

Federal Court



Cour fédérale

**Date: 20131203**

**Docket: T-1730-12**

**Citation: 2013 FC 1209**

**Ottawa, Ontario, December 3, 2013**

**PRESENT: The Honourable Mr. Justice Scott**

**BETWEEN:**

**JOHN DEREK MILLS**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] John Derek Mills (Mr. Mills) is asking this Court to review the decision of the Senior Deputy Commissioner [SDC] of Correctional Service Canada [CSC], taken on July 13, 2012, denying him in part his third level grievance (number V30A00041936) (the Decision), pursuant to section 18.1 of the *Federal Courts Act*, 1985, c F-7 [the *FCA*].

[2] The Decision dismissed part of the Mills' grievance relating to the timeliness of the response to his first level grievance, because they were processed within the prescribed timeframes.

[3] Mr. Mills' grievance relating to alleged discrimination was upheld because the Institution Head [IH] had not substantiated his findings that Mr. Mills' allegations, if proven, would not constitute discrimination contrary to Commissioner's Directive 081, *Offender Complaints and Grievances*, October 31<sup>st</sup>, 2008 [CD 081] (which has since been amended). The SDC decided that it would be more reasonable to consider the allegations of discrimination rather than returning the matter to IH because the initial grievance was submitted in 2010.

[4] The SDC, after reviewing Mr. Mills' allegations, concluded that if proven they could constitute discrimination. The Aboriginal Initiatives Directorate [AID] was consulted to ensure a proper treatment of Mr. Mills' allegations. However, it concluded that staff actions, language or decisions were not made in a discriminatory manner, therefore the definition of discrimination found in paragraph 12 of CD 081 had not been met and this part of Mr. Mills' grievance was denied. Finally, with regards to his claim that his religious and cultural needs were not fully met, that portion of the grievance was upheld.

[5] The Decision also notes that although Mr. Mills chose to grieve substantive issues related to his correctional plan and aboriginal culture, both were denied, but he failed to submit this decision to the next level of the grievance process for further review (see page 4 of the Decision).

[6] As to Mr. Mills' grievance related to the timeliness of the response to his second level grievance, the Decision determined that it was not responded in the prescribed timeframe. This portion of the grievance was upheld. However, it was determined that his grievance was extended in accordance with policy, even though the timeline was not respected. The policy was nevertheless adhered to as Mr. Mills was provided with extension letters indicating the reasons for the delays. The Decision stated that no further action was needed on that score.

[7] Finally, on the issue of corrective action, the Decision states that this response will serve as a reminder to the IH of the Port-Cartier Institution to ensure that responses to grievances containing allegations of discrimination must be dealt with in compliance with CD 081. It also states that corrective action has been implemented to address second level grievances within established timelines. The Decision does not address the fact that Mr. Mills' religious and cultural needs were not fully met.

[8] For the reasons that follow, this Court finds that the Decision is reasonable and that there was no breach of procedural fairness; consequently, the application for judicial review is dismissed.

## **II. Facts**

[9] Mr. Mills is an aboriginal federal prisoner who is serving a life maximum sentence. He is currently incarcerated at a Saskatchewan Institution. His grievances relate to allegations of discrimination based on his aboriginal heritage while he was incarcerated at the Port-Cartier Institution.

[10] On March 1, 2010, Mr. Mills filed a first level grievance with the Port-Cartier Institution in which he raised a number of issues: i) he claimed to have been punished for submitting his last grievance; ii) he alleged to have been submitted to racism; iii) he claimed that his correctional plan had been changed; iv) that he had been prevented from participating in aboriginal cultural events; and v) that his *Charter* right to freedom of religion had been violated by officials at that institution.

[11] This grievance was denied on March 19, 2010, on the basis that it did not meet the definition of discrimination but was rather related to Mr. Mills' dissatisfaction with the services offered to aboriginal inmates at Port-Cartier.

[12] On March 26, 2010, Mr. Mills filed another complaint raising concerns about threats to his Aboriginal religious cultural practices because he was refused matches and sage which are used for praying. That complaint was also denied.

[13] On March 29, 2010, Mr. Mills was informed by his Parole Officer that he would be transferred to a Saskatchewan Penitentiary. He continued his grievances nonetheless because he wanted his holistic activities and native programs reinserted into his correctional plan, as they had been cancelled.

[14] On April 4, 2010, Mr. Mills filed a second level grievance claiming that his grievances had not been answered to his satisfaction. He listed several incidents in which his aboriginal rights had been ignored; and particularly that he had been deprived of a sweat lodge ceremony for three years.

[15] On June 20, 2010, Mr. Mills filed a complaint about the response given to two issues related to his correctional plan concerning his progress and motivation. That complaint was also denied.

[16] On December 13, 2011, Mr. Mills' second level grievance was rejected, upholding the first level grievance decision that the alleged circumstances failed to meet the definition of discrimination. The Applicant had stated that Correctional Officers desecrated his medicine pouch and that he had been deprived of a sweat lodge ceremony for three years. The second level decision noted that Directive CD 566-7 calls for periodic security examinations, Aboriginal medicine bundles and other spiritual articles are not exempt. Mr. Mills refused to cooperate and allow the manipulation of his medical pouch for visual inspection. Officers ignoring the contents of the pouch manipulated it themselves to ensure that security of the institution was not compromised. The second level decision determined that this event failed to meet the definition of discrimination..

[17] On January 3, 2012, Mr. Mills filed a third level grievance to National Headquarters of CSC challenging the second level decisions. It was received by CSC on January 23, 2012 and upheld in part on July 13, 2012. A document entitled "Offender Grievance Executive Summary (Third Level)" (Executive Summary) was used in the preparation of the Decision but was not submitted to the Applicant for his comments before the Decision was rendered by the SDC.

[18] The same day that the Decision was rendered, a letter was sent by CSC to the Director of the Port-Cartier Institution confirming that Mr. Mills' religious and cultural needs had not been fully

met. It also requested that the Port-Cartier Institution ensure that the religious and cultural needs of aboriginal inmates be respected and taken into account when making decisions.

[19] On September 18, 2012, Mr. Mills filed his Notice of Application for judicial review of the Decision.

[20] Mr. Mills contends that procedural fairness was breached because he was not provided with the Executive Summary before the decision under review was rendered. He argues that his material, religious and cultural needs were not met and that his grievances were improperly handled.

### **III. Legislation**

[21] The applicable provisions of the *Corrections and Conditional Release Act*, SC 1992, c 20, [the *CCRA*], the *Corrections and Conditional Release Regulations*, SOR/92-620 [the *CCRR*], the *Federal Courts Act*, cited above, the Commissioner's Directive 081, *Offender Complaints and Grievances*, October 31<sup>st</sup>, 2008 [CD 081] are reproduced in an appendix to this decision.

### **IV. Issues**

[22] Mr. Mills claims that his application raises the following issues:

- 1) What is the standard of review?

- 2) Did the SDC err in fact, law and jurisdiction by improperly withholding from the Applicant, the information of the analyst (Executive Summary) under paragraphs 4(f) and 4(g), subsections 27(1), 27(2) and 27(3), and section 90 of the *CCRA*?
- 3) Did the SDC err in fact, law and jurisdiction by failing to observe a principle of natural justice of procedural fairness by denying/failing to provide appropriate corrective action, and or conducting an inadequate investigation into the complaint?

[23] The Respondent alleges that this application raises the following issues:

- 1) What are the applicable standards of review?
- 2) Did the failure to provide the Applicant with an opportunity to comment on the Offender Grievance Executive Summary (Third Level) before the final Decision was rendered constitute a breach of procedural fairness?
- 3) Is the Decision reasonable?

[24] The Court finds that the relevant issues in this case are firstly to determine whether the Decision on the third level grievances was reasonable and secondly whether there was a breach of procedural fairness.

## **V. Standard of review**

[25] It has been determined by previous jurisprudence that findings of mixed fact and law made in the course of the CSC offender grievance process and under the *CCRA* are reviewable under the standard of reasonableness (see *Yu v Canada (Attorney General)*, 2012 FC 970 at para 15 [*Yu*],

*Crawshaw v Canada (Attorney General)*, 2011 FC 133 at paras 24-27). Issues of procedural fairness are dealt with under the correctness standard of review (see *Fischer v Canada (Attorney General)*, 2013 FC 861).

[26] This Court must determine whether the Decision under review “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]) and whether the Applicant was afforded procedural fairness.

## **VI. Positions of the parties**

### **A. Mr. Mills’ position**

#### Reasonableness of the decision

[27] Mr. Mills contends that the SDC erred by improperly withholding the information of the analyst (the Executive Summary) under paragraphs 4(f) and 4(g), subsections 27(1), 27(2) and 27(3), and section 90 of the *CCRA*.

[28] He submits that the SDC erred in concluding that he had not been treated in an adverse and differential manner. He claims that he has suffered four years of ongoing acts of discrimination stemming from the failure to accommodate his spiritual needs, modifying his correctional plan to remove the original aboriginal focus after he initiated the grievance process, thereby having his



religious privileges restricted. At the hearing he explained that he had been deprived of his access to his aboriginal spiritual needs primarily because he questioned the services provided to aboriginals.

[29] Mr. Mills also alleges that CSC failed to accommodate his aboriginal spirituality by omitting to explore all options to accommodate these needs in a timely and effective manner and that CSC provided no justification for failing to provide these *Charter* protected accommodations for his religion.

[30] Mr. Mills claims that he was discriminated against and that discrimination is proven if it is one of the factors that influenced a decision, it does not have to be the sole or even the primary consideration. Mr. Mills relies on *Canada (Human Rights Commission) v Canada (Department of National Health and Welfare)* (1998) 146 FTR 106 at paras 11-12.

[31] Mr. Mills also argues that CSC was obligated to exhaust all possible options to accommodate his particular aboriginal cultural and spiritual needs in order to avoid discrimination and cites *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at paras 20 and 32 [*British Columbia*].

[32] Mr. Mills submits that the SDC erred in law by failing to look into alternative spiritual accommodations that could have been considered. He also omitted to explore whether alternative religious accommodations existed for similarly situated prisoners. Mr. Mills claims that the decision-maker simply accepted CSC's failure without considering pre-existing available accommodation options or providing corrective accommodation action.

[33] In sum, Mr. Mills contends that the Decision does not fall “within a range of possible acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, cited above, at para 47).

[34] At the hearing, Mr. Mills insisted that the aboriginal focus in his correctional plan had been modified primarily because he complained about the lack of services provided to aboriginal inmates at Port-Cartier.

#### Procedural fairness

[35] Mr. Mills claims that by improperly withholding the information of the analyst under paragraphs 4(f) and 4(g), subsections 27(1), 27(2) and 27(3), and section 90 of the *CCRA*, the SDC failed to observe a principle of procedural fairness. The Applicant refers to *Lewis v Canada (Correctional Service)*, 2011 FC 1233 at paras 18-24 [*Lewis*] in support of his contention. The SDC provided the Institutional Head and others with the opportunity to comment on the draft decision prior to the Decision being taken but Mr. Mills was not afforded the same opportunity.

[36] Mr. Mills also claims that the Respondent failed to observe the principles of natural justice by conducting an inadequate investigation into his grievances. He alleges that the Decision was neither neutral nor thorough since it failed to consider crucial evidence (*Panacci v Canada (Attorney General)*, 2010 FC 114 at para 69 and *Egan v Canada (Attorney General)*, 2008 FC 649 [*Egan*] at para 5).

[37] Mr. Mills submits that the SDC failed to interview witnesses who could have provided important evidence related to the issues contained in his grievances thereby committing a reviewable error. Mr. Mills refers to *Busch v Canada (Attorney General)*, 2008 FC 1211 at para 15. He explained to the Court that the institution was allowing non aboriginals to partake in activities demised for aboriginals, which lead to some incidents that were not properly investigated.

[38] It is equally argued by Mr. Mills that the Deputy Commissioner did not address fundamental issues raised in response to the Investigation.

[39] Mr. Mills concludes that the Court should issue an order in the nature of certiorari to quash the Decision to deny his grievances with directions for re-consideration and an order to the Saskatchewan Penitentiary to reinstate his original Correctional Plan.

## **B. Respondent's position**

### Reasonableness of the decision

[40] The Respondent submits that the Decision is reasonable as Mr. Mills relies on the Canadian Human Rights Commission [CHRC] and Tribunal jurisprudence that are not applicable to the present case.

[41] The Respondent claims that contrary to Mr. Mills' submissions, corrective measures were taken following the finding by the AID and the SDC that his religious and cultural needs were not fully met at the Port-Cartier Institution. In fact, a letter was sent to the Director of the Port-Cartier Institution on this matter and the Respondent claims that this was a reasonable corrective action.

[42] As to Mr. Mills' arguments on failure to respond within prescribed timelines, the Respondent submits that the SDC's conclusion that the timelines were extended in accordance with policy is reasonable and in accordance with CD 081.

[43] The Respondent argues that there is no evidence in the record that Mr. Mills' former correctional plan at the Port-Cartier Institution was modified. The Respondent argues that this plan was not before the SDC when the Decision was rendered; therefore it is inadmissible in the present proceedings. The Respondent further notes that correctional plans are developed after an offender arrives in a penitentiary (section 15.1 of the *CCRA* and subsection 102(1) of the *CCRR*), therefore his Port-Cartier correctional plan is not necessarily identical to his new correctional plan developed following his transfer to the Saskatchewan Institution.

[44] Lastly, the Respondent argues that CSC is not required to respond to each and every specific allegation raised by an offender and refers to *Ouellette v Canada (Attorney General)*, 2012 FC 801 at para 32 and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

Procedural fairness

[45] The Respondent submits that failing to provide Mr. Mills with an opportunity to comment on the Executive Summary before the Decision was rendered does not constitute a breach of procedural fairness. The Respondent argues that Mr. Mills' participatory rights in the grievance process do not include a right to review or comment on the Executive Summary.

[46] The Respondent submits that this Court should decline to follow the *Lewis* case cited above, which is relied upon by Mr. Mills in support of his contention that he should have received the Executive Summary. The Respondent alleges that the *Lewis* case was wrongly decided and the statements it contains concerning the Executive Summary are *obiter dicta*.

[47] The Respondent notes that the Court, in *Lewis*, recognized that the respondents did not argue the extent of the common law duty to act fairly nor did they discuss the statutory obligations under section 27 of the *CCRA* because the main question was the fact that the issues raised by the Applicant at the third level had not been raised in the first and second levels (see paras 25 to 26 of the *Lewis* decision).

[48] The Respondent argues that the case law relied upon in the *Lewis* case did not deal with the obligation to share the executive summary with the inmate before the decision was rendered but rather dealt with the obligation to provide the information that was the basis for the decision being grieved after that decision was rendered.

[49] The Respondent also submits that subsection 27(1) of the *CCRA* did not apply to the facts of *Lewis*, nor does it apply in the present case, because subsection 27 (1) only applies to cases in which inmates are entitled to make representations in relation to a decision to be taken about them by the Service under Part I of the *CCRA* and the *CCRR*, sections 2-98. The right to make representations entails a right to disclosure of all relevant information prior to a decision being taken. However, the Respondent argues that Part I of the *CCRA* and the *CCRR* do not entitle offenders who have submitted a grievance to make representations before a grievance decision is rendered, therefore they do not have a statutory or regulatory right to respond to a proposed grievance decision, which includes an executive summary.

[50] The Respondent submits that subsection 27(2) of the *CCRA* is the applicable section to the facts of this case. It entitles an offender to receive reasons for a decision taken about the offender *after* said decision is taken. Subsections 27(1) and (2) read as follows:

“27. (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.

(2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information”. [Emphasis added]

[51] The Respondent refers to section 80 of the *CCRR* which creates the subsection.27 (2) obligation of providing the offender with the reasons for a decision after it is taken in the grievance context.

[52] The Respondent notes that the Court, in *Lewis*, found that subsection 27 (2) did not apply, but claims this is wrong (see para 26 of the *Lewis* decision). Consequently it is submitted that the Court decline to follow *Lewis* even though the principles of judicial comity call for following the prior conclusions of law of a Federal Court judge unless the other judge is convinced that the departure from those conclusions is necessary (the Respondent refers to *Allergan Inc v Canada (Minister of Health)*, 2012 FCA 308 at para 48 and *Janssen Pharmaceutica Inc v Apotex Inc*, [1997] FCJ No 169 at para 2).

[53] The Respondent argues that the test to be applied in considering the rare exceptions where a decision of the Federal Court should not be followed is when it can be shown that the decision failed to consider legislation or binding authorities which would have produced a different result (*Kumarasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 597 at para 13, *Stone v Canada (Attorney General)*, 2012 FC 81 at para 12 and *Fernandez v Canada (Attorney General)*, 2011 FC 275 at paras 53-65).

[54] The Respondent points out that the *Lewis* case failed to consider subsection 27 (2) of the *CCRA* and section 80 of the *CCRR* which are the applicable provisions on the facts of that case. The Respondent adds that the content of the common law duty of procedural fairness in the present context is minimal and, in any event, has been met by the CSC (*Yu*, cited above, at paras 30-44), but

if subsection 27 (2) of the *CCRA* is held to define the applicable procedural rights of offenders in the grievance context, this Court should not apply a common law rule in the face of a clear statutory direction (*Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 22).

[55] The Respondent suggested that in the event the Court decides it is bound to follow *Lewis*, the comments on the disclosure of the Executive Summary are *obiter dicta* and do not bind the Court.

[56] As to the other arguments on procedural fairness raised by Mr. Mills (failing to conduct an investigation of the grievance which met the conditions of neutrality and thoroughness), the Respondent submits that they should also be rejected, because they are founded on cases concerning the CHRC and the *Canadian Human Rights Act*, RCS 1985, c H-6 [the *CHRA*] and are not applicable in the present context because the *CHRA* was relied upon by Mr. Mills for the first time in this judicial review and thus fails to exhaust the applicable administrative remedies as part of the grievance process.

## **VII. Analysis**

### ***1) Is the Decision reasonable?***

[57] Mr. Mills claims that the Decision is unreasonable for several reasons: 1) he was not provided with the Executive Summary before it was rendered; 2) it concluded that he had not been



discriminated against; 3) it failed to accommodate his needs or to explore how to accommodate them and provided no justification for failing to accommodate them. It did not specify corrective accommodation action; it simply accepted the CSC's failure.

[58] The Court disagrees with Mr. Mills' contention that the Decision is unreasonable because he was not provided with the Executive Summary. After reviewing the Decision, as such, the Court notes that the Executive Summary is just a more concise repetition of the recommendations found in the Decision and this Court finds that the Respondent had no obligation to communicate that document. This issue is further addressed in greater detail in the following section of this judgment. The Court also notes that the Executive Summary for the second level decision was not communicated to Mr. Mills either and this was not grieved.

[59] The conclusion that Mr. Mills was not discriminated comes from an independent review by the AID. The AID determined that the issues raised by Mr. Mills did not meet the definition of discrimination found in paragraph 12 of CD 081, because CSC staff actions, language or decisions were not made or taken in a discriminatory manner. Rather, there was a lack of consideration of his Aboriginal Social History by his case management team when decisions were taken concerning Mr. Mills. This conclusion "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (see *Dunsmuir*, cited above, at para 47).

[60] Mr. Mills referred to the *British Columbia* case, cited above, to support his contention that in order to avoid discrimination the CSC must exhaust all possible options to accommodate. However, the Court finds that the *British Columbia* case does not stand for such a broad proposition. In that

case discrimination had clearly been established. The Court was analyzing whether it was justifiable and necessary in such circumstances because the defendant had proven that the institution was incapable of accommodating the person. The present case is different as discrimination was not established on a *prima facie* basis.

[61] As for Mr. Mills' contention that the Decision is unreasonable because it did not accommodate his needs or provide any corrective accommodation action, the Court agrees that the Decision does not refer to the actions that would be taken after having upheld the Applicant's grievance on that point. On that score it is lacking, however, a letter was sent to the Port-Cartier Institution asking that it ensures that religious and cultural needs of aboriginal inmates be respected and taken into account by the Institution's personnel. At that time, Mr. Mills was already transferred to the Saskatchewan Penitentiary. The Decision needed to address the situation at Port-Cartier in order to avoid recurring incidents with aboriginal inmates detained in that institution. Although it should have listed the corrective accommodation actions that would be taken (the letter that would be sent); this does not have any practical implications on Mr. Mills, who is no longer incarcerated there.

[62] The Court notes that according to the Respondent's record, an Offender Complaint Response was communicated to Mr. Mills in the summer of 2010 (the exact date is unreadable) which stated that "as for the description of your aboriginal background, they are developed in your assessment for transfer dated 2010-05-11" (see Respondent's Record, volume 1 at page 67). Therefore, it appears that Mr. Mills' aboriginal background was considered for his transfer to the Saskatchewan Penitentiary.

[63] The Court also notes that according to the Respondent's Record, a correctional officer from the Port-Cartier Institution met with Mr. Mills in February 2010 and suggested that he involve himself with the native brotherhood, which he refused to do. Mr. Mills justified his refusal by claiming that the brotherhood is "a bunch of phonies who are running the circles" (see Respondent's Record, volume 1, page 57). At the hearing Mr. Mills explained that this comment was based on his view that the Institution was allowing non aboriginals to participate in aboriginal activities.

[64] The Court also notes that Mr. Mills failed to bring his complaints related to his correctional plan to the third level. As such this issue is unfortunately beyond the Court's purview.

[65] For these reasons, the Court concludes that the Decision is reasonable.

**2) *Is there a breach of procedural fairness?***

[66] Mr. Mills claims that he was not accorded procedural fairness for the following reasons: 1) he was not provided with the Executive Summary before the Decision was rendered; 2) the investigation into the grievance was not neutral and thorough and failed to look into crucial evidence; 3) important witnesses were not interviewed; and 4) the Decision did not address fundamental issues.

[67] With regards to Mr. Mills' claim that the CSC failed to provide the Executive Summary before the Decision was rendered, the Court agrees with the Respondent's position that no such

statutory obligation exists. Subsection 27 (1) of the *CCRA* applies to situations considered in the Act which provide for a right to make representations, such as section 34. When a party can make representations it is only normal that it should receive all the relevant information before the Decision is taken in order for that party to prepare adequately. However, section 90 of the *CCRA* which applies in the present case does not afford a right to make representations; therefore subsection 27(1) does not apply. The Court finds that it is rather subsection 27 (2) which applies to the facts of the present case. Pursuant to subsection 80 (3) of the *CCRR*, Mr. Mills was entitled to receive reasons for the Decision. This subsection reads as follows:

“80. (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”. [Emphasis added]

[68] The Applicant therefore only had the right to receive reasons and the Executive Summary after he filed an appeal.

[69] The main issue in the *Lewis* case cited above was not the statutory obligations under s.27 of the *CCRA*. The Court specifically stated that the Respondent's had not argued the extent of the common law duty to act fairly nor did he challenge the statutory obligations under section 27. Therefore the opinion rendered with regards to the obligation of disclosing an Executive Summary was not determinative of that case and that aspect of the judgment is not binding on this Court. As was stated in *Falvo Enterprises Ltd v Price Waterhouse Ltd* (1982), 34 OR 2<sup>nd</sup> 336 at para 31:

“An obiter dictum is an opinion expressed by a judge in giving judgment which was unnecessary for the determination of the case and on which such determination did not rest: see *Landreville v. Gouin* (1884), 6 O.R. 455 at 464 (C.A.); *Samson v. Minister of National Revenue*, [1943] Ex. C.R. 17, [1943] 2 D.L.R. 349. Dicta

are not of binding authority unless they can be shown to express a legal proposition which is a necessary step to the judgment pronounced by the court in the case in which the dicta are found ...”

[70] The Federal Court of Appeal, in a more recent decision, considered the issue of *obiter dicta* and whether courts are bound by them and affirmed:

“30. The real question is the extent to which a later court should consider itself bound by earlier obiter. Some obiter is purely gratuitous in the circumstances and is not grounded on the full submissions of opposing parties. However, some obiter is prompted by circumstances of strong practicality and justice, and is informed by full submissions from adverse parties represented by counsel.

31. In my view, we should consider ourselves bound by the obiter determination in *Savard*. That Court was prompted by strong practicality and justice and had the benefit, a rare one in this context, of full submissions by adverse parties who were represented . . . ”  
(see *Gill v Canada (Attorney General)*, 2010 FCA 182).

[71] The *Lewis* decision is clearly distinguishable, as we have explained. Consequently this Court is not bound by the opinion stated in that case.

[72] As for Mr. Mills’, claim that the investigation which was conducted into his grievance breached procedural fairness, the Court disagrees, for reasons others than those argued by the Respondent. The Respondent contends that the case-law presented by Mr. Mills concerning the CHRC, is inapplicable. The Court disagrees. The *Egan* case, cited by Mr. Mills, is relevant in the present proceedings. The Court in that case stated that:

“ . . . It is clear from the decision of the Federal Court of Appeal in *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 that failure by administrative decision makers to investigate obviously crucial evidence where an omission has been made that cannot be compensated for by making further submissions, there has been a

lack of procedural fairness such that the decision must be set aside . . . ” (see *Egan*, cited above, at para 5).

[73] The case considers the obligation to investigate broadly. In a grievance process, the CSC must investigate an inmate’s complaint and must therefore do so thoroughly, without omitting to consider obviously crucial evidence because such an omission cannot be compensated by making further submissions. However, in the present instance, Mr. Mills has failed to convince this Court that crucial evidence was left out or that important witnesses were not interviewed. At the hearing Mr. Mills provided explanations which were not presented in the original complaints and which could have potentially resulted in a different outcome. Unfortunately these facts were never before the grievance officer; consequently the Decision cannot be challenged on that count.

[74] Lastly, with regards to Mr. Mills’ claim that the Decision failed to consider a crucial aspect of his complaint relating to the removal of spiritual aspects from his correctional plan, the Court agrees with the Respondent’s argument that the correctional plan was not before the SDC. As was mentioned above, the Decision states that the Applicant chose to grieve the issues of his correctional plan and aboriginal culture in complaints which were denied and he failed to submit these complaints to the next level of the grievance process for further review (see page 4 of the Decision, Respondent’s Record, volume 1, page 15). Therefore, this is not a reviewable issue in this application (see section 30 of the CD 081).

[75] Consequently the Court concludes that the Applicant was accorded procedural fairness.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the present judicial review application is dismissed without costs.

"André F.J. Scott"

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Judge

## Appendix

**Subsection 18.1(1) of the *Federal Courts Act*, 1985, c F-7, provides as follows:**

### **Application for judicial review**

**18.1** (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

### **Demande de contrôle judiciaire**

**18.1** (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

**Sections 4, 27, 34, 90 and 91 of the *Corrections and Conditional Release Act*, SC 1992, c 20, provide as follows:**

### **Purpose and principles**

**4.** The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:

...

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

(g) correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups;

...

### **Principes de fonctionnement**

**4.** Le Service est guidé, dans l'exécution du mandat visé à l'article 3, par les principes suivants :

[...]

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

g) ses directives d'orientation générale, programmes et pratiques respectent les différences ethniques, culturelles et linguistiques, ainsi qu'entre les sexes, et tiennent compte des besoins propres aux femmes, aux autochtones, aux personnes nécessitant des soins de santé mentale et à d'autres groupes;

[...]



### **Information to be given to offenders**

27. (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.

(2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.

(3) Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) or (2) would jeopardize

- (a) the safety of any person,
- (b) the security of a penitentiary, or
- (c) the conduct of any lawful investigation,

the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (a), (b) or (c). [Emphasis added]

### **Communication de renseignements au délinquant**

27. (1) Sous réserve du paragraphe (3), la personne ou l'organisme chargé de rendre, au nom du Service, une décision au sujet d'un délinquant doit, lorsque celui-ci a le droit en vertu de la présente partie ou des règlements de présenter des observations, lui communiquer, dans un délai raisonnable avant la prise de décision, tous les renseignements entrant en ligne de compte dans celle-ci, ou un sommaire de ceux-ci.

(2) Sous réserve du paragraphe (3), cette personne ou cet organisme doit, dès que sa décision est rendue, faire connaître au délinquant qui y a droit au titre de la présente partie ou des règlements les renseignements pris en compte dans la décision, ou un sommaire de ceux-ci.

### **Exception**

(3) Sauf dans le cas des infractions disciplinaires, le commissaire peut autoriser, dans la mesure jugée strictement nécessaire toutefois, le refus de communiquer des renseignements au délinquant s'il a des motifs raisonnables de croire que cette communication mettrait en danger la sécurité d'une personne ou du pénitencier ou compromettrait la tenue d'une enquête licite.

...

[...]

### **Where institutional head must meet with inmate**

**34.** Where the institutional head does not intend to accept a recommendation made under section 33 to release an inmate from administrative segregation, the institutional head shall, as soon as is practicable, meet with the inmate

(a) to explain the reasons for not intending to accept the recommendation; and

(b) to give the inmate an opportunity to make oral or written representations.

...

### **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).

### **Access to grievance procedure**

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

...

### **Obligation du directeur**

**34.** Quand le directeur, contrairement à une recommandation faite aux termes du paragraphe 33(1), a l'intention de maintenir le détenu en isolement préventif, il doit, dès que possible, rencontrer celui-ci, lui exposer les motifs de son désaccord et lui donner l'occasion de lui présenter des observations, oralement ou par écrit.

[...]

### **Procédure de règlement**

**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.

### **Accès à la procédure de règlement des griefs**

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

[...]

**Sections 74, 75, 76, 77, 78, 79, 80, 81 and 82 of the *Corrections and Conditional Release Regulations*, SOR/92-620, provide as follows:**

**Offender Grievance Procedure**

**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,

**Procédure de règlement de griefs des délinquants**

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

(b) where the institutional head or director is the subject of the grievance, to the head of the region.

a) soit au directeur du pénitencier ou au directeur de district des libérations conditionnelles, selon le cas;

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

**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

**76.** (1) Le directeur du pénitencier, le directeur de district des libérations conditionnelles ou le commissaire, selon le cas, examine 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

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 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

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 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 commissaire.

(2) [Abrogé, DORS/2013-181, art. 3]

(3) Le commissaire transmet 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

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.

**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).

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.** 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).

**Sections 12, 27, 30, 41, 84, 85, 86 and 87 of the Commissioner's Directive 081, *Offender Complaints and Grievances*, October 31, 2008, provide as follows:**

### **Definitions**

**12. Discrimination:** when the grievor believes that CSC staff actions, language or decisions were made in a discriminatory manner based on gender, race, ethnicity, language, sexual orientation, religion, age, marital status, or a physical or mental disability. The category includes staff behaviour that constitutes a violation of the offender's human rights or the *Canadian Charter of Rights and Freedoms*.

### **Définitions**

**12. Discrimination :** des actes, des paroles ou des décisions du personnel du SCC qui incitent le délinquant à s'estimer victime de discrimination fondée soit sur le sexe, la race, l'ethnie, la langue, l'orientation sexuelle, la religion, l'âge, l'état civil ou une déficience mentale ou physique. Sont inclus les comportements du personnel qui enfreignent les droits de la personne ou la *Charte canadienne des droits et libertés*.

...

[...]

**GENERAL PROCEDURES**  
**Levels of the Complaint and Grievance**  
**Process**

27. The complaint grievance process includes four levels: written complaints, first level grievances, second level grievances and third level grievances. The initial submission will be at the complaint level unless otherwise indicated in this directive or unless the supervisor of the staff member in question is the Institutional Head, the Regional Deputy Commissioner or the Commissioner.

...

30. Grievers who are not satisfied with the final decision of the complaint and grievance process may seek judicial review of this decision at the Federal Court within the time limit prescribed at subsection 18.1 (2) of the *Federal Courts Act*.

...

**Extensions**

41. If the Institutional Head, the Regional Deputy Commissioner or the Director of Offender Redress considers that more time is necessary to deal adequately with a complaint or grievance, the grievor must be informed in writing of the reasons for the delay and of the date by which he/she may expect to receive the response.

...

**PROCÉDURE GÉNÉRALE**  
**Paliers du processus de règlement des**  
**plaintes et griefs**

27. Le processus de règlement des plaintes et griefs comprend quatre paliers : plaintes écrites, griefs au premier palier, griefs au deuxième palier et griefs au troisième palier. Une plainte doit être présentée d'abord au palier des plaintes, à moins d'indication contraire dans la présente directive ou à moins que le surveillant de l'employé visé dans la plainte soit le directeur de l'établissement, le sous-commissaire régional ou le commissaire.

[...]

30. Le plaignant qui n'est pas satisfait de la décision finale rendue dans le cadre du processus de règlement des plaintes et griefs peut faire une demande de révision judiciaire de cette décision à la Cour fédérale dans les délais prescrits au paragraphe 18.1 (2) de la *Loi sur les Cours fédérales*.

[...]

**Prolongation du délai de traitement**

41. Si le directeur de l'établissement, le sous-commissaire régional ou le directeur des Recours des délinquants juge qu'il a besoin d'un délai plus long pour traiter adéquatement une plainte ou un grief, il doit informer le plaignant par écrit des raisons de la prolongation du délai et de la date à laquelle il peut s'attendre à recevoir une réponse.

[...]

### **Coding and Classification**

**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 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.

### **Determining the Validity of the Allegations**

**85.** The Institutional Head must determine, within fifteen (15) working days from receipt, whether the allegations, if proven, would constitute harassment, sexual harassment or discrimination.

**86.** If the Institutional Head determines that the allegations, if proven, would not constitute harassment, sexual harassment or discrimination, he/she must substantiate this finding in the first level grievance response. The Institutional Head may determine that the submission should be reviewed at the complaint level and the offender may submit a complaint.

### **Assignment d'un code et détermination du niveau de priorité**

**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.

### **Détermination de la validité des allégations**

**85.** Le directeur de l'établissement doit déterminer, dans les quinze (15) jours ouvrables suivant la réception de la plainte ou du grief, si les allégations, une fois fondées, constitueraient du harcèlement, du harcèlement sexuel ou de la discrimination.

**86.** Si le directeur de l'établissement détermine que les allégations, une fois fondées, ne constitueraient pas du harcèlement, du harcèlement sexuel ou de la discrimination, il doit étayer sa conclusion dans sa réponse au grief au premier palier. Il peut déterminer que la question devrait être examinée au palier des plaintes, et le délinquant peut alors présenter une plainte.



**87.** If the Institutional Head determines that the grievance, if proven, would constitute harassment, sexual harassment or discrimination and that no further investigation is needed to determine the outcome of the grievance, he/she may simply respond to the grievance. In such cases, the response must demonstrate conclusively the basis for arriving at the findings without submitting the matter to outside investigation.

**87.** Si le directeur de l'établissement détermine que les allégations, une fois fondées, constitueraient du harcèlement, du harcèlement sexuel ou de la discrimination et qu'aucune enquête n'est nécessaire pour le règlement du grief, il peut tout simplement répondre au grief. Dans ce cas, il doit inscrire dans sa réponse les éléments concluants sur lesquels il s'est appuyé pour arriver à sa conclusion sans avoir à soumettre la question à une enquête externe.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1730-12

**STYLE OF CAUSE:** JOHN DEREK MILLS  
v  
ATTORNEY GENERAL OF CANADA

**MOTION HELD VIA VIDEOCONFERENCE ON NOVEMBER 6, 2013, FROM  
MONTREAL, QUEBEC AND PRINCE ALBERT, SASKATCHEWAN**

**REASONS FOR JUDGMENT  
AND JUDGMENT: SCOTT J.**

**DATED:** DECEMBER 3, 2013

**APPEARANCES:**

John Derek Mills FOR THE APPLICANT  
ON HIS OWN BEHALF

Joshua Wilner FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

John Derek Mills FOR THE APPLICANT  
ON HIS OWN BEHALF

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Ottawa, Ontario