Federal Court  Cour fédérale

Date: 20130613

Docket: T-746-12

Citation: 2013 FC 652

Vancouver, British Columbia, June 13, 2013

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

DONALD FRASER PICHÉ

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] Mr. Donald Fraser Piché (the "Applicant") seeks judicial review of the decision of an Independent Chairperson (the "IC"), affirming a conviction pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the "Act").

BACKGROUND

[2] The Applicant is an inmate of the Kent Institution in Agassiz, British Columbia. On January 30, 2012, he was randomly selected by an Institutional Urinalysis Officer ("the Officer") to provide a urine sample pursuant to subsection 54(b) of the Act.

[3] The Applicant, according to the Officer's Statement/Observation Report found in the Certified Tribunal Record ("CTR"), indicated that he could not comply with the request at the time but could do so once he had the chance to drink some water. When the Officer indicated that there was tap water in the collection room, the Applicant said that there were no cups available. The Officer said that he would find cups.

[4] When the Applicant asked if he could return to his unit until he would be able to comply with the request to provide a urine sample, the Officer advised that this request could not be granted since policy required that the Applicant be monitored for the entire two hour collection period. That policy is set out in the Commissioner's Directive on Urinalysis Testing in Institutions (No. 556-10, October 26, 2010) (the "Directive").

[5] Again according to the Officer's Observation Report, the Applicant was unwilling to wait with the Officer for two hours. The Applicant also indicated to the Officer that he should issue a charge because the Applicant was refusing to provide a urine sample. A charge was issued on January 31, 2012.

[6] A hearing was held before the IC on March 7, 2012. The Applicant offered an explanation for refusing to provide a sample. He said that he had urinated prior to being asked to provide a urine sample. He also advised that he was taking medication for hepatitis C and that "… once you use the washroom, you're not using the washroom for 6-7 hours."

[7] The IC noted that the Applicant's explanation was not consistent with the contents of the Officer's Observation Report. The Officer was asked to speak and he confirmed the contents of his report.

[8] The IC did not accept the Applicant's explanation and found him guilty of a refusal to provide a urine sample, imposing a fine of $50.00.

[9] The Applicant raises the following issues in this application for judicial review:

1) Did the IC lack jurisdiction to enter a conviction because he failed to consider whether the Officer attempted to informally resolve the matter as required by subsection 41(1) of the Act?

2) If the IC had jurisdiction to enter a conviction, was the conviction unreasonable on the grounds that the IC did not consider whether the Officer had attempted to informally resolve the matter pursuant to subsection 41(1) of the Act?

3) Was the conviction unreasonable because the IC did not consider the Applicant's medical grounds for refusing to provide a urine sample?

4) Does the procedure for collecting urine samples from inmates with medical conditions violate the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 (the "Charter")?

DISCUSSION

[10] The first matter to be addressed is the standard of review. The issue of the IC's jurisdiction is a question of law and is reviewable on the standard of correctness; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paras. 58-59. The issues about the entry of the conviction involve questions of mixed fact and law and are reviewable on the standard of reasonableness; see *Dunsmuir, supra*, at para. 51. The alleged Charter breach raises a question of law and is reviewable on the standard of correctness (*Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at para. 44).

[11] The correctness standard means that a reviewing court will not show deference to the decision-maker's reasoning process and will substitute its own view by providing the correct answer; see *Dunsmuir, supra*, para. 50. In *Dunsmuir, supra*, the Supreme Court of Canada described the reasonableness standard as follows, at paragraph 47:

> …A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision

> falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[12] The legislation relevant to this application for judicial review is the Act, specifically section 40, section 41 and section 56. Subsection 40(l) is relevant as follows:

40. An inmate commits a disciplinary offence who	40. Est coupable d'une infraction disciplinaire le détenu qui :
[…]	[…]
(l) fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55;	l) refuse ou omet de fournir l'échantillon d'urine qui peut être exigé au titre des articles 54 ou 55;

[13] Subsection 41(1) and section 56 are also relevant and provide as follows:

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.	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.
[…]	[…]
56. Where a demand is made of an offender to submit to urinalysis pursuant to section 54 or 55, the person making the demand shall forthwith inform the offender of the basis of the demand and the consequences of non-compliance.	56. La prise d'échantillon d'urine fait obligatoirement l'objet d'un avis à l'intéressé la justifiant et exposant les conséquences éventuelles d'un refus.

[14] The first issue raised by the Applicant is whether the IC had jurisdiction to enter a conviction if the Officer failed to seek an informal resolution of the matter, contrary to section 41.

[15] The Applicant submits that the failure to seek an informal resolution deprives the IC of jurisdiction. The Respondent takes the position that the IC did not err when concluding that the Officer had indeed taken steps to resolve the matter and that in any event, the Act does not require that the jurisdiction of the IC depend upon an attempt to informally resolve an issue.

[16] In *Laplante v. Canada (Procureur général)* (2003), 313 N.R. 285 (F.C.A.), the Federal Court of Appeal reviewed a chairperson's decision relating to a disciplinary conviction. The Court concluded that the chairperson had jurisdiction to consider whether the charging officer had attempted informal resolution. At paragraph 12 the Court said the following:

> Having said this, I am unable to see how and why a properly constituted disciplinary court, with jurisdiction over the matter, the person and the place, can lose its jurisdiction as a result of the failure of a third party, in this case a Correctional Services officer, to comply with an inmate's right. This amounts to saying, for example, that a criminal court loses jurisdiction to hear and determine a charge brought against a person owing to the failure of a police officer to inform that person of his right to counsel. On the contrary, the criminal court, in the exercise of its jurisdiction, is vested with the authority to ensure compliance with the rights of an accused during the process leading to the charge. To my way of thinking, the Board is in the same situation. Far from being deprived of its jurisdiction to hear the complaint that has been laid, the Board has the power to satisfy itself that the inmate's rights under the disciplinary system have been respected and, if need be, to take steps to safeguard them.

[17] Applying this finding to the present case, I reject the Applicant's challenge to jurisdiction. The IC had jurisdiction to adjudicate the charge against the Applicant.

[18] Did the IC err in failing to consider whether the Officer attempted to resolve the issue informally?

[19] The Applicant argues that the IC erred by finding the Applicant guilty where informal resolution was not attempted. The Respondent submits that informal attempts at resolution are not mandatory, and that the Applicant's right under subsection 41(1) of the Act must be raised at the earliest opportunity before the IC. The Respondent further argues that even if the IC had considered informal resolution, the Officer took reasonable steps to assist the Applicant in providing a sample.

[20] In my view, the Federal Court of Appeal's decision in *Laplante, supra*, completely answers this argument. At paragraphs 21-22 of that decision, the Court stated that an inmate could not raise the issue of a failure to seek informal resolution of an issue, for the first time, at judicial review:

> As we saw earlier, subsection 41(1) gives an inmate a relative right (where possible) to have all reasonable steps taken to resolve the issue in dispute informally. This right must be cited at the earliest opportunity before the chairperson of the Board, failing which, like the other rights of an inmate, it is subject to the waiver principle: see, for example, *R. v. Clarkson*, [1986] 1 S.C.R. 383, 66 N.R. 114; 69 N.B.R. (2d) 40; 177 A.P.R. 40, at pages 394 et seq [S.C.R.]; R. v. M.C.H., [1998] 2 S.C.R. 449; 230 N.R. 1; 113 O.A.C. 97, at paragraphs 47 and 113.
>
> We have been informed by counsel for the appellant that the new offence report and notice of the charge form sent to the chairperson of a Board indicates whether steps were taken to reach an informal resolution and, if not, the reasons why it was impossible to take such steps in the circumstances. A copy of this report and notice is given to the inmate: section 42 of the Act and section 25 of the Regulations. So informed of his right and the fate reserved to it by Correctional Services, an inmate can in my humble opinion hardly escape the presumption of waiver if he does not submit to the chairperson of the Board his request that the matter be returned to the penitentiary administration: see *Clarkson, supra*.

[21] In the present case, there is no evidence that the Applicant raised any question about informal resolution of the charge at any time before filing his application for judicial review. There is no evidence that he raised it before the Officer on January 30, 2012, when he was asked to provide a urine sample. There is no evidence that he raised it before the IC in the hearing that was held on March 7, 2012.

[22] The record is unclear as to whether informal resolution was attempted. Nevertheless, even if the Applicant had raised this issue with the IC, I am not persuaded that an attempt at informal resolution would have led to a different outcome. The IC accepted the Officer's evidence that the Applicant told him that the Officer might as well charge him. I do not see how, in this situation, informal resolution was an option. From the evidence in the record the Applicant was refusing the legitimate order to provide a urine sample. A refusal could lead to a disciplinary charge which, in fact, happened.

[23] In addition, the policies relating to urinalysis testing do not include guidance specific to this situation. The Directive sets out details on the procedure to be followed in testing. Correctional Services Canada Bulletin 2004-01 dated July 9, 2004, entitled "Shy Bladder Syndrome and Urinalysis Collection in the Institution" provides that when an inmate says that he or she cannot provide a sample due to a shy bladder, the collecting officer is to proceed to informal resolution. The Bulletin further states that in these cases only, informal resolution consists of a strip search and a search of the collection area.

[24] The third issue is whether the IC erred by failing to consider the Applicant's medical condition in adjudicating the charge against him. The Applicant submits that the IC ignored this fact and should have adjourned the hearing to verify his medical condition. The Respondent argues that the IC noted that the Officer's Observation Report did not record that the Applicant offered a medical reason for his refusal. As well, the Observation Report does not say that the Applicant requested an adjournment to allow an investigation of his physical condition.

[25] The Applicant raised the issue of his medical condition before the IC. The IC then stated that the Applicant's explanation was not consistent with the Officer's Observation Report.

[26] The Report stated that the Applicant had told the Officer that he was not willing to wait for two hours and that the Officer might as well just charge him. The Officer repeated this explanation at the hearing and added that he had informed the Applicant of the consequences of his refusal and took him at his word that he was refusing. When asked to respond to this evidence, the Applicant simply stated that the IC could find him guilty and repeated his statement that the medication interfered with his system.

[27] I note that in his affidavit on this application for judicial review, the Applicant claims that he told the Officer that he was on medication which would prevent him from giving a sample for hours.

[28] I have two comments about this evidence. First, the hearing transcript shows that the Applicant did not make this claim at the hearing. The IC did not have any evidence before him that

the Applicant had raised his medical condition with the Officer. Accordingly, given the evidence before him, the IC's decision was reasonable.

[29] Second, an application for judicial review proceeds only on the basis of the evidence that was before the initial decision-maker, in this case, the IC, unless leave is granted to allow the introduction of further evidence. No such leave was requested or granted in this case.

[30] The contents of the Applicant's affidavit will be given little weight.

[31] It is not necessary for me to address the Applicant's Charter argument since the matter can be disposed of otherwise; see the decision in *Law Society of Upper Canada v. Skapiner*, [1984] 1 S.C.R. 357 at page 383 in which Justice Estey stated:

> The development of the Charter, as it takes its place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new Charter provisions, none should be undertaken.

[32] In the result, I am satisfied that the IC acted within his jurisdiction in adjudicating the disciplinary charge against the Applicant and made a reasonable decision having regard to the evidence before him.

[33] The application is dismissed, with costs to the Respondent, as requested. In the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/98-106, I assess those costs at $250.00 inclusive of fees and disbursements and taxes.

ORDER

THIS COURT ORDERS that the application is dismissed, with costs to the Respondent. In the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/98-106, I assess these costs at $250.00 inclusive of fees and disbursements and taxes.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-746-12
STYLE OF CAUSE:	DONALD FRASER PICHÉ v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	December 13, 2012
REASONS FOR ORDER AND ORDER:	HENEGHAN J.
DATED:	June 13, 2013

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