedure. The Respondent thus argues that judicial review before the Federal Court and the offender grievance procedure are applied exclusive of one another, but in conjunction with one another. Moreover, the Respondent notes that the factual underpinning in this case is insufficient to support the declaration that the offender grievance procedure is not an adequate alternative to judicial review.

[20] The Respondent recognizes that the October 29, 2008 and August 14, 2008 decisions from the Assistant Commissioner are in direct contradiction to the third level grievance response dated March 11, 2008 from Senior Deputy Commissioner Head on the issue of the authority of staff members to restrict prisoners to a cell or a particular area as a form of informal resolution. However, the Respondent asserts that the position expressed by the Assistant Commissioner is a reasonable interpretation of paragraph 13 of Commissioner's Directive 580 concerning the *Discipline of Inmates*, which allows for involuntary restriction of movement for up to eight hours as

a type of informal resolution to a disciplinary infraction, and that consequently no reviewable error was committed by the Assistant Commissioner in so finding.

[21] The Respondent further argues that the Assistant Commissioner made no reviewable error in refusing to address through a direct third level grievance the allegations of negative consequences for the Applicant resulting from his involvement in the collective grievance. These allegations were properly dealt with at the first level of the grievance procedure.

[22] The Respondent finally adds that the Federal Court has no authority to make a bare finding of fact concerning the alleged negative consequences. The Respondent asserts, on the basis of *Grenier v. Canada*, 2005 FCA 348, [2005] F.C.J. No. 1778 (QL), that an action in damages which is premised on the illegality or wrongfulness of a decision of a federal body or agency cannot succeed unless that decision has first been declared invalid or unlawful, a declaration which the Applicant is not seeking in these proceedings, having rather limited his relief to a declaration of a factual finding of negative consequences.

The Legislative Framework

[23] Section 3 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the "Act") sets out that the purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by carrying out sentences through the safe and humane custody and supervision of offenders and their reintegration into the community as law-abiding citizens through the provisions of programs in penitentiaries and in the community. For this purpose, guiding

principles are set out in section 4 of the Act, including the following principles pertinent to this judicial review:

(*d*) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;	*d*) les mesures nécessaires à la protection du public, des agents et des délinquants doivent être le moins restrictives possible;
(*e*) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;	*e*) le délinquant continue à jouir des droits et privilèges reconnus à tout citoyen, sauf de ceux dont la suppression ou restriction est une conséquence nécessaire de la peine qui lui est infligée;
[…]	[…]
(*g*) that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure;	*g*) ses décisions doivent être claires et équitables, les délinquants ayant accès à des mécanismes efficaces de règlement de griefs;

[24] The Act distinguishes between inmates and offenders. Section 2 of the Act defines inmates as including those persons who are in a penitentiary pursuant to a sentence, committal, transfer or condition, while offenders include inmates within a penitentiary and those outside a penitentiary by reason of parole or statutory release.

[25] Sections 38 to 44 of the Act provide for a disciplinary system for inmates. The pertinent provisions of the Act for our purposes are as follows:

38. The purpose of the disciplinary system established by sections 40 to 44 and the regulations is to 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.

38. Le régime disciplinaire établi par les articles 40 à 44 et les règlements vise à encourager chez les détenus un comportement favorisant l'ordre et la bonne marche du pénitencier, tout en contribuant à leur réadaptation et à leur réinsertion sociale.

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

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

40. An inmate commits a disciplinary offence who

(*a*) disobeys a justifiable order of a staff member;

[…]

(r) wilfully disobeys a written rule governing the conduct of inmates;

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

a) désobéit à l'ordre légitime d'un agent;

[…]

r) contrevient délibérément à une règle écrite régissant la conduite des détenus;

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.

(2) Where an informal resolution is not achieved, the institutional head may, depending on the seriousness of

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.

(2) À défaut de règlement informel, le directeur peut porter une accusation d'infraction disciplinaire

the alleged conduct and any aggravating or mitigating factors, issue a charge of a minor disciplinary offence or a serious disciplinary offence.

mineure ou grave, selon la gravité de la faute et l'existence de circonstances atténuantes ou aggravantes.

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.

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.

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.

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.

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

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

(*a*) the inmate is voluntarily absent;

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

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

b) la personne chargée de 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.

(3) The person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt,

(3) La personne chargée de l'audition ne peut prononcer la culpabilité que si elle est convaincue hors de tout doute

based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question.	raisonnable, sur la foi de la preuve présentée, que le détenu a bien commis l'infraction reprochée.
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:	**44.** (1) Le détenu déclaré coupable d'une infraction disciplinaire est, conformément aux règlements pris en vertu des alinéas 96*i*) 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 duties; and	*e*) travaux supplémentaires;
(*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.

[26] The *Correctional and Conditional Release Regulations* SOR/92-620 (the "Regulations") provide further details on the discipline of inmates in sections 24 to 33, including provisions for a notice of disciplinary charge to be provided to the concerned inmate, for a hearing before a senior staff member for charges involving minor offences or before an independent chairperson for charges involving serious offences, for the right of an inmate who is charged to question witnesses and to make submissions, and for records of disciplinary hearings to be kept.

[27] Sections 34 to 41 of the Regulations address sanctions flowing from disciplinary offences by inmates, and sets out various maximum penalties for minor and major offences. In the case of minor offences, a maximum of seven days of loss of privileges, a maximum fine of $25 and a maximum of 10 hours of extra duties are provided for.

[28] Section 90 of the Act calls for a grievance procedure for offenders to be operated in accordance with the Regulations:

90. There shall be a procedure for fairly and expeditiously resolving offenders' grievances on matters within the jurisdiction of the Commissioner, and the procedure shall operate in accordance with the regulations made under paragraph 96(*u*).	**90.** Est établie, conformément aux règlements d'application de l'alinéa 96*u*), une procédure de règlement juste et expéditif des griefs des délinquants sur des questions relevant du commissaire.

[29] Sections 74 to 82 of the Regulations set out the operating parameters for the offender grievances procedure. Section 74 first sets out a written complaint process by which an offender who is dissatisfied with an action or decision by a staff member can attempt to resolve the matter informally through discussion:

74. (1) Where an offender is dissatisfied with an action or a decision by a staff member, the offender may submit a written complaint, preferably in the form provided by the Service, to the supervisor of that staff member.	**74.** (1) Lorsqu'il est insatisfait d'une action ou d'une décision de l'agent, le délinquant peut présenter une plainte au supérieur de cet agent, par écrit et de préférence sur une formule fournie par le Service.
(2) Where a complaint is	(2) Les agents et le délinquant

submitted pursuant to subsection (1), every effort shall be made by staff members and the offender to resolve the matter informally through discussion.	qui a présenté une plainte conformément au paragraphe (1) doivent prendre toutes les mesures utiles pour régler la question de façon informelle.
(3) Subject to subsections (4) and (5), a supervisor shall review a complaint and give the offender a copy of the supervisor's decision as soon as practicable after the offender submits the complaint.	(3) Sous réserve des paragraphes (4) et (5), le supérieur doit examiner la plainte et fournir copie de sa décision au délinquant aussitôt que possible après que celui-ci a présenté sa plainte.

[30] The Regulations then set out a three level grievance process in the event the complaint is not resolved informally or the decision of the supervisor is not deemed satisfactory. First the grievance is submitted to the institutional head. Then the grievance can proceed to the second level before the head of the region. The third and final stage of the grievance procedure is before the Commissioner or his or her delegate. The pertinent provisions of the Regulations read as follows:

75. Where a supervisor refuses to review a complaint pursuant to subsection 74(4) or where an offender is not satisfied with the decision of a supervisor referred to in subsection 74(3), the offender may submit a written grievance, preferably in the form provided by the Service,	**75.** Lorsque, conformément au paragraphe 74(4), le supérieur refuse d'examiner la plainte ou que la décision visée au paragraphe 74(3) ne satisfait pas le délinquant, celui-ci peut présenter un grief, par écrit et de préférence sur une formule fournie par le Service :
(a) to the institutional head or to the director of the parole district, as the case may be; or	a) soit au directeur du pénitencier ou au directeur de district des libérations conditionnelles, selon le cas;
(b) where the institutional head or director is the subject of the	b) soit, si c'est le directeur du pénitencier ou le directeur de

grievance, to the head of the region.

[…]

78. The person who is reviewing a grievance pursuant to section 75 shall give the offender a copy of the person's decision as soon as practicable after the offender submits the grievance.

[…]

80. (1) Where an offender is not satisfied with a decision of the institutional head or director of the parole district respecting the offender's grievance, the offender may appeal the decision to the head of the region.

(2) Where an offender is not satisfied with the decision of the head of the region respecting the offender's grievance, the offender may appeal the decision to the Commissioner.

(3) The head of the region or the Commissioner, as the case may be, shall give the offender a copy of the head of the region's or Commissioner's decision, including the reasons for the decision, as soon as practicable after the offender submits an appeal.

district des libérations conditionnelles qui est mis en cause, au responsable de la région.

[…]

78. La personne qui examine un grief selon l'article 75 doit remettre copie de sa décision au délinquant aussitôt que possible après que le détenu a présenté le grief.

[…]

80. (1) Lorsque le délinquant est insatisfait de la décision rendue au sujet de son grief par le directeur du pénitencier ou par le directeur de district des libérations conditionnelles, il peut en appeler au responsable de la région.

(2) Lorsque le délinquant est insatisfait de la décision rendue au sujet de son grief par le responsable de la région, il peut en appeler au commissaire.

(3) Le responsable de la région ou le commissaire, selon le cas, doit transmettre au délinquant copie de sa décision motivée aussitôt que possible après que le délinquant a interjeté appel.

[31] The Regulations also provide that this grievance procedure is not an impediment to offenders pursuing other legal remedies. Indeed, section 81 of the Regulations reads as follows:

81. (1) Where an offender decides to pursue a legal remedy for the offender's complaint or grievance in addition to the complaint and grievance procedure referred to in these Regulations, the review of the complaint or grievance pursuant to these Regulations shall be deferred until a decision on the alternate remedy is rendered or the offender decides to abandon the alternate remedy.	81. (1) Lorsque le délinquant décide de prendre un recours judiciaire concernant sa plainte ou son grief, en plus de présenter une plainte ou un grief selon la procédure prévue dans le présent règlement, l'examen de la plainte ou du grief conformément au présent règlement est suspendu jusqu'à ce qu'une décision ait été rendue dans le recours judiciaire ou que le détenu s'en désiste.
(2) Where the review of a complaint or grievance is deferred pursuant to subsection (1), the person who is reviewing the complaint or grievance shall give the offender written notice of the decision to defer the review.	(2) Lorsque l'examen de la plainte ou au grief est suspendu conformément au paragraphe (1), la personne chargée de cet examen doit en informer le délinquant par écrit.

[32] Finally, sections 97 and 98 of the Act allow the Commissioner of the Correctional Service of Canada to make rules for the purposes of carrying out Part 1 of the Act and the Regulations, and to designate such rules as directives. Two particularly pertinent directives for the purposes of this judicial review have been issued under the authority of the Commissioner, namely Directive 081 concerning *Offender Complaints and Grievances*, and Directive 580 concerning *Discipline of Inmates*, both of which will be referred to more extensively below.

The Issues

[33] The issues in these proceedings can be stated as follows:

a. Is the Application for judicial review moot?

b. What is the applicable standard of review?

c. Should this Court declare that the offender grievance procedure is not an adequate substitute to judicial review?

d. Did the Assistant Commissioner commit a reviewable error in finding that informal discipline extends to the involuntary restriction of the movement of an inmate to a cell for up to eight hours?

e. Should this Court declare that the Applicant was subjected to reprisals as a result of his involvement in the correctional grievance process?

Is the Application moot?

[34] The Respondent argues that the Application in this case is moot since the Applicant now benefits from a statutory release and is consequently no longer in a penitentiary.

[35] Under the doctrine of mootness, a court may decline to decide a case which raises merely hypothetical or abstract questions. Mootness applies when the decision of the court will not have the effect of resolving a controversy which affects or might affect the rights of the litigants. However, even when a case is moot, a court may still decide to render judgment in certain circumstances. The leading decision concerning mootness is *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[36] I find that the doctrine of mootness does not apply in this case.

[37] Indeed, the Act and the Regulations provide for an offender grievance procedure, which includes both offenders who are inmates in penitentiaries and offenders who are no longer in a penitentiary following a parole or statutory release. Consequently, by the very terms of the grievance procedure, the change of status from offender inmate to offender on statutory release has no effect on the grievance procedure itself. Moreover paragraph 65 of Commissioner's Directive 081 concerning *Offender Complaints and Grievances* specifically requires that the grievance procedure must be completed even in circumstances where the offender has fully served his or her sentence:

65. When an offender completes his/her sentence after having submitted a grievance during his/her sentence, the Service shall complete the grievance as required and forward the response to the offender. If a forwarding address cannot be located, the original response shall be placed on the griever's file until such time as an Access to Information and Privacy request has been completed by the griever.	65. Si la peine que purge un délinquant prend fin avant que le grief qu'il a déposé soit réglé, le Service doit poursuivre normalement le traitement du grief et lui envoyer la réponse. Si l'on ne peut trouver son adresse, on doit verser la réponse originale dans le dossier du plaignant et l'y laisser jusqu'à ce que ce dernier fasse une demande à l'Unité de l'accès à l'information et de la protection des renseignements personnels.

[38] These provisions apply to the grievance procedure, but are also to be read as extending to judicial review of the decisions made pursuant to the procedure in light of paragraph 30 of Commissioner's Directive 081, which specifically contemplates judicial review of final decisions on

grievances, which, by implication, includes decisions made after completion of sentence, and *a fortiori* decisions regarding inmates who are benefiting from a statutory release. This is a clear indication that mootness does not apply in circumstances, such as here, where an inmate who has submitted a grievance subsequently obtains a parole or a statutory release prior to the grievance procedure and the subsequent resulting judicial review having run their full course.

[39] Moreover, a live controversy still exists between the parties. Indeed, pursuant to subsection 128(1) of the Act, an offender benefiting from a statutory release continues to serve the sentence until its expiration. In addition, a statutory release can be suspended or revoked pursuant to subsection 135(1) of the Act.

[40] Consequently, this Application does not raise theoretical issues. The Applicant is clearly an offender to whom the grievance procedure applies, and he is still at risk of returning to a penitentiary as an inmate through the operation of the Act. Moreover, the Applicant is seeking declarations which may eventually allow him to pursue a claim in damages against the Respondent.

Standard of review

[41] *Dunsmuir v. New Brunswic*k, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 62 established a two-step process for determining the standard of review. First, the court ascertains whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves

unfruitful, the court must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[42] The Application here raises three essentially different matters. It first raises concerns about the fundamental fairness of the correctional grievance procedure, and for this purpose, a declaration that the current procedure is not an adequate substitute to judicial review is requested. This raises questions concerning principles of natural justice and of procedural fairness.

[43] Second, it directly challenges the decisions of the Assistant Commissioner concerning two issues: a) the authority to involuntarily restrict the movement of a prisoner for up to eight hours as a form of involuntary disciplinary measure and b) the process for treating allegations of reprisals for participation in a grievance. These two issues raise solely questions related to the legal interpretation of the Act, the Regulations and Commissioner's Directives 081 and 580 concerning *Offender Complaints and Grievances* and the *Discipline of Inmates*.

[44] Third, a declaration is sought concerning the alleged "negative consequences" the Applicant would have suffered as a result of his participation in the group grievance. This raises questions of fact.

[45] As a general rule, principles of natural justice and procedural fairness are to be reviewed on the basis of a correctness standard of review: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 43. This also applies to issues concerning natural justice and

procedural fairness raised in the context of the offender grievance procedure: *Sweet v. Canada (Attorney General)*, 2005 FCA 51, [2005] F.C.J. No. 216 (QL) at para. 16.

[46] Prior to *Dunsmuir v. New Brunswick*, the jurisprudence has held, within the context of judicial reviews of decisions under the offender grievance procedure, that a correctness standard of review applied where questions of law were at issue, such as the proper interpretation of the Act; that a standard of reasonableness *simpliciter* applied to mixed questions of law and fact; and that a standard of patent unreasonableness applied to pure questions of fact: *Tehrankari v. Canada (Correctional Service)*, (2000) 188 F.T.R. 206, [2000] F.C.J. No. 495 (QL) at para. 44; *Mennes v. Warkworth Institution*, 2001 FCT 1349, [2001] F.C.J. No. 1830 (QL) at paras. 13-14; *Ennis v. Canada (Attorney General)*, 2003 FCT 461, [2003] F.C.J. No. 633 (QL) at paras. 17 to 21; *Sweet v. Canada (Attorney General)*, above at paras. 14-15; *Bégin v. Canada (Attorney General)*, 2008 FC 89, [2008] F.C.J. No. 205 (QL) at paras. 16 to 18.

[47] Subsequent to *Dunsmuir v. New Brunswick*, Federal Court decisions have found that a correctness standard applies to questions of procedural fairness, and a reasonableness standard applies to questions of fact and of mixed law and fact: *Dutiaume v. Canada (Attorney General)*, 2008 FC 990, [2008] F.C.J. No. 1230 (QL) at paras. 27 to 29; *Johnson v. Canada (Attorney General)*, 2008 FC 1357, [2008] F.C.J. No. 1763 (QL) at paras 35 to 39; *Lemoy v. Canada (Attorney General)*, 2009 FC 448, [2009] F.C.J. No. 589 (QL) at paras. 13 to 15; *Yu v. Canada (Attorney General)*, 2009 FC 1201, [2009] F.C.J. No. 1495 (QL) at para. 22.

[48] Questions of law such as those raised by these proceedings are to be reviewed on a standard of correctness. This approach is consistent with the prior case law and with the standard of review analysis.

[49] Indeed, no privative clause protects decisions made within the offender grievance process, the process itself is administrative and decisions are not made by independent adjudicators; the nature of the questions at issue concern proper statutory interpretation, and the decisions makers in this process hold no special expertise in the interpretation of legislation. All this points clearly to a standard of correctness in reviewing the issues of law raised by these proceedings.

[50] I further add that in regard to the issue concerning the discipline of inmates through informal resolution, the positions of the Assistant Commissioner and of Senior Deputy Commissioner Head clearly contradict one another. In circumstances where officials from the same Department are contradicting each other within the framework of a dispute resolution process provided by statute, a correctness standard of review should apply: see by analogy *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.S.C. 282 at page 327; *Produits Pétro-Canada Inc. c. Moalli (C.A.)*, [1987] R.J.Q. 261 at pages 267-68; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385, at para. 61; *Canada (Attorney General) v. Mowat*, 2009 FCA 309, 312 D.L.R. (4th) 294, [2009] F.C.J. No. 1359 (QL) at para. 45; *Abdoulrab v. Ontario (Labour Relations Board)*, 2009 ONCA 491, [2009] O.J. No. 2524 (QL), at para. 48.

[51] Consequently, I shall review the issues of natural justice and procedural fairness and the issues of law raised by this Application on a standard of correctness. The issues of fact concerning the alleged "negative consequences" will be reviewed, if need be, on a standard of reasonableness.

Should this Court declare that the offender grievance procedure is not an adequate substitute to judicial review?

[52] The Applicant seeks a general declaration from this Court that the current offender grievance procedure is not an adequate substitute to judicial review. The Applicant asserts as the basis for this general declaration various annual reports form the Correctional Investigator of Canada tabled in Parliament by the responsible minister pursuant to section 192 of the Act. The Correctional Investigator of Canada is mandated under Part III of the Act as a type of ombudsman for offenders. In his various annual reports, the Correctional Investigator has severely criticised the application and management of the offender grievance procedure by the Correctional Service of Canada.

[53] The Correctional Investigator notes in his annual reports that the current grievance procedure originated from a comprehensive review of the penitentiary system in Canada carried out in 1976 and 1977 by the Standing Committee on Justice and Legal Affairs. That grievance procedure appears to have been plagued from the onset with long delays in the treatment of grievances, placing into question the effectiveness and credibility of the procedure. These issues have been the object for many years of regular admonishments by the Correctional Investigator, who has criticised the lack of commitment and responsibility on the part of the Correctional Service of Canada.

[54] The Correctional Investigator also refers to the Arbour Commission's report of 1996 (*Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kinston*) which noted the "…disturbing lack of commitment to the ideals of Justice on the part of the Correctional Service…" (at page 198 of the Arbour Report) and also noted the deficiencies of the offender grievance procedure and recommended improvements (at pages 150-51 of the Arbour Report).

[55] Though some adjustments to the offender grievance procedure were made following the Report of Justice Arbour, the Correctional Investigator continues to consistently report important problems associated principally with the timelessness of the procedure. In his 2007-08 annual report, the Correctional Investigator noted (at page 37) his serious concerns in terms of the Correctional Service's legislative responsibilities to provide a procedure for fairly and expeditiously resolving offender grievances as called for by section 90 of the Act.

[56] Though all this is interesting, the difficulty here is that the Applicant, a self-represented litigant, did not submit much evidence to sustain the declaration he seeks. Indeed, the Correctional Investigator's annual reports were not submitted with the Applicant's record supporting his Application, but rather with the Applicant's book of authorities presented on the day of the hearing of this Application. The net result is that these documents on which the Applicant largely rests his case were never properly included in the record, thus impeding the Respondent from challenging or responding to these documents and submitting evidence concerning the issues they raise. Moreover, no statistical information concerning the current delays in the offender grievance

procedure or any form of expert report explaining the alleged problems was submitted by the Applicant.

[57] In these circumstances, I agree with the Respondent that there is an insufficient evidentiary record in this case for this Court to consider the general declaration sought by the Applicant. This case simply does not have the proper evidentiary foundation to allow the Court to properly adjudicate the claims made by the Applicant concerning the overall fairness of the offender grievance procedure and whether it meets the legislated responsibilities set out in section 90 of the Act.

[58] I note in addition that section 81 of the Regulations reproduced above, and paragraphs 75 to 77 of Commissioner's Directive 081 do recognize that the grievance procedure is not an impediment to the initiation of court proceedings by offenders. These sections indicate that an offender may pursue a legal remedy for the complaint or grievance, in which case the grievance procedure is suspended until the legal proceedings have been completed.

[59] However, a judicial review application will normally be considered only after the offender grievance procedure has been exhausted. As recently noted by Justice Lemieux in *Ewert v. Canada (Attorney General)*, 2009 FC 971, [2009] F.C.J. No. 1532 (QL) at para. 32:

> It has been well established by this Court and by the Federal Court of Appeal that through the CCRA and the CCRR, Parliament and the Governor-in-Council have established a comprehensive scheme to deal with grievance by inmates lodged in federal prisons and such grievance system constitutes an adequate alternative remedy to judicial review which would generally lead the Federal Court to

> decline its judicial review jurisdiction until inmates have exhausted those procedures (see *Condo v. Canada (Attorney General)*, [2003] F.C.J. No. 310; *Giesbrecht v. Canada*, [1998] F.C.J. No. 621 (*Giesbrecht*); *Marek v. Canada (Attorney General)*, 2003 FCT 224; *Collin v. Canada (Attorney General)*, [2006] F.C.J. No. 729; *McMaster v. Canada (Attorney General)*, 2008 FC 647 (*McMaster*)). The alternative remedy need not be perfect; it must be adequate (see *Froom v. Canada (Minister of Justice*), 2004 FCA 352).

[60] This is an approach which is both reasonable and which ensures an efficient use of judicial resources. Nevertheless, this does not imply that an offender may never seek judicial review prior to the completion of the grievance procedure. Each situation is to be reviewed in its specific context, and judicial review, or another form of judicial intervention, may be sought in appropriate circumstances prior to the completion of the grievance procedure if the situation so commands, such as cases of emergency or evident inadequacy in the procedure followed in a specific grievance.

Did the Assistant Commissioner commit a reviewable error in finding that informal discipline extends to the involuntary restriction of the movement of an inmate to a cell for up to eight hours?

[61] Paragraph 13 of Commissioner's Directive 580 concerning *Discipline of Inmates* reads as follows:

13. Restriction of movement to a particular area or cell may be used as a type of informal resolution of a disciplinary infraction (section 41 of the CCRA) and shall:	**13.** Limiter les déplacements à une cellule ou à un secteur en particulier est une façon de régler de façon informelle une infraction disciplinaire (article 41 de la LSCMLC). La restriction :
a. not exceed eight (8) hours unless approved by the Institutional Head; and	a. ne doit pas durer plus de huit (8) heures, à moins que la prolongation soit approuvée par le directeur de l'établissement;

b. be immediately reported to the Correctional Supervisor/Assistant Team Leader or Unit Manager/Team Leader.	b. doit être signalée immédiatement au surveillant correctionnel ou chef d'équipe adjoint, ou au gestionnaire d'unité ou chef d'équipe.

[62] In his October 29, 2008 and August 14, 2008 decisions, the Assistant Commissioner takes the position that staff members may restrict inmates to their cells as a form of informal resolution even if this disciplinary restriction is not voluntary, i.e. is not agreed to by the inmate. This position is in direct contradiction to that expressed by Senior Deputy Commissioner Head in his March 11, 2008 third level response to the collective grievance from the Applicant, who rather took the position that staff members are not permitted to discipline inmates on an involuntary basis outside the framework of the formal inmate disciplinary process.

[63] For the reasons stated below, the position expressed by Senior Deputy Commissioner Head is correct, and consequently this Court finds that the Assistant Commissioner made reviewable errors in overruling him.

[64] First, the Assistant Commissioner had no authority to overrule Senior Deputy Commissioner Head. Paragraph 29 of Commissioner's Directive 081 provides that the decision of the Commissioner or his delegate at the third stage of the grievance process "constitutes the final stage of the complaint and grievance process". There is no provision either in the Act, the Regulations or in Commissioner's Directive 081 for overturning a third level decision other than through judicial review in the Federal Court.

[65] Though the Assistant Commissioner was responding to a third level grievance, this concerned the application of the corrective measures called for under Senior Deputy Commissioner Head's decision of March 11, 2008. Paragraph 82 of Commissioner's Directive 081 exceptionally allows for a third level grievance to be submitted if the completion of a third level corrective action is at issue. The grievance before the Assistant Commissioner thus concerned the allegation that the corrective measures provided in Deputy Commissioner Head's decision were not implemented. The grievance did not concern the merits of that decision.

[66] Consequently, the Assistant Commissioner overstepped his authority when he proceeded to overrule Senior Deputy Commissioner Head.

[67] In addition, the position expressed by Senior Deputy Commissioner Head was consistent with the Act, the Regulations and Commissioner's Directive 580 concerning the *Discipline of Inmates*, and should not therefore have been overturned by the Assistant Commissioner.

[68] Commissioner's Directive 580 defines "Informal resolution" as follows in paragraph 4 [emphasis added]:

4. Informal resolution: Reasonable alternatives to the disciplinary process agreed to by both parties to address inappropriate inmate conduct with a view to preventing its recurrence. Informal resolution includes responses such as resolution circles, negotiation, mediation, counselling,	4. Règlement informel: Recours à d'autres moyens raisonnables que le processus disciplinaire, approuvés par les deux parties, pour traiter la conduite inappropriée du détenu dans le but d'éviter qu'elle se reproduise. Il peut s'agir d'interventions comme les cercles de résolution, la

cooperative problem solving, warnings and advice	négociation, la médiation, le counseling, la résolution des problèmes axée sur la coopération, la formulation d'avertissements et la prestation de conseils.

[69] Informal resolution is also dealt with as a mutually agrees to solution at sub-paragraph 11(a) of Commissioner's Directive 580 [emphasis added]:

11. Informal resolution or attempts shall: a. be considered by the witnessing officer as an option, at any point in the process, <u>with the agreement of the parties</u> involved, since circumstances may change during or following an incident or charge;	11. Le règlement informel et les tentatives en ce sens doivent : a. être envisagés par l'agent témoin comme une possibilité à tout moment du processus, <u>avec l'accord des parties en cause</u>, car les circonstances peuvent changer pendant ou après un incident ou une accusation;

[70] I note that subsection 74(2) of the Regulations also treats informal resolution as a discussion format. This subsection provides that where a complaint is submitted by an offender, every effort must be made "by staff members and the offender to resolve the matter informally through discussion". This is consistent with the approach requiring that informal resolution requires the agreement of the parties involved.

[71] Paragraph 13 of Commissioner's Directive 580 is therefore not authority for a staff member to restrict an inmate to his or her cell on an involuntary basis as a form of informal discipline. It is simply an indication that restriction of movement to a cell for a maximum period of eight hours is one of the forms of informal resolution which can be used as an alternative or in addition to other

informal resolution solutions. However, the use of restriction of movement to a cell as a form of informal resolution still requires the agreement of the parties involved as specified in both paragraph 4 and subparagraph 11(a) of Commissioner's Directive 580.

[72] This approach is consistent with the Act and the Regulations and with the general legal principles concerning inmate discipline as set out by the Supreme Court of Canada.

[73] Indeed, paragraphs 4(d) (e) and (g) of the Act, reproduced above, provide for the principles that the least restrictive measures should be used for disciplining offenders, that offenders retain the rights and privileges of all members of society except those that are necessarily removed or restricted as a consequence of the sentence, and that correctional decisions, including disciplinary decisions, are to be made in a forthright and fair manner.

[74] In disciplinary matters, sections 41 to 44 of the Act and sections 25 to 33 of the Regulations, also reproduced above, specifically call for informal resolution, and where such is not possible, for a formal process of disciplinary charges, notifications and hearings affording inmates an opportunity to be heard on disciplinary matters and the resulting punishments. The interpretation of paragraph 13 of Commissioner's Directive 580 must be consistent with these provisions of the Act and of the Regulations. It is useful to note in this context that Commissioner's Directive 580 provides for a disciplinary hearing process where a simple warning or reprimand or a maximum fine of $25 may be at issue.

[75] The fundamental issue here is if an inmate may have his or her residual liberty within a federal penitentiary restricted for up to 8 hours as a form of discipline and without his or her consent or any form of disciplinary hearing.

[76] In *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602, Justice Dickson noted that a decision which has the effect of depriving an individual of his liberty by committing him to a "prison within a prison" was subject to some procedural protection on the basis that "[t]he rule of law must run within penitentiary walls" (at page 622). Moreover, in *May v. Ferndale Institution*, above at para. 77, Justices LeBel and Fish noted the following:

> A deprivation of liberty will only be lawful where it is within the jurisdiction of the decision-maker. Absent express provision to the contrary, administrative decisions must be made in accordance with the Charter. Administrative decisions that violate the Charter are null and void for lack of jurisdiction: Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at p. 1078. Section 7 of the Charter provides that an individual's liberty cannot be impinged upon except in accordance with the principles of fundamental justice. Administrative decisions must also be made in accordance with the common law duty of procedural fairness and requisite statutory duties. Transfer decisions engaging inmates' liberty interest must therefore respect those requirements.

[77] Senior Deputy Commissioner Head's approach to the issue at hand here is consistent with the teachings of the Supreme Court of Canada and is therefore to be preferred.

[78] I note that this approach does not imply that staff members may not restrict inmates to their cells to ensure order in the penitentiary or to otherwise ensure the proper management of the institution. Rather this approach seeks to avoid staff members unilaterally deciding to impose and

enforce *ex post facto* disciplinary measures in the form of restrictions to cells without following the disciplinary process called for by the Act, the Regulations and the Commissioner's Directives. In this specific case, restriction to cells was used as a disciplinary measure well after the alleged disciplinary incident took place.

Should this Court declare that the Applicant was subjected to reprisals as a result of his involvement in the correctional grievance process?

[79] On April 9, 2008 the Applicant submitted a first level grievance concerning alleged "negative consequences" following the receipt of the third level decision from Senior Deputy Commissioner Head dated March 11, 2008 and upholding in part the collective grievance. This "negative consequences" grievance was rejected at the first level on May 3, 2008, and the Applicant did not pursue the matter to the second level, opting instead to submit his third level grievance dated May 26, 2008 concerning both the lack of corrective action on the collective grievance and his allegations concerning "negative consequences".

[80] Section 91 of the Act clearly provides that every offender has complete access to the offender grievance procedure "without negative consequences."

[81] Though the right to access the grievance procedure without negative consequences is specifically guaranteed by legislation, the grievance procedure itself does not provide for special means to resolve allegations of "negative consequences". Commissioner's Directive 081 concerning *Offender Complaints and Grievances* treats a complaint of "negative consequences" as a harassment or discrimination complaint which must be dealt with as a first level grievance. Such a

grievance is however automatically designated as a high priority grievance and must be immediately brought to the attention of the institutional head.

[82] Paragraphs 83 and 84 of Commissioner's Directive 081 are clear on these matters:

83. An offender may submit a first level grievance where he/she believes that he/she is being subjected to harassment, sexual harassment or discrimination.	**83.** Un délinquant qui croit être victime de harcèlement, de harcèlement sexuel ou de discrimination peut présenter un grief au premier palier.
84. When a complaint or grievance includes allegations of harassment, sexual harassment or discrimination, or any behaviour that could constitute harassment, sexual harassment or discrimination, it must be: a. deemed sensitive; b. designated as a high priority; c. entered as a first level grievance; and d. immediately brought to the attention of the Institutional Head in a sealed envelope for his/her review.	**84.** Lorsqu'une plainte ou un grief contient des allégations de harcèlement, de harcèlement sexuel ou de discrimination, ou encore de tout comportement qui pourrait constituer du harcèlement, du harcèlement sexuel ou de la discrimination, il doit être : a. jugé de nature délicate; b. désigné prioritaire; c. considéré comme un grief au premier palier; d. acheminé immédiatement au directeur de l'établissement dans une enveloppe scellée, aux fins d'examen.

[83] Consequently, the Assistant Commissioner made no reviewable error in refusing to treat the "negative consequences" complaint within the framework of a direct third level grievance.

[84] However, the Applicant goes further, and seeks from this Court a declaration that he should not have been subjected to negative consequences as the result of his use of the offender grievance procedure. This would require this Court to first find that the Applicant was indeed subjected to "negative consequences". Since the Applicant did not pursue a second level grievance on the merits of his "negative consequences" allegations, no decision on the merits of these allegations is the subject of a judicial review before this Court. Consequently, in such circumstances, the declaration sought by the Applicant cannot be granted within the framework of this judicial review application.

[85] Finally, in his written submissions, the Applicant added as an alternative conclusion that this Court grant him leave to file an action in tort against the Commissioner of the Correctional Service of Canada as a result of the allegations of "negative consequences". The Applicant needs no authorization to file an action if he deems this advisable. This being stated, this Court makes no pronouncement on whether such an action may or may not be sustained on procedural or substantive grounds, nor if the principles set out in *Grenier v. Canada*, referred to above, could act as a bar. These are matters to be dealt within the context of such an action if and when it is submitted.

Conclusions

[86] In light of the above, the judicial review application will be granted in part.

[87] Though the Applicant is seeking declarations, the true essence of his Application concerns the judicial review of the Assistant Commissioner's decision set out in his letter of October 29, 2008 confirming his prior decision of August 14, 2008.

[88] I do not believe that a general declaration is the appropriate remedy in this case. The appropriate and adequate remedy in these circumstances is to declare invalid and to set aside the decision of the Assistant Commissioner insofar as it purports to overturn the prior decision of Senior Deputy Commissioner Head set out in his third level grievance response dated March 11, 2008. Furthermore, the matter will be returned to the Commissioner of the Correctional Service of Canada in order to ensure that the corrective measures set out in that third level grievance decision of March 11, 2008 have been properly implemented.

[89] The Applicant did not seek costs in his Application, and no costs shall be granted.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES as follows:

1. The Application for judicial review is granted in part;

2. The decision of the Assistant Commissioner of Policy and Research of the Correctional Service of Canada set out in correspondence dated October 29, 2008 and August 14, 2008 overturning the third level grievance decision of Senior Deputy Commissioner Head dated March 11, 2008, is declared invalid and set aside; and

3. The matter is returned to the Commissioner of the Correctional Service of Canada so that he ensure that the corrective measures set out in the aforementioned third level grievance decision of March 11, 2008 have been properly implemented.

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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