

Federal Court



Cour fédérale

Date: 20120731

Docket: T-875-11

Citation: 2012 FC 958

Vancouver, British Columbia, July 31, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

MICHAEL AARON SPIDEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Michael Aaron Spidel seeks judicial review of a decision of the Assistant Commissioner, Policy, of the Correctional Service of Canada (CSC). The Assistant Commissioner's decision related to Mr. Spidel's third-level grievance in which he alleged that the CSC is failing to fulfill its statutory obligation to provide a fair and expeditious procedure for the resolution of prisoner grievances because of significant systemic delays in its internal grievance process.

[2] The Assistant Commissioner acknowledged that there had been delays in the response time for grievances "[o]ver the last couple of years". He further acknowledged that several grievances

filed by Mr. Spidel had not been dealt with within the time frames provided for in the relevant Commissioner's Directive. As a result, Mr. Spidel's grievance was upheld in part.

[3] The Assistant Commissioner refused, however, to provide for any corrective action in relation to Mr. Spidel's grievance on the basis that an action plan was already in place in the CSC's Pacific Region to resolve the backlog and delays in the grievance process.

[4] For the reasons that follow, I have concluded that the Assistant Commissioner's decision failed to address central aspects of Mr. Spidel's grievance, and as such, the decision was unreasonable. I have also found that the failure of the Assistant Commissioner to properly consider the record before him with respect to the nature and extent of the systemic problems with the CSC grievance process rendered unreasonable his conclusion that no further corrective action was required. As a consequence, Mr. Spidel's application for judicial review will be granted.

Legal Framework

[5] In order to put the issues raised by this application into context, it is first necessary to have an understanding of the legislative framework governing complaints and grievances brought by prisoners incarcerated in federal penitentiaries. The full text of the relevant legislation is attached as an appendix to these reasons.

[6] Section 4 of the *Corrections and Conditional Release Act*, S.C. 1992, c.20 [the Act] sets out the principles that are to guide the CSC in achieving its legislative mandate. One of these principles

is “that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure”: subsection 4(g) [emphasis added].

[7] The process for resolving prisoner complaints is set out at sections 90 and 91 of the Act and sections 74 through 82 of the *Corrections and Conditional Release Regulations*, SOR/92-620 [Regulations]. Section 90 of the Act requires that there be a process “for fairly and expeditiously resolving offenders’ grievances”. Section 91 provides inmates with the right to commence a grievance without negative consequences.

[8] Sections 74 through 82 of the Regulations set out the grievance procedure. The Regulations contemplate a four-level process: an offender complaint stage, a first-level grievance to the Head of the institution, a second-level grievance to the Head of the Region, and a third-level grievance to the Commissioner of the CSC. Grievances may be initiated at different levels in the process, depending upon the nature of the grievance and the remedy sought.

[9] Sections 97 and 98 of the Regulations allow the Commissioner of the CSC to make rules, or “Directives” for the purposes of carrying out the objects of the Act and Regulations. These Commissioner’s Directives have been held to constitute “regulations” within the meaning of subsection 2(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21: *Canada (Attorney General) v. Mercier*, 2010 FCA 167, 320 D.L.R. (4th) 429 at para. 58.

[10] Commissioner’s Directive 081 concerning *Offender Complaints and Grievances*, dated September 23, 2003 [CD081], is the Directive relevant to this application for judicial review.

Amongst other things, CD 081 provides for different categories of grievances with different levels of priority. It also sets out timelines to be followed in relation to the various steps within the grievance process. Section 35 of CD 081 provides that:

35. Decision-makers will respond to complaints and grievances in the following timeframes:

Complaint, First Level and Second Level

- High Priority – Within fifteen (15) working days of receipt by the decision-maker.
- Routine Priority – Within twenty-five (25) working days of receipt by the decision-maker.

Third Level

- High Priority – Within sixty (60) working days of receipt by the decision-maker.
- Routine Priority – Within eighty (80) working days of receipt by the decision-maker.

[11] Mr. Spidel asserted in his grievance that these timelines are routinely disregarded, the result of which is that CSC is not meeting its statutory duty to provide offenders with a fair and expeditious process for the resolution of their complaints and grievances.

[12] Also of relevance to this proceeding is Section 37 of CD 081 which stipulates that “[t]he decision-maker will ensure that grievors are provided with complete, written responses to all issues raised in complaints and grievances” [emphasis added].

Jurisprudential Background

[13] This case is the latest in a series of attempts by federal prisoners, including Mr. Spidel, to have the systemic problems and delays within the CSC grievance process dealt with by this Court.

[14] The CSC internal grievance process has historically been viewed as providing federal prisoners with an adequate alternate remedy to judicial review. As a result, inmates are generally required to exhaust those procedures before this Court will exercise its jurisdiction: see, for example, *Condo v. Canada (Attorney General)*, 2003 FCA 99, 239 F.T.R. 158; *Giesbrecht v. Canada*, 148 F.T.R. 81, [1998] F.C.J. No. 621 (T.D.) (QL).

[15] In *Bonamy v. Canada (Attorney General)*, 2010 FC 153, 378 F.T.R. 71, a federal inmate sought a declaration that the CSC grievance process is not an adequate alternate remedy to judicial review because of the delays inherent in the process.

[16] In support of his application, Mr. Bonamy provided the Court with various annual reports prepared by the Correctional Investigator of Canada. These reports severely criticized the management of the CSC grievance process and the lack of commitment and responsibility on the part of the CSC for improving the process. The reports were, however, filed with the Court as authorities, rather than as evidence, with the result that the documents upon which Mr. Bonamy based his case were not properly part of the evidentiary record before the Court. Mr. Bonamy had also not provided any statistical information concerning current delays or expert evidence explaining the alleged problems.

[17] As a consequence, Justice Mainville concluded that the evidentiary record before him was insufficient to justify the granting of the general declaration sought by Mr. Bonamy. Justice Mainville did, however, leave open the possibility that an offender could seek judicial review prior to exhausting the grievance process on the basis of a different record: see para. 60.

[18] Mr. Spidel has himself been trying to have the CSC address his concern with respect to systemic problems with the CSC grievance process for some time. In an earlier case, Mr. Spidel filed a grievance in relation to another matter, and then brought an application for judicial review in this Court prior to receiving a response to his grievance. Mr. Spidel justified his attempt to by-pass the grievance process by arguing that the systemic delays in the CSC internal grievance process meant that it did not constitute an adequate alternate remedy to judicial review.

[19] Mr. Spidel's application was rejected by Justice Phelan, who held that Mr. Spidel had not established that there were compelling or exceptional circumstances which would justify the Court exercising its discretion to trump the grievance process: see *Spidel v. Canada (Attorney General)*, 2010 FC 1028, [2010] F.C.J. No. 1292 (QL) at para. 16 [*Spidel #1*].

[20] Justice Phelan noted that the CSC grievance process has previously been found to constitute an adequate alternate remedy, citing *Giesbrecht and Ewert v. Canada (Attorney General)*, 2009 FC 971, 355 F.T.R. 170. He further found that Mr. Spidel had not established that the grievance that he had filed related to the issue before the Court had itself been delayed. Consequently, the application was dismissed.

[21] Mr. Spidel also brought a grievance with respect to the delays that he had encountered in the processing of some of his own grievances. When the Commissioner dismissed Mr. Spidel's grievance, he then brought an application for judicial review in this Court. Mr. Spidel filed almost 450 pages of documentation with the Court in support of his application. This record included some of the same material that had been provided to Justice Mainville in the *Bonamy* case. Mr. Spidel filed this material with the Court in order to show that the grievance procedure was an inadequate alternative to judicial review. Much of the material had not, however, been placed before the Commissioner when he made the decision under review.

[22] Justice Phelan dismissed the application in *Spidel v. Canada (Attorney General)*, 2010 FC 1040, [2010] F.C.J. No. 1300 (QL) [*Spidel* #2]. He determined that Mr. Spidel had failed to identify any error in the Commissioner's decision, but rather had brought "a free-ranging attack on each and every aspect of the operation of the prison grievance system without [any] focus on the specific facts of the case": at para. 14.

[23] Justice Phelan concluded that it would be inappropriate to embark upon a review of the inadequacy of the CSC grievance process, given that there was no evidence of any problems in the processing of Mr. Spidel's own case: at para. 17.

[24] Justice Phelan also declined to consider Mr. Spidel's new evidence with respect to systemic problems in the grievance process on the basis that this material had not been before the Commissioner when he made his decision.

[25] Most recently, in *Rose v. Canada (Attorney General)*, 2011 FC 1495, [2011] F.C.J. No. 1821 (QL), three prisoners filed a grievance with respect to the termination of their employment within a CSC institution. They did not, however, await the completion of the grievance process but instead sought immediate judicial review, alleging that the CSC grievance process did not constitute an adequate alternate remedy as it was both unfair and too slow. Once again, some of the same material relied upon by Mr. Spidel in this case was placed before the Court in support of the prisoners' application.

[26] Although Justice Martineau found the information provided by the prisoners to be "more or less persuasive", he found that it was insufficient to justify the by-passing of the grievance system: at paras. 28 and 30.

[27] Justice Martineau accepted that while some cases had clearly been subject to excessive delays, it had not been established that there had been excessive delays in the applicants' own cases. He further found that the anecdotal evidence provided in *Rose* was "simply insufficient to support a general all-inclusive declaration that the grievance procedure is wrought with delay and thus not an adequate alternative to judicial review": at para. 34.

[28] Justice Martineau did, however, leave open the possibility that a more complete evidentiary record could lead the Court to a different result in a future case: at para. 34.

The Grievance in this Case

[29] In response to Justice Phelan's decision in *Spidel #2*, Mr. Spidel then filed a fresh grievance at the third level of the grievance process. This grievance specifically addressed the alleged system-wide failings of the CSC grievance regime: Grievance No. V80R00000120.

[30] In support of his grievance, Mr. Spidel described his own experience with the CSC grievance process. He provided documentation demonstrating that in a number of cases, he had not received a response within the prescribed time frame. He was instead sent letters advising him that the CSC was aiming to provide a response by a future date, usually several weeks hence.

[31] These "extension letters" are contemplated by the CSC's *Offender Complaint and Grievance Procedures Manual* [Grievance Manual], section 9 of which provides that in the case of routine complaints and grievances, "extensions should only be applied in exceptional circumstances" [emphasis added].

[32] Each time the promised date approached, another extension letter would be sent to Mr. Spidel, further delaying the CSC's response to the grievance in question. This exercise was repeated over and over again, with Mr. Spidel receiving as many as seven or, in one case, eight, extension letters before actually getting a substantive response to his grievance. These delays occurred regardless of whether the case was a "routine" or a "high priority" grievance.

[33] By way of example, at the time that he swore the affidavit provided to the Assistant Commissioner in support of his grievance, Mr. Spidel had yet to receive a response to a high-

priority grievance that he had filed at the second level of the grievance process some 242 days earlier. It will be recalled that section 35 of CD 081 contemplates that the CSC provide a response to such a grievance within 15 working days.

[34] In each case, the reason cited by the CSC for its failure to comply with the time frames for responses set out in Section 35 of CD 081 was the current increase in the volume of grievances at the relevant level.

[35] Mr. Spidel's grievance challenged what he says is the CSC's practice of routinely issuing "form" extension letters on the basis of the "current volume of grievances", noting that the Grievance Manual requires that extensions be issued only in "exceptional circumstances".

[36] In an attempt to show that the problems were not limited to his own numerous grievances, but were instead systemic in nature, Mr. Spidel filed affidavits from three other inmates incarcerated in the Pacific region of the CSC attesting to their own experiences with the CSC grievance process. These affidavits confirm that it has often taken many, many months for the prisoners to get a substantive response to a grievance from CSC at a single level of the grievance process. In one case, the affiant alleges that a grievance involving what was alleged to be an urgent medical situation took over eight months to work its way through the system.

[37] Mr. Spidel alleged that based upon his experience on Inmate Committees and working in Social Development within the penitentiary system, he had observed that the delays in the process served as a systemic barrier to prisoner access to the grievance process. According to the affidavit

provided by Mr. Spidel to the Assistant Commissioner, “few Federal prisoners have the wherewithal, patience, fortitude or even time in their sentences to employ the only means they have for Redress...” [emphasis in the original]. Mr. Spidel pointed out that unless an inmate is serving a lengthy sentence, it is unlikely that the inmate will receive a final response to his or her grievance while still they are still in custody.

[38] Mr. Spidel also provided the Assistant Commissioner with hundreds of pages of material, including some of the material that Justice Phelan had declined to consider in *Spidel #2*. This material included a number of independent reports, working papers, and annual reports of the Correctional Investigator of Canada. These documents reveal serious and long-standing shortcomings in the grievance process.

[39] Mr. Spidel alleged in his grievance that the CSC has continuously failed to live up to its statutory obligation to provide an “expeditious”, “effective”, and “fair” grievance process, free of any “negative consequences” for prisoners, as contemplated by sections 4(g), 90 and 91 of the Act.

[40] He further contended that delays in the grievance process frustrate inmates’ ability to have their grievances addressed in a meaningful fashion. This deters inmates from filing grievances, causes them to abandon their grievances out of frustration, or renders the grievances moot by the time they are processed.

The Assistant Commissioner' Decision

[41] As noted earlier, the Assistant Commissioner upheld Mr. Spidel's grievance, in part, but refused to order that any corrective action be taken.

[42] The Assistant Commissioner declined to consider the affidavits of the three other inmates on the basis that Mr. Spidel's grievance had not been filed as a group grievance. He did, however, consider the information provided by Mr. Spidel with respect to the processing times for his own grievances and acknowledged that the responses to a number of these grievances "took longer than the prescribed time frame as stated in paragraph 35 of CD 081." As a consequence, the Assistant Commissioner concluded that this aspect of Mr. Spidel's grievance should be upheld.

[43] The Assistant Commissioner noted that no further action was required for other grievances that had been filed by Mr. Spidel as CSC had provided him with extension letters informing him of the delay and setting revised response times. However, he did not address Mr. Spidel's allegation that CSC was breaching its own grievance policy by routinely and repeatedly issuing extension letters rather than limiting the use of such letter to cases where there were "exceptional circumstances", as contemplated by the Grievance Manual.

[44] Despite having allowed portions of Mr. Spidel's grievance, the Assistant Commissioner determined that no further action was required in relation to the allegations of systemic delay in the grievance process. The Assistant Commissioner acknowledged that CSC had indeed experienced significant delays "over the last couple of years" as a result of an increase in the volume and complexity of complaints and grievances. However, he went on to observe that "corrective action is

already underway”, noting that in November of 2010 the CSC had implemented “an action plan to resolve the current backlog and delays” in inmate grievances in the Pacific Region.

[45] Finally, the Assistant Commissioner urged Mr. Spidel to provide feedback to his Inmate Welfare Committee, as the Grievance Manual was currently under review.

Standard of Review

[46] Mr. Spidel has raised a number of issues in his application. However, the determinative issue is, in my view, the Assistant Commissioner’s treatment of the evidence before him. This aspect of the decision involves the Commissioner’s appreciation of the facts and is reviewable on the reasonableness standard: *Bonamy*, above at paras. 41-51; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 47, 53.

The Record Before the Assistant Commissioner

[47] The evidence put before the Assistant Commissioner by Mr. Spidel paints a troubling picture of serious and long-standing problems with the CSC prisoner grievance process. It raises real concerns as to the extent to which the CSC has complied with its statutory obligation to provide inmates with an effective grievance procedure.

[48] In his 1995-1996 annual report, the Correctional Investigator noted that his office had long identified concerns with respect to the effectiveness and credibility of the CSC grievance process. The Correctional Investigator attributed the problems to “the commitment and acceptance of responsibility on the part of those mandated to make the process work”. He further found that, as of

1995-1996, the grievance process did not meet the statutory requirement of a fair and expeditious process: Canada, Correctional Investigator, *Annual Report of the Correctional Investigator 1995-1995* (Ottawa: Minister of Public Works and Government Services Canada, 1996) at 26.

[49] In 1996, the Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston noted the "...disturbing lack of commitment to the ideals of Justice on the part of the Correctional Service...": Commission of Inquiry into Certain Events at the Prison for Women in Kingston, *Report* (Public Works and Government Services Canada, 1996) at 198 (Commissioner: Louise Arbour) [Arbour Report]. The Arbour Report also discussed the deficiencies in the offender grievance procedure. In particular, Justice Arbour noted that responses were never provided in relation to some grievances and that those that were answered were almost always answered late: at 150-151.

[50] According to Justice Arbour, "by far the most troubling aspect of [CSC] responses to these grievances ... was the number of times in which the responses failed to deal properly with the substance of the issues raised" and "failed to appreciate the legal significance of the issues raised by the inmates": at 151.

[51] Changes were made to the CSC grievance process in the wake of the Arbour Report. However, subsequent annual reports by the Correctional Investigator continued to identify deficiencies in the grievance system, particularly with respect to the excessive delays experienced by those who endeavored to access the process. The Correctional Investigator also repeatedly expressed frustration with the failure of the CSC to respond to these concerns.

[52] For example, the 2003-2004 Annual Report noted that “[t]imeliness remains a significant issue” and that “[i]t will be necessary for CSC to recognize that this is a problem requiring accountable managerial attention”: Canada, Correctional Investigator, *Annual Report of the Correctional Investigator 2003-2004* (Ottawa: Public Works and Government Services Canada, 2004) at 26.

[53] The 2005-2006 Annual Report observed that the Office of the Correctional Investigator had raised concerns with the inadequacy of the CSC’s grievance process in every annual report issued since 1987. This Report described the inmate grievance process as “...dysfunctional in terms of expeditiously resolving offender grievances, most notably at the national level”: Canada, Correctional Investigator, *Annual Report of the Correctional Investigator 2005-2006* (Ottawa: Public Works and Government Services Canada, 2006) at 19. This led the Correctional Investigator to conclude that “[t]he net effect is that the current procedure remains non-compliant with legislative and policy requirements”: at 5.

[54] This Report also noted that during the reporting year, only 15 percent of the grievances responded to at the Commissioner’s level were addressed on time, and that the CSC had itself acknowledged that its grievance process was not meeting the statutory requirement: at 13.

[55] As a result, the Correctional Investigator recommended that the “...Correctional Service immediately comply with its legal obligation and establish a procedure for fairly and expeditiously resolving all offender grievances”: as cited in the 2007-2008 Annual Report, below at 31.

[56] The 2006-2007 Annual Report of the Correctional Investigator noted ongoing delays in the grievance process. It further observed that a number of learned articles had called for reforms to the grievance process in order to ensure fair and timely resolution of complaints: Canada, Correctional Investigator, *Annual Report of the Correctional Investigator 2006-2007* (Ottawa: Public Works and Government Services Canada, 2007) at 27.

[57] The Report went on to observe that “[t]he system has been ineffective in dealing with the chronic backlog of cases. This situation continues to have an impact on the operations of this Office as, increasingly, offenders turn to us to resolve their concerns”: at 25.

[58] The 2007-2008 Annual Report of the Correctional Investigator observed that concerns with respect to the timeliness of the grievance process dated back some 35 years “and unfortunately still ring true today”: Canada, Correctional Investigator, *Annual Report of the Correctional Investigator 2007-2008* (Ottawa: Public Works and Government Services Canada, 2008) at 10. The Report noted that “[h]arsh conditions and treatment of prisoners, as well as the denial of access to effective internal and external complaint mechanisms, can lead to violence”: at 4. The Report further stated that “[i]ntroducing effective complaint mechanisms can alleviate tensions and reduce violence in prison”.

[59] To address these concerns, the Correctional Investigator recommended that that “the Minister direct the Correctional Service to immediately re-instate the response times at the Commissioner’s level of the Offender Grievance and Complaint System at 15 days for priority

grievances and 25 days for non-priority grievances, and that the Correctional Service take the necessary steps to comply with those timeframes”: at 41.

[60] Mr. Spidel has also produced an undated manual on prison law that had been prepared for prisoners by the Law Foundation of British Columbia. Tellingly, he says, the chapter of the manual dealing with the CSC grievance process included the phrase “Why Bother?” in its title.

[61] Finally, a 2009 study by Michael Jackson and Graham Stewart entitled *A Flawed Compass: A Human Rights Analysis of a Roadmap to Strengthening Public Safety* noted that “the importance of a fair, timely and responsive grievance system has been a theme of royal commissions, Parliamentary committees and government task forces”: M. Jackson & G. Stewart, *A Flawed Compass: A Human Rights Analysis of a Roadmap to Strengthening Public Safety* (24 Sept. 2009), online: < www.justicebehindthewalls.net/resources/news/flawed_Compass.pdf > at 189 [*A Flawed Compass*].

[62] After reviewing the Reports of the Correctional Investigator and Justice Arbour discussed above, the authors of *A Flawed Compass* examined the tragic death of a young woman by the name of Ashley Smith while she was in the custody of the CSC. They describe Ms. Smith’s experience with the CSC grievance process, noting that a grievance filed by Ms. Smith was not even opened by the CSC until some two months after her death. The authors state that “I provide these details of Ms. Smith’s experiences with the CSC’s Offender Complaints and Grievance System as concrete examples of the inability of that system to appropriately and reasonably resolve inmate complaints in a timely manner”: at 191.

Analysis

[63] The grievance filed by Mr. Spidel alleged that there were grave systemic problems with the entire CSC grievance process. In addition to the significant delays that Mr. Spidel had himself encountered in the processing of the various grievances that he had filed, Mr. Spidel provided the Assistant Commissioner with a substantial record documenting long-standing and serious problems with the CSC offender grievance process. These problems went back decades and were by no means limited to the CSC's Pacific Region.

[64] I note that the respondent does not challenge the ability of a prisoner to bring a grievance with respect to an alleged systemic problem within the CSC. Rather, the respondent simply contends that the Assistant Commissioner's decision in this case was reasonable.

[65] The Assistant Commissioner clearly recognized the systemic nature of the grievance brought by Mr. Spidel. This is reflected in the statement in the decision that "[y]ou claim that the delays with respect to the grievance process are a systemic issue", and is further reflected in the Executive Summary prepared in relation to the decision.

[66] In addressing the systemic aspect of Mr. Spidel's grievance, the Assistant Commissioner's decision states: "Over the last couple of years the Correctional Service of Canada (CSC) has encountered a significant increase in the volume and complexity of complaints and grievances. As such there have effectively been delays in the response time of grievances".

[67] Given the systemic nature of Mr. Spidel's grievance, it was, in my view, unreasonable for the Assistant Commissioner to refuse to consider the affidavits of the three other inmates describing their own recent experiences with the CSC grievance process on the basis that the affiants were not part of a group grievance. These individuals were not seeking any form of relief for themselves, but were providing evidence to Mr. Spidel to support his allegation of system-wide institutional delay. It was, of course, open to the Assistant Commissioner to attach whatever weight he saw fit to the affidavits, but it was not reasonable for him to refuse to even consider them.

[68] That said, I am not persuaded that this was a material error given that the Assistant Commissioner accepted that there were systemic delays in the grievance process, at least within the Pacific Region of the CSC in the last couple of years. The refusal to consider this affidavit evidence is, however, indicative of the failure of the Assistant Commissioner to look beyond Mr. Spidel's own personal circumstances and engage fully with the larger systemic issues raised by his grievance.

[69] As noted earlier, the Assistant Commissioner upheld the grievance insofar as it related to Mr. Spidel's own personal experiences with the grievance process. The Assistant Commissioner examined the processing time associated with Mr. Spidel's earlier grievances, and accepted that the responses to five of these grievances took longer than the prescribed time set out in Commissioner's Directive.

[70] At no time, however, did the Assistant Commissioner ever truly engage with or respond to the systemic component of Mr. Spidel's grievance. Mr. Spidel's systemic concern was not merely a

collateral aspect of his grievance but was central to his entire case. Indeed, as previously noted, Mr. Spidel had placed hundreds of pages of evidence before the Assistant Commissioner in his attempt to establish that there were very serious systemic shortcomings in the efficacy of the CSC offender grievance process.

[71] It was Mr. Spidel's assertion that these deficiencies resulted in a failure on the part of the CSC to comply with its statutory obligation to provide inmates with an effective grievance procedure. Mr. Spidel also challenged CSC's practice of routinely issuing "form" extension letters arguing that the Grievance Manual permitted extensions of time only in "exceptional circumstances".

[72] The Assistant Commissioner never even tried to engage with these issues in any meaningful way in his decision.

[73] There is no discussion whatsoever in the decision of Mr. Spidel's challenge to the CSC's alleged practice of routinely issuing extension letters. Despite the requirement in section 37 of CD 081 that decision-makers must provide with complete responses to all issues raised in complaints and grievances, the Assistant Commissioner simply did not address this aspect of Mr. Spidel's grievance at all. As a result, I find that this aspect of the Assistant Commissioner's decision lacks the justification, transparency and intelligibility required of a reasonable decision.

[74] There is also no reference in the decision to any of the evidence of systemic delay, apart from the evidence relating to Mr. Spidel's own past grievances. While accepting that there had been

problems with delay, the Assistant Commissioner disposes of the systemic aspect of the grievance in one paragraph, portraying the issue as a problem that had just arisen over “the last couple of years” as a result of a recent increase in the volume and complexity of prisoner complaints and grievances in the Pacific Region.

[75] That is, the Assistant Commissioner appeared to view the problem as something of a recent “blip” in the numbers in the Pacific Region rather than reflecting a long-standing, deep-rooted, system-wide problem as suggested by Mr. Spidel’s grievance and the documentary record produced by him.

[76] It was with this understanding of the limited nature and scope of the problem that the Assistant Commissioner determined that no further corrective action was required in relation to Mr. Spidel’s allegations of systemic delays in the grievance process, as the CSC had implemented “an action plan to resolve the current backlog and delays” in inmate grievances in the Pacific Region.

[77] Before examining the reasonableness of the Assistant Commissioner’s conclusion that no corrective action was required in relation to Mr. Spidel’s grievance, I would note that the CSC has filed an affidavit in support of this application for judicial review from the CSC’s Director General of Rights, Redress and Resolution. This affidavit refers to the “Action Plan” for backlog reduction in the Pacific Region and provides statistical information with respect to the results of the implementation of the Plan.

[78] Judicial review is ordinarily to be conducted on the basis of the record that was before the original decision-maker. Additional evidence may be admitted in limited circumstances where, for example, there is an issue of procedural fairness or jurisdiction: see *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, 2002 FCA 218, [2003] 1 F.C. 331 at para. 30.

[79] The respondent acknowledges that the statistical information contained in the Director General's affidavit was not before the Assistant Commissioner when he made his decision in relation to Mr. Spidel's grievance. This new evidence also does not go to a question of either procedural fairness or jurisdiction. Indeed, I agree with the comment made by Justice Harrington in the context of a preliminary ruling in this matter that the affidavit appears instead to be an attempt by the respondent to "shore-up" the Assistant Commissioner's decision: see *Spidel v. Canada (Attorney General)*, 2011 FC 1449 at para. 17. As a consequence, I am not prepared to consider this statistical information in my deliberations.

[80] As far as the Assistant Commissioner's decision is concerned, I recognize that a tribunal is not required to refer to every piece of evidence in the record, and will be presumed to have considered all of the evidence before it: see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317, 36 A.C.W.S. (3d) 635 (F.C.A.).

[81] That said, the more important the evidence that is not specifically mentioned and analyzed in the tribunal's reasons, the more willing a court may be to infer that the evidence has been overlooked: see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425 (QL) at paras.14-17.

[82] In this case, the Assistant Commissioner failed to come to grips with much of the evidence before him. His characterization of the problem of delay in the grievance process in the Pacific Region of CSC as being recent in nature suggests that he did not have regard to the record before him. To paraphrase Justice Arbour, he failed to appreciate the legal significance of the issues raised by Mr. Spidel.

[83] I accept that CSC has many competing priorities and statutory responsibilities that it must address with limited available resources. I also accept that senior CSC personnel will ordinarily be much better positioned than this Court to assess, as a matter of policy, how best to deal with the administrative challenges facing the organization within its budgetary constraints. For that reason, it is not for this Court to assess the reasonableness of the Action Plan developed for the Pacific Region of the CSC in order to address the backlog in the grievance process.

[84] That said, the failure of the Assistant Commissioner to properly understand or address the nature and scope of the problem of systemic delay in the grievance process identified in Mr. Spidel's grievance directly calls into question the reasonableness of his conclusion that no additional corrective measures were required to respond to the grievance.

[85] Clearly, if one does not properly understand the nature or extent of a particular problem, one cannot reasonably determine whether a particular solution will be sufficient to address the problem.

Conclusion

[86] For these reasons, the application for judicial review is allowed and the decision of the Assistant Commissioner, Policy, is set aside. In my view, the appropriate remedy is to remit the matter to the Assistant Commissioner, Policy, of the Correctional Service of Canada for re-determination in accordance with these reasons.

Costs

[87] Mr. Spidel very ably represented himself on this application and does not seek anything for legal expenses. He does, however, seek costs in the amount of \$350 for photocopying and filing fees, representing his out-of-pocket disbursements associated with this application. I so order.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to the Assistant Commissioner, Policy, of the Correctional Service of Canada for re-determination in accordance with these reasons; and

2. Mr. Spidel shall have his costs of this application in the amount of \$350.

“Anne Mactavish”

Judge

APPENDIX

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

4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are

[...]

(g) that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure;

[...]

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).

91. Every offender shall have complete access to the offender grievance procedure without negative consequences.

96. The Governor in Council may make regulations

[...]

(u) prescribing an offender grievance procedure;

[...]

4. Le Service est guidé, dans l'exécution de ce mandat, par les principes qui suivent:

[...]

g) ses décisions doivent être claires et équitables, les délinquants ayant accès à des mécanismes efficaces de règlement de griefs;

[...]

90. Est établie, conformément aux règlements d'application de l'alinéa 96u), une procédure de règlement juste et expéditif des griefs des délinquants sur des questions relevant du commissaire.

91. Tout délinquant doit, sans crainte de représailles, avoir libre accès à la procédure de règlement des griefs.

96. Le gouverneur en conseil peut prendre des règlements :

[...]

u) fixant la procédure de règlement des griefs des délinquants;

[...]

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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.

(2) Where a complaint is submitted pursuant to subsection (1), every effort shall be made by staff members and the offender to resolve the matter informally through discussion.

(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.

(4) A supervisor may refuse to review a complaint submitted pursuant to subsection (1) where, in the opinion of the supervisor, the complaint is frivolous or vexatious or is not made in good faith.

(5) Where a supervisor refuses to review a complaint pursuant to subsection (4), the supervisor shall give the offender a copy of the supervisor's decision, including the reasons for the decision, as soon as practicable after the offender submits the complaint.

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,

(a) to the institutional head or to the director of the parole district, as the case may be; or

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) Les agents et le délinquant qui a présenté une plainte conformément au paragraphe (1) doivent prendre toutes les mesures utiles pour régler la question de façon informelle.

(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.

(4) Le supérieur peut refuser d'examiner une plainte présentée conformément au paragraphe (1) si, à son avis, la plainte est futile ou vexatoire ou n'est pas faite de bonne foi.

(5) Lorsque, conformément au paragraphe (4), le supérieur refuse d'examiner une plainte, il doit fournir au délinquant une copie de sa décision motivée aussitôt que possible après que celui-ci a présenté sa plainte.

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) 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 grievance, to the head of the region.

76. (1) The institutional head, director of the parole district or head of the region, as the case may be, shall review a grievance to determine whether the subject-matter of the grievance falls within the jurisdiction of the Service.

(2) Where the subject-matter of a grievance does not fall within the jurisdiction of the Service, the person who is reviewing the grievance pursuant to subsection (1) shall advise the offender in writing and inform the offender of any other means of redress available.

77. (1) In the case of an inmate's grievance, where there is an inmate grievance committee in the penitentiary, the institutional head may refer the grievance to that committee.

(2) An inmate grievance committee shall submit its recommendations respecting an inmate's grievance to the institutional head as soon as practicable after the grievance is referred to the committee.

(3) The institutional head shall give the inmate a copy of the institutional head's decision as soon as practicable after receiving the recommendations of the inmate grievance committee.

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.

79. (1) Where the institutional head makes a decision respecting an inmate's grievance, the inmate may request that the institutional head refer the inmate's grievance to an outside review

b) soit, si c'est le directeur du pénitencier ou le directeur de district des libérations conditionnelles qui est mis en cause, au responsable de la région.

76. (1) Le directeur du pénitencier, le directeur de district des libérations conditionnelles ou le responsable de la région, selon le cas, doit examiner le grief afin de déterminer s'il relève de la compétence du Service.

(2) Lorsque le grief porte sur un sujet qui ne relève pas de la compétence du Service, la personne qui a examiné le grief conformément au paragraphe (1) doit en informer le délinquant par écrit et lui indiquer les autres recours possibles.

77. (1) Dans le cas d'un grief présenté par le détenu, lorsqu'il existe un comité d'examen des griefs des détenus dans le pénitencier, le directeur du pénitencier peut transmettre le grief à ce comité.

(2) Le comité d'examen des griefs des détenus doit présenter au directeur ses recommandations au sujet du grief du détenu aussitôt que possible après en avoir été saisi.

(3) Le directeur du pénitencier doit remettre au détenu une copie de sa décision aussitôt que possible après avoir reçu les recommandations du comité d'examen des griefs des détenus.

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.

79. (1) Lorsque le directeur du pénitencier rend une décision concernant le grief du détenu, celui-ci peut demander que le directeur transmette son grief à un comité externe

board, and the institutional head shall refer the grievance to an outside review board.

(2) The outside review board shall submit its recommendations to the institutional head as soon as practicable after the grievance is referred to the board.

(3) The institutional head shall give the inmate a copy of the institutional head's decision as soon as practicable after receiving the recommendations of the outside review board.

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.

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.

(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.

d'examen des griefs, et le directeur doit accéder à cette demande.

(2) Le comité externe d'examen des griefs doit présenter au directeur du pénitencier ses recommandations au sujet du grief du détenu aussitôt que possible après en avoir été saisi.

(3) Le directeur du pénitencier doit remettre au détenu une copie de sa décision aussitôt que possible après avoir reçu les recommandations du comité externe d'examen des griefs.

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.

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) 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.

82. In reviewing an offender's complaint or grievance, the person reviewing the complaint or grievance shall take into consideration

(a) any efforts made by staff members and the offender to resolve the complaint or grievance, and any recommendations resulting therefrom;

(b) any recommendations made by an inmate grievance committee or outside review board; and

(c) any decision made respecting an alternate remedy referred to in subsection 81(1).

82. Lors de l'examen de la plainte ou du grief, la personne chargée de cet examen doit tenir compte :

a) des mesures prises par les agents et le délinquant pour régler la question sur laquelle porte la plainte ou le grief et des recommandations en découlant;

b) des recommandations faites par le comité d'examen des griefs des détenus et par le comité externe d'examen des griefs;

c) de toute décision rendue dans le recours judiciaire visé au paragraphe 81(1).

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: MICHAEL AARON SPIDEL v.
ATTORNEY GENERAL OF CANADA

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APPEARANCES:

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