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Canada

Correctional Service Canada

Service correctionnel Canada

Correctional Case Law Manual

Manuel de jurisprudence en droit correctionnel



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CORRECTIONAL CASE LAW MANUAL

MANUEL DE JURISPRUDENCE EN DROIT CORRECTIONNEL

Correctional Service Canada

CORRECTIONAL SERVICE OF CANADA

SERVICE CORRECTIONNEL DU CANADA

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MEMORANDUM **NOTE DE SERVICE**

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Subject / Objet

Correctional Case Law Manual

Please find enclosed the new sections and recent case law which should be added to the Correctional Case Law Manual distributed in April 1991.

This replacement package includes a list of the summaries of new decisions that have been added to the former Manual. Moreover, we have indicated, in the Table of Cases, the citations for decisions in order to facilitate the location of the original text of decisions.

You will notice that in some cases, different levels of courts have rendered decisions in the same case (e.g. Daniels). In some of these cases, a summary of each level of decision was made.

Manuel de Jurisprudence en Droit Correctionnel

Veuillez trouver ci-joint les ajouts au Manuel de jurisprudence en Droit correctionnel distribué en avril 1991.

Ce matériel comporte notamment une liste des nouveaux résumés de décisions qui ont été ajoutés au Manuel ainsi qu'une liste des abréviations utilisées dans le Manuel. Par ailleurs, nous avons dans la mesure du possible, indiqué dans la table de jurisprudence, les citations des décisions pour faciliter la recherche du texte de la décision.

Vous noterez que dans certains cas où différents niveaux de tribunaux se sont penchés sur une même affaire (ex: Daniels), un résumé de chaque décision rendue par les différents niveaux de tribunaux a été fait.

Sept 16, 1992
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This Manual will continue to be updated on a periodic basis.

A French version of the Manual is now available through CSC, Legal Services.

An additional copy for your institutional library can be provided upon your request to the Legal Services of CSC.

Ce Manuel de jurisprudence sera mis à jour périodiquement et régulièrement.

La version française du Manuel est disponible aux Services juridiques du SCC.

Une copie supplémentaire pour la bibliothèque institutionnelle vous sera procuré sur demande aux Services juridiques du SCC.

M. Gravelle-Bazinet

Mathilde Gravelle-Bazinet

Careen v. Attorney General of Newfoundland,
Attorney General of Canada et al.

This is a decision of the Supreme Court of Newfoundland, Trial Division, rendered by the Honourable M. Justice Noel on November 29, 1991.

Facts:

The appellant, Gerard J. Careen, is serving a term of four years and has been classified as a high medium security inmate. He has been served notice of his transfer from a Newfoundland low medium security prison to a high medium security federal penitentiary.

The appellant has applied for an order under Section 24 of the Canadian Charter of Rights and Freedoms to prohibit his transfer on the grounds that:

1. he is a resident of Newfoundland and most of his family reside in this province;

2. his mother is seriously ill and she resides in Newfoundland;

3. his child will be born in Newfoundland in February;

4. he will be deprived of the advantages of being imprisoned in the province in which he intends to reside.

Issues:

1. Does the decision to transfer the inmate to a high medium security federal penitentiary contravene Section 12 of the Charter?

2. Has the appellant's rights under Subsection 15(1) of the Charter been upheld in the decision of his transfer?

Decision:

1. Based on Kelly v. Canada (1987) 12 F.T.R. 296 a prisoner does not have a "right" to be in one prison rather than another and the decision to transfer from a medium to a maximum security prison is basically and essentially an administrative decision. This transfer will not subject the appellant to cruel or unusual punishment.

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2. The applicant has been treated fairly and in accordance with the procedure generally followed in cases such as his. He has failed to provide evidence of discrimination against him.

The application is dismissed.

The Queen v. Belczowski

Federal Court of Appeal decision rendered February 17, 1992 per Hugessen J.

Facts:

In 1988 inmate Walter Belczowski filed an action in the trial division of the Federal Court of Canada in which he challenged the constitutionality of paragraph 51(e) of the Canada Elections Act, which prevents inmates from voting in federal elections. He was serving a life sentence in a federal penitentiary. On February 28, 1991, Strayer J. of the Federal Court held that paragraph 51(e) of the Canada Elections Act was inconsistent with section 3 of the Charter which guarantees every citizen of Canada the right to vote. He further held that the restrictions on voting were not justified under section 1 of the Charter and that therefore this paragraph was of no force and effect.

The government appealed the decision to the Federal Court of Appeal.

Issue:

The issue before the Federal Court was whether paragraph 51(e) of the Canada Elections Act could be saved by section 1 of the Charter.

Decision:

Hugessen J. held that there was no question that paragraph 51(e) of the Canada Elections Act was in conflict with section 3 of the Charter. The only question was whether the limitation against voting by incarcerated persons is a reasonable limit which is justified in a free and democratic society.

The disqualification of prisoners from the right to vote was, in his view, far more analogous to legislation dealing with the punishment of criminals than to social legislation which balances the interests of two classes of citizens. Accordingly, the government's objective in limiting the right to vote would have to be "pressing and substantial" in order to limit inmates' right to vote.

It was conceded by Her Majesty that administrative and security problems could not be invoked to justify paragraph 51(e). The objectives of paragraph 51(e) advanced by the Crown were that: (1) it affirms and maintains the sanctity of the franchise in our

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democracy; (2) it preserves the integrity of the voting process; and (3) it sanctions offenders who have breached the social contract.

The court held that all of these objectives are symbolic and abstract and it expressed serious doubts as to whether a wholly symbolic objective could ever be sufficiently important to justify the taking away of rights which are themselves so important and fundamental as to have been enshrined in our constitution.

It further held that even if the objective of the legislation were acceptable, there is no indication that paragraph 51(e) is rationally connected to the objective. The fact of being in prison is not a sure or rational indication that the prisoner is not a decent and responsible citizen. Secondly, there is no necessary connection between incarceration and the ability to participate fully in a democratic process. Finally, the legislation does not exclude all manner of persons who are clearly not decent and responsible citizens.

Summary:

The court held that paragraph 51(e) does not have the objectives which the Crown claimed for it. While some of those objectives, notably, punishment of offenders, may be legitimate, neither the text nor the operation of the legislation supports the view that this was what Parliament was aiming at. Even assuming the validity and legitimacy of the ends, the means chosen to effect these ends are irrational, arbitrary and disproportionate. Paragraph 51(e) therefore violates the rights granted by section 3 of the Charter and is not a reasonable limit which can be demonstrably justified in a free and democratic society.

The appeal was dismissed thereby upholding the right of inmates to vote in federal elections.

Bruce v. Yeomans 1979 Federal Court, Trial Divison

This is a judgement of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Collier on July 17, 1979 in Vancouver, B.C.

The applicants seek an injunction, or "relief in the nature thereof" to restrain respondent's power to transfer the inmate to Millhaven penitentiary in Ontario.

Facts:

The applicant, Bruce, is an inmate of the British Columbia penitentiary. The Penitentiary Service proposes to transfer Bruce from B.C. penitentiary to Millhaven Institution in Ontario.

The applicants have been refused permission to marry and have launched an appeal concerning the matter.

The appellant Bruce has also appealed the conviction and sentence concerning a hostage taking.

Both appeals are pending.

Principles:

1- Is the decision regarding the transfer one that would require providing the applicant with full details of the case and a hearing ?

Inmates are not entitled, as a right, to appear on person, or be heard on proposals or questions of transfer nor are they entitled to reasons why a transfer is carried out.

This decision has no quasi-judicial quality which would require a hearing nor is there an obligation "by law" to hold such hearing. The inmate has no "right" to be in a particular institution, therefore the decision taken regarding his transfer is an administrative decision which does not require a duty to act in accordance with the principles of natural justice.

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2- Should the power to transfer be restrained until all litigations in which applicants are involved in B.C. be completed ?

Concerning the marriage appeal, the Court will be aware that Bruce could be transferred back to a B.C. institution and for that reason would not be influenced by the transfer.

Bruce will be brought back to B.C., when the pending criminal appeal and criminal charges come for a hearing. Therefore there is no unfairness, in law, in deciding to transfer Bruce to Ontario immediately.

3- Have the provisions of the *Canadian Bill of Rights* (para. (1)(b), para. 2(e) concerning the right to equality before the law and the right to a fair hearing, been infringed ?

None of those rights, of either applicants, have been infringed in the statutory procedures followed by the respondents.

REFERENCES: Sauvageau
Pagé
Howarth (F.C.) (S.C.)
Ex parte McCaud (Nov. 1968)
Cline
Dubeau
Beaumier
Martineau #1 , #2

R. v. Conway

Judgment of the Federal Court of Appeal, rendered on July 13, 1990.

Justice Strayer of the Federal Court of Canada, Trial Division, held in his decision of June, 1987, that it was unlawful, except in emergency situations, for female guards to view male inmates in their cells at Collins Bay Penitentiary without their express or implied consent where such viewing was neither previously scheduled to the general knowledge of inmates affected nor previously announced to them by reasonable means. He also held that frisk searching of male inmates by female correctional officers was not in contravention of the Charter.

The Crown appealed the case to the Federal Court of Appeal and Conway cross-appealed on the narrowness of the decision on cross-gender viewing in cells and on the issue of cross-gender frisk searching.

ISSUES: 1) Did the trial judge err in concluding that it was unlawful, except in emergency situations, for female guards to view male inmates in their cells at Collins Bay Penitentiary where such viewing was neither previously scheduled nor previously announced?

2) Did the trial judge err in concluding that frisk searching of male inmates by female guards was not in contravention of s.8 of the Charter?

DECISION: 1) The Court of Appeal held that the presence of female guards in the living areas of the inmates for professional reasons, at all times, was not unreasonable. The decision of the Court, written by Madame Justice Desjardins, was that the inmate's reasonable expectation of privacy in prison must be balanced against the public interest which encompasses three objectives: a)the need for adequate security in prisons; b) the goal of allowing women equal access to employment in federal prisons; c) the goal of rehabilitating inmates. The Court stated that on balance, these goals pursued by the state override the concerns of the inmate. Therefore, there is no breach of section 8 of the Charter when women guards unexpectedly view male inmates in their cells.

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The Court of Appeal held that unexpected viewing of male inmates during surprise counts is necessary to maintain order in the carceral institutions and ensure that inmates are alive: it is no more unreasonable when women perform the counts than when men do. Vestibuling female guards while male guards do the counts keeps women from working the whole spectrum of the Penitentiary Service. Finally, the Court noted that the presence of women guards in general has some significant positive impact for the inmates and the institutions. The Crown's appeal on this issue was therefore allowed while Conway's cross-appeal was denied.

2) The Court accepted the assessment of the trial judge that frisk searches of male prisoners by female guards do not constitute a breach of the rights guaranteed by sections 7,8 or 15 of the Charter. Conway's cross-appeal in this issue was therefore denied.

Mr. Justice Marceau concurred in the result but wrote his own reasons. He wrote that he did not consider that unexpected viewing or surveillance by female guards of male inmates in their living quarters would constitute a breach of s.8 of the Charter because such viewing or surveillance in plain view would not constitute a search within the meaning of s.8 of the Charter. However, even if such viewing is a search within the meaning of s.8, that section does not guarantee protection for personal interests and feelings such as Conway has invoked.

He held further that were the search unreasonable, it could not be justified by the affirmative action program under s.15 of the Charter because such a program has no bearing on the reasonableness of the search. Finally, he held that s.15 was not brought into play merely by the fact that male inmates are treated differently from female inmates: "Not only is this so-called inequality created by a hiring policy and a special directive and not by law, it does not appear to me to prejudice men in a way significant enough to speak of discrimination."

APPEAL: Leave to appeal to the S.C.C. has been granted.

Robert Cunningham v. The Queen
(Ont. S.C. May 2, 1989 unreported)
(Ont. C.A. Oct. 11, 1990 unreported)

FACTS:

The inmate filed a Habeas Corpus application seeking his release on mandatory supervision. He alleged that this case was referred less than 6 months prior to his MSD and not by reason of "information received within 6 months" of that date.

ISSUES:

1. Whether sections 21.3 and 21.4 of the Parole Act as they apply to Mr. Cunningham are contrary to S.7 of the Charter in that they were enacted following his sentencing and result in continued imprisonment beyond the date he was entitled to release at the time the sentence was imposed.

2. Whether the information relied upon by the Commissioner in referring the appellant to the NPB within six months of his release date was information obtained within the six months as envisaged by the legislation.

DECISIONS:

Smith J. (Ont. S.C.) dismissed the application. He stated that the information obtained within the 6 months must be new information, that is, information not reasonably expected to have been within the knowledge of the Commissioner or the Service.

The Ontario Court of Appeal agreed with the conclusion of Smith J. but did not agree with his view that information must be new in the sense Smith J. attributed to it. They adopted the decision of McKay J. (G.C.) in Ford v. the Commissioner of Corrections, 1990, who stated that the information must be new in the sense that the content be unknown to both the Commissioner and the Service for which he is responsible prior to the 6 month period; it should come into their possession for the first time during that period. Appeal dismissed.

APPEAL:

Leave to appeal to the S.C.C. has been granted.

Kenneth Currie and Timothy Nelligan v. The Correctional Service of Canada

This is a judgement of the Court of Queen's Bench of New Brunswick, Trial Division, rendered by the Honourable M. Justice Paul S. Creaghan on November 5, 1991.

The applicants seek a judicial review by way of a motion for habeas corpus, or relief in the nature thereof, in order that their detention in a segregation unit at the Atlantic Institution be declared invalid. Further, they seek an order that the decision of the Respondent to transfer the Applicants from the Atlantic Institution to a special handling unit elsewhere in the correctional system be revoked and that the decision to transfer the Applicants be stayed.

Facts:

The Applicants were served with a notice of recommendation of involuntary transfer from the Atlantic Institution to a special handling unit elsewhere. The administrative head had reason to believe that the Applicants had been involved in the murder of an inmate two days prior to the administrative decision to segregate them. The basis of that belief was communicated to the Applicants as well as progress summary reports and a gist of security intelligence reports that included the grounds for believing that the Applicants were involved in the murder of an inmate. The allegations that Nelligan was involved with drugs and that Currie had threatened and intimidated another prisoner was communicated to the Applicants. They were allowed the opportunity to respond and have done so.

Issues:

1. Was sufficient information provided to the Applicants to allow them to respond, in an intelligent manner, to the notice of recommendation of involuntary transfer to a special handling unit?

2. Must the sources of the information upon which the Respondent relies be fully disclosed to the Applicants?

3. Was the process followed, with respect to the recommendation to transfer the Applicants, unfair?

Decision:

1. The Applicants were given sufficient information to allow them to respond to the reasons for making the recommendation of an involuntary transfer.

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2. There is no obligation on the Respondent to identify the sources of the information relied upon where it is shown that there are reasonable grounds that to make such disclosure could place informants at risk as is the case here.

3. The administrative action here was justified, the process was fair and no breach of fundamental justice or Charter rights occurred in the process under which the decision was made to make the recommendation for transfer.

The applications are dismissed.

The Queen v. Carol Maureen Daniels

This is a judgment of the Court of Appeal for Saskatchewan rendered on behalf of the Court by Sherstobitoff, J. on June 6, 1991.

Facts:

Following a criminal conviction, the trial judge ordered that Ms. Daniels not serve any portion of her sentence in Kingston Penitentiary for Women. The Court held that S.731 of the Criminal Code and S.15 of the Penitentiary Act and all regulations and directives thereunder are null and void and of no force or effect to the extent that they cause Carol Daniels or other native women from Western Canada to be sent to Prison for Women. The Court found that Carol Daniels' Charter rights guaranteed by S.7 (right of life, liberty and security), S.12 (not to be subjected to cruel and unusual treatment or punishment), S.15 (right to equality) and S.28 (rights guaranteed equally to both sexes) would be violated if she was sent to Prison for Women.

Issues:

The issues raised on the Appeal were:

1. Whether the Attorney General of Canada had status to appeal an order granting relief under the Charter when the Criminal Code provides for leave to Appeal only to the Attorney General of Saskatchewan.

2. Whether the trial judge lacked jurisdiction to grant relief in the nature of prohibition against the Commissioner.

3. Whether imprisonment in Prison for Women would violate Carol Daniels' right under S.12 of the Charter not to be subjected to cruel and unusual treatment or punishment.

4. Whether imprisonment in Prison for Women would violate Carol Daniels' right under S.15(1) of the Charter, not to be discriminated against on the basis of her sex.

Decision:

With respect to issue #1, the Court of Appeal found that although the province has exclusive jurisdiction over the administration of the criminal law, the appeal in this case dealt with remedies granted under the Charter during a criminal trial rather than with the criminal law itself. As a result, the Attorney General of Canada has the right of appeal of the Charter remedies pursuant to S.8 of the Constitutional Questions Act and S.6 of the Court of Appeal Act.

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The Court of Appeal further found that even if no statutory right of appeal existed for the Attorney General of Canada, such a right could be inferred. The Court thereby adopted the decision of Beare v. R. [1987] 4 W.W.R. 309 which held: "... where no effective provision for appeal to a court of error from final orders can be found to exist outside the Charter, one ought to be found to exist within it, as a necessary appendage to S.24(1)".

With respect to issue #2, the Court of Appeal found that the trial judge erred in finding that the Commissioner had no choice but to send Ms. Daniels to Kingston and failed to take into consideration other options available to the Commissioner respecting placement. The Court of Appeal further held that the trial judge erred in determining that if the Commissioner had no choice but to send Ms. Daniels to Kingston, his lack of choice arose as a result of the provisions of S.731 of the Criminal Code or S.15 of the Penitentiary Act. The Court of Appeal found instead that the Commissioner's lack of choice resulted from his failure to exercise his power under the Penitentiary Act to provide other facilities.

Any Charter violation therefore arose not from the imposition of the sentence in the criminal trial, but rather, with the administration of the sentence, which authority is that of the Commissioner. The trial judge's remedy which prohibited Ms. Daniels' incarceration in Prison for Women, affected the exercise or non-exercise of the Commissioner's powers. The Court of Appeal held that this remedy is within the exclusive jurisdiction of the Federal Court and could therefore not be exercised by the trial judge.

The Court of Appeal therefore set aside the order of the trial judge directing that Ms. Daniels not serve any part of her sentence in Prison for Women.

The Court did not rule on the Charter issues before it.

Appeal:

Leave to appeal to the S.C.C. has been denied.

Haines v. Disciplinary Tribunal Prison for Women

Decision of Mr. Justice Teitelbaum of the Federal Court Trial Division on November 1, 1990.

Facts:

The applicant was charged with four criminal offences and two internal disciplinary offences arising from the same fact scenario. The applicant sought a writ of Prohibition to prevent the disciplinary hearing from proceeding, on the grounds that she would be prejudiced by being prevented from giving full answer and disclosure at the disciplinary hearing for fear that it could be used against her directly or indirectly at the criminal proceedings.

Issue:

Should the Court issue a writ of Prohibition to prevent the disciplinary hearing from proceeding so as not to prejudice the Applicant's criminal charges?

Held:

The internal disciplinary proceedings and the criminal proceedings are totally different proceedings. Any evidence that the Applicant may give before the disciplinary tribunal cannot be used to incriminate her in the criminal proceedings pursuant to s. 13 of the Charter. It is possible that some evidence from the hearing could be indirectly against the Applicant but there is no evidence at all suggest that this is probable or that she would be prejudiced by proceeding with the disciplinary hearing. A concern that may possibly arise regarding the Applicant's inability to make full disclosure at the disciplinary hearing is so remote as to prevent the court, in its discretion, from issuing the extraordinary remedy of Prohibition.

Donald Alexander Hay v. NPB, CSC and the A. G. of Canada

Decision of Dubé J. of the Federal Court (Trial Division) on June 24, 1991 rejecting an application for certiorari and mandamus.

FACTS:

The Applicant was serving a life sentence for kidnapping and sexual intercourse with a twelve year old girl which was imposed on November 25, 1976.

He brought a motion for;

(1) certiorari to quash decisions made by the NPB denying applications for full parole, UTAs and day parole;

(2) mandamus to require the NPB to provide the Applicant with a new in-person hearing and decisions on applications for conditional release;

(3) certiorari to review the program of temporary absences provided to the Applicant;

(4) mandamus to require the NPB and CSC to provide the Applicant with an appropriate program of temporary absences.

The Applicant conducted himself well during his fourteen (14) years of incarceration. He was eligible for full parole as of September 1983, and day parole since September 1981. However, both day and full parole had been denied on every one of Hay's applications. He was granted a program of temporary absences in 1987 but in 1989 the NPB refused unescorted temporary absences. That is the decision under attack in this motion.

ISSUES:

Were the decisions of the NPB to deny the Applicant's applications for full parole and unescorted temporary absences contrary to the evidence and therefore in excess of jurisdiction and illegal?

Did the decisions contravene sections 7, 9, 12 and 15 of the Charter?

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HELD:

The court cannot be expected to walk in the shoes of the NPB members and to impose its decision on them. It is not sufficient for the Applicant to show that the tribunal was not correct in its decisions; he must show that the Board has not complied with procedural fairness or has not acted fairly or reasonably.

The Applicant's Charter rights were not violated. Section 7 is not involved in the conditional release of offenders. The Applicant is not being arbitrarily imprisoned nor was he subject to cruel and unusual treatment or punishment. None of the section 15 grounds of discrimination has been established.

The Application was dismissed.

Robert Jaenicke v. CSC et al

A decision of Harding, J. of the Supreme Court of British Columbia released June 21, 1991.

Facts

Jaenicke applied for habeas corpus with certiorari in aid to compel penitentiary officials to transfer him to a medium security institution. His application for a voluntary transfer had been rejected on the grounds that he had been involved in assaults on inmates.

Issue

Is habeas corpus with certiorari in aid the proper remedy in this situation?

Decision

The right of the superior courts of the provinces to grant habeas corpus with certiorari in aid in respect of prisoners detained in federal institutions has been affirmed several times by the Supreme Court of Canada. Counsel for the applicant submitted that this case comes within the class of situations where habeas corpus will lie on the basis of an alleged continuation of deprivation of liberty by virtue of the refusal of the prison authorities to transfer the petitioner to a less secure institution.

It is clear from Warden Mountain Institution v. Steele, a decision of the Supreme Court of Canada, that habeas corpus is not available here. A decision of institutional officials not to grant a prisoner additional privileges cannot, as a rule, be equated to causing him to suffer a "loss" of any degree of freedom. Rather, it is akin to a decision of the Parole Board. In the circumstances of this case the habeas corpus remedy is not available.

Patrick Michael Kelly v. Solicitor General et al

Federal Court - Trial Division

Application for an order in the nature of mandamus requiring the Solicitor General of Canada and the Commissioner of Corrections to issue a new Commissioner's Directive 770 on private family visits, dismissed by Muldoon J. on February 13, 1992.

FACTS:

The applicant sought an order to compel the Commissioner to promulgate a revised CD 770. In 1989 the applicant's request for a private family visit was denied on the grounds that he did not meet the current criteria in CD 770. Since that time CSC had been indicating that the CD was being reviewed and a new version was being drafted. As of February 1991 no new CD had been issued.

DECISION:

As long as the Commissioner and CSC operate lawfully and fairly, the Court will not interfere in their operations. In this case there is no evidence of their being bloody-minded, malicious or lax in any duty owed to the applicant. Subsection 37(3) of the Penitentiary Act does not cast a positive duty on the respondent, but rather grants a discretion which the respondents say they are willing to exercise.

The applicant cannot successfully move the Court to compel the promulgation of the CD.

Pizzuro v. The Warden of Frontenac Institution

This was a judgment of the Ontario Court of Justice (General Division) rendered by Mr. Justice Campbell on September 6, 1991 with supplementary reasons given on September 17, 1991.

The Applicant Hugo Pizzuro brought an application for a Writ of Habeas Corpus and a Writ of Certiorari in Aid in order to correct a confinement alleged as illegal by the applicant.

Facts

The applicant was sentenced by Judge P.J. Lesage on May 25, 1984 for trafficking in a narcotic. His sentence was 45 months in jail. He was later convicted of conspiracy to traffic in a narcotic by Judge H. Smith and sentenced on September 24, 1986 to imprisonment for a term of 6 years and 3 months consecutive to sentence now being served. In both cases, it was a certificate of sentence which was executed by the custodial authorities rather than a warrant of committal. The applicant made no appeal as to the proceedings either before Judge Lesage or Judge Smith.

Issues

1. Does the confinement of a person under a certificate of conviction rather than a warrant of committal meet the legal requirements of Section 15 of the Penitentiary Act as amended in 1985? This Subsection 15(1) states: "If the warrant of committal states ...".

   Further, does it comply with subsection 570(5) of the Criminal Code which reads:

   > "Where an accused other than a corporation is convicted, the judge or provincial court judge, as the case may be, shall issue or cause to be issued a warrant of committal in form 21."

2. When the convicted person does not appeal the proceeding of the trial, does Section 776 of the Criminal Code bar a separate proceeding by way of certiorari?

3. Does an irregularity, informality or insufficiency in a proceeding render a conviction or order invalid?

4. Should the narcotic charges of trafficking in a narcotic and conspiracy of trafficking in a narcotic have been dealt with by summary conviction rather than as indictable offences as alleged by the applicant?

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Decision:

The court proceeded with the applications for habeas corpus with certiorari in aid under section 774 of the Criminal Code rather than proceeding into stages under section 775.

1. The court applied the Supreme Court of Canada decision in Goldhar v. The Queen and ruled that the certificate of convictions in sentences are sufficient in lieu of formal separate warrants of committal. The court further referred to the judgment in ex parte Leclerc in the Quebec Court of Appeal where Turgeon J.A. held that the minute of conviction of certificate of judgment were sufficient to detain the convicted inmate. He further stated "I will add that form 18 like all other forms in the Criminal Code is not sacro saint and that the minute of conviction referred to above contains all the essential elements of a warrant of committal.

2. The court held that where this defendant appeared, pleaded and was tried and convicted but he did not appeal the convictions. Section 776 of the Criminal Code bars certiorari per se.

3. The court relied on section 777(1) which mandates that no conviction or order shall on a proceeding such as in this matter, be held to be invalid by reason of any irregularity, informality or insufficiency where the court is satisfied that: (1) the offence of the nature described in the conviction order or warrant was committed; (2) that there was jurisdiction to make the conviction or order or issued the warrant as the case may be; and (3) that the punishment imposed, if any, was not in excess of the punishment that might unlawfully have been imposed.

4. The Narcotic Control Act section 43 sets the offence of trafficking in a narcotic as an indictable offence and liable to imprisonment for life. Section 465(1)(c) of the Criminal Code provides that conviction on conspiracy invokes liability to the same punishment as applicable to the offence per se.

Order

Applications for habeas corpus and certiorari in aid are dismissed.

Kenneth Ratte v. the Warden of Kingston Penitentiary

This is a judgment of the Ontario Court of Justice (General Division) rendered by Mr. Justice D.L. McWilliam on September 18, 1991.

The applicant sought a writ of habeas corpus with certiorari in aid to overturn the applicant's confinement in dissociation.

Facts:

The applicant, an HIV positive inmate, was placed in dissociation for the last several months of his confinement. While in dissociation, the Classification Board failed to review his case pursuant to PSR 40.

Issues:

1. Was the applicant's confinement in isolation unlawful under Section 40 of the Penitentiary Service Regulations?

2. Was the applicant's confinement in isolation an arbitrary detention and therefore contrary to Section 9 of the Charter?

3. Was the applicant's confinement in isolation cruel and unusual punishment pursuant to Section 12 of the Charter?

4. Was the applicant's confinement in isolation discrimination based on physical disability contrary to Section 15 of the Charter?

Decision:

1. S.40 of the Penitentiary Service Regulations permits an institutional head to dissociate an inmate for the maintenance of good order and discipline in the institution or if it is in the best interest of the inmate.

   The court found that Mr. Ratte's placement in isolation was justified for the maintenance of good order and discipline in the institution. Mr. Ratte had, on different occasions: threatened to bite and stab staff claiming he, "had nothing to lose and wanted to take down as many officers as possible"; threatened staff with blood from his razor and threatened to spit on guards.

   The court found that the failure to have the appropriate 30 day review required by S.40 was a serious error; however, the error had been corrected prior to the hearing.

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2. The court found that no attack on the validity of the detention could be sustained under S.9 of the Charter. The policy of the institution is not to remove inmates with HIV from the general population. Mr. Ratte's behaviour and threats against staff justified his placement in isolation.

3. The court found that "Mr. Ratte presented as a hydra-headed problem which defied administrative pigeon-holing". His attitudes and his threats to use his disease against staff justified his placement in segregation. His placement in segregation did not outrage standards of decency and therefore a S.12 argument could not be sustained.

4. The court further found that Mr. Ratte failed to establish that his S.15 Charter right was infringed. Mr. Ratte's placement in isolation arose not as a result of his physical disability, but rather, from the threat he posed because of the characteristics he possessed as an individual.

St-Jacques v. The Queen

This is a decision of the Federal Court, Trial Division, rendered by Mr. Justice Denault on April 11, 1991.

The applicant claims damages for being illegally placed in administrative segregation for a period of eighty (80) days.

Facts:

The plaintiff was transferred from Dorchester Penitentiary to the Renous Institution in New Brunswick on March 10, 1987. It was discovered that, during his time in Dorchester, another inmate was found to be suffering from tuberculosis, a communicable disease. The Ministry of Health requested from CSC officials the identity of inmates who had been in contact with the infected inmate. These inmates were directed by the Director of the Health Care Center at Renous, to undergo "Mantoux" test for tuberculosis and a chest X-Ray. The plaintiff refused the TB skin test on the basis that he believed himself to be allergic to the product used in the testing. He was then placed in administrative segregation on the basis of "medical quarantine for refusing the TB test".

A few days after his segregation and several times during the course of it, as an alternative to the "Mantoux" test, he requested a chest X-Ray which the penitentiary authorities ignored. He addressed a grievance to the Warden who answered it on July 20, 1991. In his response, the Warden stated that the sole reason for his segregation was medical quarantine. However, at trial, the defendant stated that the Warden had ordered administrative segregation based on S.40 of the Penitentiary Service Regulations for the purpose of maintaining order in the institution. As well, the statutory monthly reviews of segregation were not carried out.

The plaintiff brought a successful habeas corpus application to obtain his release from segregation. The grounds for segregation set out in S.40 of the Penitentiary Service Regulations do not include "medical quarantine", thus rendering this segregation illegal. Justice Turnbull of the Queen's Bench of New Brunswick ordered an end to the segregation. The plaintiff was required to submit to chest X-Rays and sputum tests. These all revealed to be negative.

The plaintiff in this action, claims $24,250.00 including $18,000.00 as exemplary damages.

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Issues:

1. Was the administrative segregation imposed by the Warden of Renous Institution, justified by the facts in this matter and by the legislation?

2. Does putting a prisoner in administrative segregation without following prescribed regulations constitute the tort of false imprisonment?

3. Is an award of punitive damages justified if the above is found to be "false imprisonment"?

Decision:

1. Justice Denault ruled that the defendant failed to prove that:

   i) inmate St-Jacques had ever been in contact with the infected inmate at Dorchester or that he was on the list of contact persons;

   ii) a written notice ordering the "Mantoux" test and signed by the Regional Medical Officer of Health had been given to St-Jacques before the decision to place him in administrative segregation was made;

   iii) an order from the Regional Medical Officer of Health had ever been given to the Renous health nurse mandating her to enforce "Mantoux" testing on the inmates;

   iv) St-Jacques had been placed in administrative segregation for refusing the "Mantoux" test pursuant to S.25(3) of the New Brunswick Health Act.

   v) an order of "medical quarantine" had ever been made by the Regional Medical Officer of Health.

   Based on the above facts and on the absence of provision for "medical quarantine" under S.40 of the Penitentiary Service Regulations, the administrative segregation of inmate St-Jacques was unjustified in fact and in law.

2. In view of the finding that St-Jacques had been placed in administrative segregation based on improper and unfounded grounds and further, that his case was not reviewed on a monthly basis, as required by subsection 40(1)(b), this segregation constitutes "false imprisonment".

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3. Justice Denault applied LeBar v. Canada [1987] C.F. 585 in awarding $2,000.00 in exemplary damages. He found the behaviour of the penitentiary authorities to be "oppressive, arbitrary and unconstitutional acts by public servants". A further $800.00 was awarded for non-physical damages suffered by St-Jacques during the eighty (80) days of administrative segregation. Finally, $950.00 was given for legal expenses for a total award of $3,758.00.

This decision is currently under appeal.

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FORWARD

This Manual has been prepared by the Department of Justice, Legal Services Unit of the Correctional Service of Canada. It contains a summary of the most significant Canadian cases in the field of correctional law.

For a more complete understanding you may want to refer to the full decision as the summary brings out only the essential part(s) of the case.

Periodically this Manual will be updated as new judgements are released.

INTRODUCTION

Ce recueil de jurisprudence a été préparé par le ministère de la Justice, soit par les Services juridiques du Service correctionnel du Canada. Il contient un résumé des décisions canadiennes importantes en matière de droit correctionnel.

Il s'agit de résumés de jugements qui font ressortir le ou les point(s) essentiel(s) du jugement. Pour de plus amples renseignements, vous pouvez consulter le jugement dans sa version intégrale.

Ce recueil sera mis à jour sur une base périodique.

List of Abreviations / Liste des abréviations

Alta. Q.B.	Alberta Court of Queen's Bench
Alta. S.C.	Alberta Supreme Court
ALL E.R.	All England Law report
Admin. L.R.	Administrative Law Reports
B.C.C.A.	British Columbia Court of Appeal
B.C. Prov. Ct.	British Columbia Provincial Court
B.C.S.C.	British Columbia Supreme Court
C.C.C.	Canadian Criminal Cases
C.N.L.R.	Canadian Native Law Reporter
C.R.	Criminal Reports
C.R.R.	Canadian Rights Reporter
D.L.R.	Dominion Law Reports
Ex. C.R.	ExChequer Court Reports
F.C.	Federal Court
F.C.A.	Federal Court of Appeal
F.C.T.D.	Federal Court Trial Division
F.T.R.	Federal Trial Reports
Man. C.A.	Manitoba Court of Appeal
Man. R.	Manitoba Reports
N.B.C.A.	New Brunswick Court of Appeal
N.B.Q.B.	New Brunswick Queen's Bench
N.S.C.A.	Nova Scotia Court of Appeal
Ont. C.A.	Ontario Court of Appeal
Ont. Co. Ct.	Ontario County Court

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Ont. C. Gen. Div.	Ontario Court General Division
Ont. H.C.	Ontario High Court
Ont. S.C.	Ontario Supreme Court
Q.B.	Queen's Bench
Que. C.A.	Quebec Court of Appeal
Que. Prov. Ct.	Quebec Provincial Court
Que. S.C.	Quebec Superior Court
S.C.C.	Supreme Court of Canada
S.C.R.	Supreme Court Reports
Sask. C.A.	Saskatchewan Court of Appeal
Sask. Q.B.	Saskatchewan Court of Queen's Bench
W.C.B.	Western Criminal Bulletin
W.W.R.	Western Weekly Reports

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- Currie and Nelligan v. CSC
- Daniels (R.v.)
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- Hay v. N.P.B., CSC and the A.G. of Canada
- Jaenicke v. CSC et al.
- Kelly v. Solicitor General et al.
- Pizzuro v. The Warden of Frontenac Institution
- Ratte v. The Warden of Kingston Penitentiary
- St-Jacques v. The Queen

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* **MEDICAL TREATMENT/SOINS MEDICAUX**

- Attorney General of British Columbia et al. v. Astaforoff et al.

* **PAROLE/LIBERATION CONDITIONNELLE**

Day Parole/Libération conditionnelle de jour

- Bains v. National Parole Board
- Beaumier v. National Parole Board et al.
- Dumas v. Director of Leclerc Institution

Discretion/Discrétion

- Perron v. The Commissioner of Corrections et al.

Duty to Act Fairly/Devoir d'agir équitablement

- Beaumier v. National Parole Board et al.

Review of Decision/Révision de la décision

- Beaumier v. National Parole Board et al.

* **PAROLE REVOCATION/REVOCATION DE LIBERATION CONDITIONNELLE**

Arbitrary Detention, Charter, Section 9/Détention arbitraire, article 9 de la Charte

- Klashinsky v. The Queen

Disclosure of Confidential Information/Divulgation d'information confidentielle

- Latham v. Solicitor General of Canada et al.

Double Jeopardy, Charter, Section 11(h)/Double péril, article 11(h) de la Charte

- Klashinsky v. The Queen

Duty to Act Fairly/Devoir d'agir équitablement

- Cadeddu and Nunery v. The Queen
- Greenberg v. National Parole Board and Kaplan
- Re. Howarth and the National Parole Board (F.C.A.)
- Re. Howarth and the National Parole Board (S.C.C.)
- Latham v. Solicitor General of Canada et al.
- Ex Parte Lewis (B.C. Supreme Court)
- Ex Parte Lewis (B.C. Court of Appeal)
- MacAllister v. Goulem
- Martens v. National Parole Board
- Poirier v. National Parole Board

(a) **Right to a Hearing/Droit à une audition**

- Greenberg v. National Parole Board and Kaplan
- Latham v. solicitor General of Canada et al.
- Martens v. National Parole Board
- Poirier v. Naitonal Parole Board

(b) **Right to be Given Reasons/Droit d'être informé des motifs**

- Latham v. Solicitor General of Canada et al.
- Ex. Parte Lewis (B.C. Supreme Court)
- Ex. Parte Lewis (B.C. Court of Appeal)
- Martens v. National Parole Board

(c) **Right to Counsel/Droit à la représentation par avocat**

- Latham v. Solicitor General of Canada et al.

Effect on Sentence Calculation/Effet sur le calcul de sentence

- Re. Hills and The Queen
- Jones v. The Queen
- Klashinsky v. The Queen

Fundamental Justice, Charter, Section 7/Justice naturelle, article 7 de la Charte

- Klashinsky v. The Queen

Jurisdiction of National Parole Board/Juridiction de la Commission nationale des libérations conditionnelles

- Bains v. National Parole Board
- Latham v. Solicitor General of Canada
- MacAllister v. Goulem

Jurisdiction of Quebec Parole Board/Juridiction de la Commission des libérations conditionnelles du Québec

- Rondeau v. Quebec Parole Board et al.

Review Procedure/Procédure de révision

- Bains v. National Parole Board
- Roach v. Director of Kent Institution

Suspension of Parole/Suspension de la libération conditionnelle

- Greenberg v. National Parole Board and Kaplan
- MacAllister v. Goulem

* **PLACE OF CONFINEMENT/LIEU D'EMPRISONNEMENT**

- Careen v. Attorney General of Newfoundland, Attorney General of Canada et al.
- Currie and Nelligan v. CSC (N.B.Q.B.)
- The Queen v. Daniels
- Dinardo v. The Queen
- R. v. Levesque and Reynolds
- Olson v. The Queen (Court of Appeal of Saskatchewan)
- Olson v. The Queen (S.C.C., 1979)
- R. v. Daniels (Sask. C.A.)
- The Queen v. Olson (Ontario Court of Appeal)

* **SEARCHES/FOUILLES**

- Bouchard (R. v.)
- Bryntwick v. Yeomans and Rousseau
- Conway (R. v.)
- Dion (R. v.)
- Gunn v. Yeomans and Caros (F.C.T.D., 1979)
- Gunn v. Yeomans and Caros (F.C.T.D., 1980)
- Henry v. The Queen
- Jackson v. Joyceville Penitentiary (Disciplinary Tribunal)
- Maltby v. Attorney General of Saskatchewan et al.
- Robertson v. Yeomans and Dowsett (F.C.T.D., 1980)
- Robertson v. Yeomans and Dowsett (F.C.T.D., 1981)
- Soenen v. Director of Edmonton Remand Centre et al.
- Warriner v. Disciplinary Tribunal of Kingston Penitentiary
- Weatherall v. The Attorney General of Canada

* **SENTENCE CALCULATION/CALCUL DE SENTENCE**

Consecutive and Concurrent Sentences/Peines consécutives et concurrentes

- Bloome v. National Parole Board et al.
- Booth and Baker v. Attorney General of Canada
- Burbidge and McLean v. The Queen
- Re. Hass and the Queen
- Fontaine v. The Correctional Service of Canada
- Fulton v. The Solicitor General of Canada
- Jones v. The Queen
- Lauzon v. Director of Millhaven Institution (Ontario Supreme Court).
- Lauzon (R. v.) (Ontario Court of Appeal)
- LeBar v. The Queen (F.C.T.D.)
- LeBar v. The Queen (F.C.A.)
- Lylick v. Attorney General of Canada et al.
- McIntyre v. The Queen (F.C.T.D.)
- McIntyre v. The Queen (F.C.A.)
- Shea v. The Queen
- Sowa v. The Queen
- Sowa v. The Queen

Escape/Evasion

- Re. Hass and the Queen
- Ex. Parte Langlois
- Lauzon v. Director of Millhaven Institution (Ontario Supreme Court)
- Lauzon v. (R. v.) (Ontario Court of Appeal)
- Leschenko v. Attorney General of Canada et al.
- MacDonald v. R.

- Re. MacDonald and the Deputy Attorney General of Canada
- McIntyre v. The Queen (F.C.T.D.)
- McIntyre v. The Queen (F.C.A.)
- Milbury v. The Queen
- Morley v. Director of Stony Mountain Institution (Manitoba Court of Queen's Bench)
- Morley v. Director of Stony Mountain Institution (Manitoba Court of Appeal)
- Sinobert v. R.
- Smith v. Solicitor General of Canada and the Director of Matsqui Institution
- Sowa v. The Queen
- Sowa v. The Queen
- Whittaker v. The Queen

General/Général

- Blaylock v. The Queen
- Dempsey v. Attorney General of Canada et al. (F.C.T.D.)
- Dempsey v. Attorney General of Canada et al. (F.C.A.)
- The Queen v. Dozois
- R. v. Dunlop
- Harris v. The Queen
- Hickey v. Correctional Service of Canada
- R. v. Law
- LeBar v. The Queen (F.C.T.D.)
- LeBar v. The Queen (F.C.A.)
- Ex. Parte McCaud (Ontario Supreme Court)
- Ex. Parte McCaud (Ontario Supreme Court)
- Olson v. The Queen (Saskatchewan Court of Appeal)
- R. v. Olson (S.C.C., 1979)
- Roach v. Director of Kent Institution
- Scotland v. Rousseau, Director of Leclerc Institution et al.
- Shaver v. The Queen
- Shiminousky v. Robinson et al.
- Silver v. The Queen

* **SOLICITOR - CLIENT PRIVILEGE/PRIVILEGE AVOCAT - CLIENT**

- Belliveau v. The Queen [1982] 1 F.C. 439 (F.C.T.D.)
- Solosky v. The Queen (F.C.T.D.)
- Solosky v. The Queen (S.C.C.)

* **SPECIAL HANDLING UNIT/UNITE SPECIALE DE DETENTION**

- Currie and Nelligan v. CSC (N.B.Q.B.)
- Gallant v. Trono (F.C.T.D.)
- Gallant v. Trono (F.C.A.)
- Re. Miller
- The Queen v. Miller
- Morin v. National Special Handling Unit Committee et al. (Quebec Superior Court)
- Morin v. National Special Handling Unit Committee et al. (S.C.C.)
- Morin v. Sauvé et al.

* **STATUTORY REMISSION/REDUCTION STATUTAIRE DE PEINE**

- Morley v. Director of Stony Mountain Institution (Manitoba Court of Queen's Bench)
- Morley v. Director of Stony Mountain Institution (Manitoba Court of Appeal)

* **SUBPOENA**

- Gingras (R. v.)

* **TEMPORARY ABSENCE/ABSENCE TEMPORAIRE**

- Hay v. National Parole Board et al.
- Toews v. Stonoski

* **TRANSFER/TRANSFEREMENT**

Arbitrary Detention, Charter, Section 9/Détention arbitraire, article 9 de la Charte

- Pilon and Tyler v. Yeomans

Availability of Habeas Corpus/Possibilité de procéder par voie d'habeas corpus

- Balian v. Regional Transfer Board and Warden of Joyceville Institution
- Currie and Nelligan v. CSC (N.B.Q.B.)
- Jaenicke v. CSC et al.
- Pruneau v. Goulem
- Ribaric v. National Parole Board

Cruel and Unusual Punishment, Charter, Section 12/Traitement cruel ou inusité, article 12 de la Charte

- The Queen v. Daniels (Sask. Q.B.)
- The Queen v. Daniels (Sask. C.A.)

Delegation of Authority/Délégaton de pouvoirs

- Anaskan v. The Queen
- Chester v. The Queen

Duty to Act Fairly/Devoir d'agir équitablement

- Balian v. Regional Transfer Board & Warden of Joyceville Institution
- Bruce v. Yeomans
- Bruce and Meadley v. Reynett and Yeomans
- Butler v. The Queen et al.
- Camphaug v. The Queen et al.
- Chester v. The Queen
- Collin v. Lussier
- Lussier v. Collin
- DeMaria v. The Regional Classification Board et al. (F.C.T.D., 1986)
- DeMaria v. The Regional Classification Board et al. (F.C.A.)
- Dunbar v. The Warden of Millhaven et al.
- Feuerstein v. The Queen
- Gallant v. Trono (F.C.T.D.)
- Gallant v. Trono (F.C.A.)
- Hay v. National Parole Board et al.
- Hnatiuk v. The Queen
- Jacobson v. Regional Transfer Board (Pacific)
- Jamieson v. R. LeBlanc and G. Downing
- Kelly v. Attorney General of Canada
- Lasalle v. Disciplinary Tribunal of Leclerc Institution and Rousseau
- Magrath v. R.
- McInroy v. Benner et al.
- Mitchell v. Crozier et al.
- Re. Morin and the Dir. of Corrections for Saskatchewan et al.
- Pagé v. Yeomans
- Perron v. Commissioner of Corrections and the National Parole Board
- Pilon and Tyler v. Yeomans
- Pruneau v. Goulem et al.
- Ribaric v. National Parole Board
- Seymour v. R.D. McGregor in his capacity as Regional Director (Pacific)
- Smoke v. Commissioner of Corrections et al.
- Spearman v. Gobeil and Commissioner of Penitentiaries

(a) **Right to a Hearing/Droit à une audition**

- Bruce v. Yeomans
- Butler v. The Queen et al.
- DeMaria v. The Regional Classification Board et al. (F.C.T.D., 1986)
- Dubois v. Sauvé et al.
- Jacobson v. Regional Transfer Board (Pacific)
- Jamieson v. R. LeBlanc and G. Downing
- Lasalle v. Disciplinary Tribunal of Leclerc Institution and Rousseau
- McInroy v. Benner et al.
- Pilon and Tyler v. Yeomans
- Smoke v. Commissioner of Corrections et al.

(b) **Right to Notice/Droit à un avis**

- Chester v. The Queen
- Gallant v. Trono (F.C.T.D.)
- Gallant v. Trono (F.C.A.)
- Re. Morin and the Director of Corrections for Saskatchewan et al.
- Smoke v. Commissioner of Corrections et al.

(c) **Right to be Given Reasons/Droit d'être informé des motifs**

- Currie and Nelligan v. CSC (N.B.Q.B.)
- Balian v. Regional Transfer Board & Warden of Joyceville Institution
- Bruce v. Yeomans
- DeMaria v. Regional Classification Board et al. (F.C.A., 1986)
- Dunbar v. Warden of Millhaven et al.
- Feuerstein v. The Queen
- Gallant v. Trono (F.C.T.D.)
- Gallant v. Trono (F.C.A.)
- Hnatiuk v. The Queen
- Lasalle v. disciplinary Tribunal of Leclerc Institution and Rousseau
- Macgrath v. R.
- Millette v. Alarie et al.
- Mitchell v. Crozier et al.
- Poirier v. the Federal Training Centre Disciplinary Board et al.
- Seymour v. R.D. McGregor in his capacity as Regional Director (Pacific)
- Spearman v. Gobeil and Commissioner of Penitentiaries

(d) **Right to Counsel/Droit à un avocat**

- Ribaric v. National Parole Board

Freedom of Religion and Association, Charter, Section 2/Liberté de religion et d'association, article 2 de la Charte

- Butler v. The Queen et al.

Fundamental Justice, Charter, Section 7/Justice naturelle, article 7 de la Charte

- Camphaug v. The Queen et al.
- Chester v. The Queen
- Collin v. Lussier
- Lussier v. Collin
- Gallant v. Trono (F.C.T.D.)
- Gallant v. Trono (F.C.A.)
- DeMaria v. The Regional Transfer Board & Mr. Tom Epp, Warden of Joyceville Institution (F.C.T.D., 1988)
- Hay v. National Parole Board et al.
- Jamieson v. R. LeBlanc and G. Downing
- Mitchell v. Crozier et al.
- Pilon and Tyler v. Yeomans

Inmate Rights - Right to be Kept in a Particular Institution/Droits des Détenus - droit de rester dans un établissement spécifique

- Anaskan v. The Queen
- Careen v. Attorney General of Newfoundland, Attorney General of Canada et al.
- Currie and Nelligan v. CSC (N.B.Q.B.)
- Perron v. Commissioner of Corrections and the National Parole Board

Institutional Security/Sécurité dans les établissements

- Re. Morin and the Director of Corrections for Saskatchewan et al.

Jurisdiction/Juridiction

- R. v. Walford

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- Morin v. Sauvé et al.
- Unrau v. Warden of Saskatoon Correctional Centre et al.

Right to Retain and Instruct Counsel, Charter, Section 10/Droit d'avoir recours à l'assistance d'un avocat, article 10 de la Charte

- R. v. Walford

Special Handling Unit/Unité spéciale de détention

- Chester v. The Queen
- Currie and Nelligan v. CSC (N.B.Q.B.)
- Dubois v. Goulem
- Gallant v. Trono (F.C.T.D.)
- Gallant v. Trono (F.C.A.)
- McIlvride v. The Attorney General of Canada et al.
- McInroy v. Benner et al.
- Morin v. National Special Handling Unit Committee et al. (Quebec Superior Court)
- Morin v. National Special Handling Unit Committee et al. (S.C.C.)
- Morin v. Sauvé et al.
- Pruneau v. Goulem

Staying of Execution/Suspension d'exécution

- The Queen v. Faulkner

Transfer - Her Majesty's Penitentiary in Newfoundland/ Transfèrement impliquant le Pénitencier de Sa Majesté à Terre-Neuve

- Bell v. Director of Springhill Institution
- Careen v. Attorney General of Newfoundland

Transfer - Inter-jurisdictional/Transfèrement Interjuridictionnel

- Anaskan v. The Queen
- Re. Morin and the Director of Corrections for Saskatchewan et al.
- Unrau v. Warden of Saskatoon Correctional Centre et al.

Transfer -Transfer of Offenders Act/Transfèrement -Loi sur le transfèrement des détenus

- Fulton v. The Solicitor General of Canada
- Korrol v. Deputy Attorney General of Canada and the Solicitor General of Canada

* **TRUST FUND/COMPTE EN FIDUCIE**

- Henry v. Commissioner of Penitentiaries

* **UNESCORTED TEMPORARY ABSENCES/ABSENCES TEMPORAIRES SANS ESCORTE**

- Cadieux v. Director of Mountain Institution and the National Parole Board
- Hay v. N.P.B., CSC and the A.G. of Canada

* **USE OF FORCE/UTILISATION DE LA FORCE**

- R. v. Berrie
- Germain v. Therrien

* **VISITING PRIVILEGES/PRIVILEGES DE VISITE**

- Bryntwick v. Yeomans and Rousseau
- Veysey v. The Commissioner of the Correctional Service of Canada (F.C.T.D.)
- Veysey v. The Commissioner of the Correctional Service of Canada (F.C.A.)

* **VOTING/DROIT DE VOTE**

- Badger v. Attorney General of Canada (Manitoba Court of Queen's Bench)
- Badger v. Attorney General of Canada(Manitoba Court of Appeal, 1986)
- Badger v. Attorney General of Manitoba(Manitoba Court of Appeal, 1988)
- Jolivet and Barker v. The Queen and the Solicitor General of Canada
- Levesque v. Attorney General of Canada et al.
- Maltby v. Attorney General of Saskatchewan et al.
- R. v. Belczowski (F.C.A.)
- Reynolds v. Attorney General of British Columbia
- Sauvé v. The Attorney General of Canada et al.

* **WARRANTS OF COMMITTAL/MANDATS DE DEPOT**

- Bedard v. Correctional Service of Canada and Director of Leclerc Institution
- Johns v. Commissioner of Penitentiaries
- MacDonald v. R.
- Re. MacDonald and the Deputy Attorney General of Canada
- Olson v. The Queen (Saskatchewan Court of Appeal)
- Olson v. The Queen (S.C.C., 1979)
- Pizzuro v. the Warden of Frontenac Institution

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RICHARD AMBROSE v. MARK TIMMS (INDEPENDENT CHAIRPERSON) AND EDMONTON INSTITUTION

This is a judgment of the Federal Court, Trial Division, rendered orally by Mr. Justice Jerome on January 6, 1989.

Facts:

In October 1988, inmate Ambrose was charged with the disciplinary offence of indecent exposure pursuant to section 39 of the Penitentiary Service Regulations. The Disciplinary Tribunal found inmate Ambrose to have exposed his naked genitals to a female sub-control officer on five occasions within the period of one hour. A penalty of fifteen (15) days dissociation was imposed, effective immediately. This is an application for certiorari of the Tribunal's decision.

Issue:

Whether the Disciplinary Tribunal conducted itself in accordance with its duty to act fairly.

Held:

Application for certiorari granted. The Tribunal did not observe the proper standard of fairness and the matter was returned to the Tribunal for a fresh hearing conducted by a new Chairman.

Reasons

The fact that the Tribunal was advised by two different officers during the hearing and that neither of them were present for both the determination of guilt and punishment was not found, because of the Court's findings on other grounds, to be sufficient to grant the application. However, the Court stressed that such an occurrence should be rare and usually at least one officer should be present throughout the entire proceeding.

The Tribunal did not meet its requisite duty to act fairly with respect to the Independent Chairperson's discretion respecting punishment. While the Court recognized that the standard of fairness to be observed by such a Tribunal is less than that of a judicial determination, the Court nevertheless found that the Tribunal did not meet this lower threshold of fairness. Fairness requires that after excluding Ambrose and his counsel from hearing submissions as to punishment by designated officers, some information be conveyed to them concerning those deliberations that had taken place in their absence. The failure to do so and to give the accused and his counsel an opportunity to react is contrary to the duty to act fairly and regulation 38.4 of the Penitentiary Service Regulations. In light of the Tribunal's failure to follow Regulation 38.4, the application was granted.

Anaskan v. Her Majesty the Queen

Judgement of the Supreme Court of Ontario, Court of Appeal, rendered by Mr. Justice Evans, Mackinnon and Zuber on January 17, 1977.

This is an appeal from a decision of the Supreme Court of Ontario, Trial Division, allowing a transfer from a provincial jail in Saskatchewan to a federal penitentiary in Kingston.

Issue:

Was the appellant legally removed from a provincial correctional centre in Saskatchewan to the federal prison from women at Kingston, Ontario, where she is now ?

S. 15(1) of the *Penitentiary Act* authorizes the Solicitor General to enter into an agreement with the Government of any province, to accept the transfer into a federal penitentiary of prisoners who are serving sentences between six months and two years long. The Government of Saskatchewan reached an agreement for the transfer under the authority of the Federal-Provincial Agreements Act of 1972.

S. 15(1) of the *Penitentiary Act* is a particular intention of Parliament to alter the general rule expressed in s. 659(3) of the *Criminal Code* which orders that a sentence of six months to two years be served in a provincial institution.

The Solicitor General has signed a general agreement on November 21, 1973 according to s. 15(1) of the *Penitentiary Act* and he does not need to sign each agreement personally, he can delegate that power to someone else.

If the decision was one that affected the civil rights of the inmate, it would have required a quasi-judicial procedure. The inmate had no "right " to be in particular institution. Therefore since the question of the transfer of a prisoner is an administrative matter and it does not affect the civil rights of an inmate, a quasi-judicial procedure is not required.

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Obiter: The appellant has taken a writ of certiorari to quash the decision taken by the Government of Saskatchewan. The Ontario Court of Appeal has no power to quash an order from another government taken by virtue of its statute but the Court dealt with the issue even though it has no jurisdiction.

The appeal is dismissed.

Attorney General for the Province of British Columbia, Stevenson and Merat v. Astaforoff and Attorney General of Canada

This was a decision rendered by the British Columbia Court of Appeal with the reasons for judgment being delivered by the Honourable Mr. Justice Taggart on July 14, 1983.

This was an appeal by the Attorney General of Canada from the decision of Bouck, J., who refused to make an order to compel the British Columbia Corrections Branch to provide such medical care to Mrs. Astaforoff as appropriate under the circumstances in order to preserve her life and health.

Facts: Mrs. Astaforoff is a Doukhobor who was convicted of arson on September 14, 1981 and later sentenced to a term of imprisonment of three years. Under an agreement between the Government of Canada and the Government of British Columbia, British Columbia agreed to receive and confine Mrs. Astaforoff in a provincial institution. Pursuant to that agreement she was imprisoned at the Lakeside Correctional Centre, where she was kept when this case arose. Mrs. Astaforoff has fasted on several occasions while incarcerated. During the fast which gave rise to these proceedings, Mrs. Astaforoff informed the director of medical services for British Columbia Corrections Branch that she did not wish, either during a conscious state or during an unconscious state, to be fed by force, nor did she wish to receive any medical treatment. The said director expressed the opinion, before the court, that Mrs. Astaforoff could die within a few days, or within a few weeks, unless provided with food.

Issue:

Should a declaration have been made that the B.C. Corrections Branch is under a statutory duty, a common law duty, or both, to render such medical treatment as deemed appropriate to preserve the life or Mary Astaforoff, although she did not consent to such treatment ?

Held:

(1) Based on the statutes and regulations to which the court was referred by the appellants, the B.C. Corrections Branch does not have a statutory duty to render such medical treatment as deemed appropriate to preserve Mrs. Astaforoff's life, where she did not consent to such medical treatment.

(2) As there is no clear authority establishing a common law duty requiring the B.C. Corrections Branch to render such medical treatment as deemed appropriate to preserve Mrs. Astaforoff's life where she did not give her consent, a declaratory order such as the one sought in this case should not be made on that basis.

Order

The court should not make the declaration sought. Appeal dismissed.

BADGER v. ATTORNEY GENERAL OF MANITOBA

This is a judgment of the Queen's Bench Court of Manitoba rendered by the Honourable M. Justice Scollin on March 12, 1986.

The applicants seek a declaration that section 31 of the Elections Act of Manitoba which disqualifies inmates as voters is unconstitutional in view of section 3 of the Canadian Charter of Rights and Freedoms and that their names should be placed on the voters' list for the next Manitoba election.

ISSUE

Whether section 31 of the Elections Act constitutes a reasonable limit, in accordance with Section 1 of the Charter, to the fundamental right to vote.

DECISION

In the recent Oakes case, the Supreme Court of Canada has provided the key test to the application and use of section 1 of the Charter. A limit is considered reasonable and demonstrably justified in a free and democratic society if it meets two criteria: first, the objective of the measure must be sufficient in importance to override a constitutionally protected right or freedom. Second, the objective being recognized, it must be carefully designed, exempt from unfairness or arbitrary procedure, it should impair the right or freedom as little as possible, and should preserve a proportionality between the objective sought and the effects of the measure.

Applying this test to the right to vote, the first step is therefore to determine whether there is a sufficient objective behind the disenfranchisement of prisoners to justify the negation of a right protected by the Charter. The Attorney General submitted that society may take the conduct of criminals into account and decline to give any weight to their political views or choices. The limitation of the right to vote may in that respect have the several legitimate objectives of preserving the currency of franchise and both symbolically and practically stigmatizing those who deliberately breach their duty to society. Consequently, there exists an objective of major importance which justifies the legislation imposing a limit to the constitutional right to vote.

However, once the objective and general nature of the limit have been justified, the real issue becomes the proportionality test referred to in the Oakes case and its three aspects described above. The disqualification in the Elections Act clearly fails this proportionality test. It is a blanket disqualification of absolutely everyone who is in a penal institution, serving a sentence for any offence, serious or minor. Furthermore, the requisite rational connection between the objective and the measure may be absent, for instance, in the case of a person who has been imprisoned for the inadvertent commission of an offence of absolute liability. The law-makers must give more considerate thought to the Charter implications of their legislations. Section 31(d) as it presently reads could not be justified by section 1 of the Charter; it is therefore of no force or effect.

The application was allowed in part

(Having struck down the provision, the learned judge stated that in the circumstances, the election being only a few days away, public interest including the perception by the public of the operation of its own legal system should prevail over the claim of the applicants to be placed on the voters' list for such election. He further stated that the legislators should be given an opportunity to decide what limit, if any, should be placed on the right to vote. An integral part of the statute having been held invalid, the whole system is left crippled and distorted. The learned judge consequently refused to order that any steps be taken to enable convicted prisoners to participate in the election.)

Badger v. Attorney General of Manitoba

This is a judgment of the Manitoba Court of Appeal rendered on March 17, 1986.

FACTS:

The appellants were successful before the Supreme Court of Manitoba where they argued that section 31(d) of the Manitoba Elections Act, which disenfranchised inmates from voting, violated section 3 of the Charter. However, the inmates went on appeal of this decision because they wanted to force the Chief Electoral Officer to place their names on the voters' list. This case was argued a few hours before the provincial elections day.

ISSUE:

Whether the appellants can have their names put on the voters' list?

DECISION:

The Manitoba Court of Appeal assumed that the law of Manitoba was as expressed by The Supreme Court of Manitoba and that, therefore, prisoners were not disenfranchised.

The Manitoba Court of Appeal ruled that it would not be just and appropriate (section 24 of the Charter) to make the order sought by the applicant at that time.

There was not much time left to put in place some voting mechanism. Moreover, it was felt by the Court that it was not appropriate to order to government officials how to put in place such mechanisms for inmate voting.

Application for mandamus dismissed.

Badger vs Attorney General of Manitoba

This is a decision of the Manitoba Court of Appeal rendered on November 18, 1988.

The Applicant appealed the decision of Mr. Justice Hirschfield of the Manitoba Court of Queen's Bench delivered on November 4, 1988. In that decision, the Manitoba Court of Queen's Bench declared that section 14(4)(e) of the Canada Elections Act was inconsistent with section 3 of the Charter and that it was not a reasonable limit.

Facts:

Inmate Badger along with some other inmates filed a Motion challenging section 14(4)(e) of the Canada Elections Act which disqualifies from voting "every person undergoing punishment as an inmate in any penal institution for the commission of any offence". The Manitoba Court of Queen's Bench declared that section 14(4)(e) of the Canada Elections Act to be inconsistent with section 3 of the Charter. Essentially, the Court found that the wording of the Canada Elections Act was too broad. The Crown filed an appeal to the Manitoba Court of Appeal.

Issues:

(1) Is section 14(4)(e) of the Canada Elections Act inconsistent with section 3 of the Charter?

(2) If so, is that a reasonable limit prescribed by law which is justified in a free and democratic society?

Decision:

(1) The Manitoba Court of Appeal found that section 14(4)(e) of the Canada Elections Act was inconsistent with section 3 of the Charter.

(2) The Court however found that it was a reasonable limit prescribed by law which was justified in a free and democratic society.

The appeal was granted. The inmate filed a Leave to Appeal in Supreme Court of Canada which was rejected on June 8, 1989.

Bailey v. Thomas Dinsley, in his capacity as the Independent Chairperson of Disciplinary Court of Mission Institution

Judgement of the Federal Court of Canada, Trial Division, rendered by the Honourable M. Justice Teitelbaum on August 22, 1986.

This is an application for a writ of certiorari quashing the respondent's decision to convict and sentence the applicant of an offence pursuant to subsection 39(i) of the Penitentiary Service Regulations.

FACTS

In 1983, the applicant was sentenced to a term of 7 years imprisonment.

On February 10, 1986, he was charged pursuant to subsection 39(i) of the Penitentiary Service Regulations with having contraband in his possession. The Inmate Offence Report and Notification of Charge stated the offence category as being "intermediary".

After having appeared before the respondent and having obtained an adjournment on February 13, 1986, the applicant contacted Ruth Elliot, Legal Information Counsellor, in order to obtain legal advice. She gave him general advice on how to proceed, as she was unable to attend the hearing scheduled for February 20, 1986.

On February 20, when he appeared before the respondent, the applicant requested counsel, which request was denied. The applicant was subsequently found guilty of having contraband in his possession and was sentenced to 15 days punitive dissociation, loss of all privileges except smoking, correspondence and visits, suspended 60 days pending good behaviour, and a fine of $20.00. He also failed to earn remission which he would have earned, had he not been found guilty.

It is now argued that the denial of representation by counsel, as well as lack of evidence, make the applicant's sentence and conviction illegal.

ISSUES

Whether the respondent should have adjourned the hearing in order to enable the applicant to obtain counsel.

Whether there was any evidence before the respondent with regard to the charge to enable him to find the applicant guilty of the said charge.

DECISION

The Court referred itself to the Savard and Howard cases, dealing with the issue of representation by counsel before Disciplinary Courts. In this particular case, the offence was listed as being an intermediary one. The applicant was given the punishments prescribed by subsection 38(8) of the Penitentiary Service Regulations, and failed to earn remission in view of his conviction. Considering the circumstances of this case relating to the type of offence and the possible punishments, especially dissociation and failure to earn remission, the offence was one that the failure to allow the applicant the right to counsel was a denial of the principles of fundamental justice accorded under section 7 of the Canadian Charter or Rights and Freedoms.

As for the issue relating to lack of evidence, the Court must find that a principle of fundamental justice was not followed in order to quash the decision of an Independent Chairperson.

An inmate must be given the opportunity to defend himself against any charge, and in order to do so he must be made aware of the evidence that is used to attempt to obtain a decision against him. In this case, no evidence was disclosed at the hearing, according to the transcript. The results of the tests conducted on the objects found in the applicant's cell were never disclosed to him, and he cannot be assumed to have known them. This was a denial of fundamental justice.

The applicant was dismissed.

FANJA SINGH BAINS v. NATIONAL PAROLE BOARD

Judgment of the Federal Court, Trial Division, rendered by Mr. Justice Muldoon on August 1, 1989.

Application by an inmate for a writ of certiorari to quash the Chairman's decision that the Board reçeive and consider information which might not have been available to the Board when it considered the applicant's case and that correctional authorities not release the applicant until the Board had an opportunity to consider the new information; a writ of mandamus to compel the Board to implement its decision of June 23, 1989 admitting the applicant to day parole, and; a writ of prohibition in order to prevent the Board from instituting any review of its decision taken on June 23, 1989.

FACTS:

The Applicant was serving a term of 18 years imprisonment in consequence of his having been convicted of three counts of attempted murder. He became eligible for release on day parole on June 7, 1987 and on full parole on June 7, 1989. Having heard the applicant's proposed plans for release and considered the supportive community assessment report prepared by the Correctional Services of Canada (CSC), on June 23, 1989, a panel of the Board decided to admit the applicant to day parole to a half-way house in the Peterborough area. He was to take up employment with his community contact.

Prior to implementing the Board's decision, further highly unusual negative representations were made to the Board's Chairman and its Ontario Regional Director by the trial judge, the Attorney General and Deputy Attorney General of Ontario, the prosecuting Crown Attorney, and the Mayor and Deputy Chief of Police of Peterborough to the effect that the applicant had threatened to murder the trial judge, and he should not be admitted to day parole.

The Chairman then instructed that the Applicant not be released until the Board had an opportunity to consider the new information.

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ISSUE:

Whether the Board had jurisdiction to review its decision of June 23, 1989 upon the receipt of the new information; whether the Chairman had jurisdiction to instruct his staff not to effect release of the applicant until the Board had an opportunity to consider the new information.

JUDGMENT:

Application for Certiorari and Mandamus allowed.

Neither the Chairman nor the Board had any specific statutory or regulatory authority to do what the Chairman purported to do. The "exclusive jurisdiction and absolute discretion" conferred upon the Board by s. 13 of the Parole Act R.S.C. 1985, c. P-2 must be wielded fairly and lawfully meaning at least within the jurisdiction of the Board. Since the Board relied on the directions issued by its Chairman, its actions in apparently nullifying its own decision to admit the applicant to day parole rendered this nullification reviewable by the Federal Court.

The Court granted an order of prohibition as well, which prohibited the Board from doing anything adverse to the Applicant's day parole except in accordance with the law as stated in the Act.

Raffic Balian v. Regional Transfer Board and Warden of Joyceville

Judgement by the Honourable Mr. Justice Smith of the Supreme Court of Ontario on February 1, 1988.

It involves an application for habeas corpus with certiorari in aid by inmate Balian to have his emergency transfer to Millhaven from Joyceville quashed.

FACTS The precipitating events leading to the impugned transfer was a sit-down strike at Joyceville protesting the involuntary transfer to Millhaven of inmate Demaria. The applicant and two others were identified by CSC security information as being ring leaders in the sit-down. The inmates were singled out and directed to return to work. They refused to do so and were subsequently transferred to Millhaven. The applicant claimed that the transfer was a breach of s. 7 of the Charter or of the rules of natural justice.

ISSUE 1) Does a provincial Superior Court have jurisdiction to issue habeas corpus in respect of a transfer from a medium security institution to a maximum facility? 2) Was procedural fairness observed in the transfer of the inmate?

DECISION As a matter of practicality, the Federal Court was indicated to be the more appropriate forum in the vast majority of custodial penitentiary cases. Notwithstanding this, the ruling established that the validity of a detention imposed by a federal board where the deprivation of an inmate's residual liberty is significant may now be challenged in provincial courts and not just the Federal Court. Habeas corpus may therefore issue in cases where the inmate is transferred to a higher security facility.

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On the issue of procedural fairness the court held that emergency situations must be recognized as permitting the authorities to derogate temporarily from the rules but any arbitrariness, or suspicion thereof, must be promptly addressed. The court justified judicial intervention in this case on the finding that the right of the applicant to defend himself was ignored and that he was given insufficient information regarding the case against him. He therefore had no basis upon which to mount a challenge of the order of transfer. On the basis that procedural fairness had not been observed the court quashed the transfer decision and ordered that the applicant be returned to Joyceville.

Jean-Claude Beaulieu v. René Rousseau, Director of Leclerc Institution

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Joyal on December 14, 1987.

This is an application for an injunction and a writ of mandamus against the decision of the penitentiary authorities to deny the applicant access to certain rehabilitative programs.

FACTS: On January 31, 1986, the applicant was charged with three disciplinary offences, one of them intermediary and the other two minor. He pleaded guilty to all three, and was fined $5.00 and deprived of privileges for four evenings. The procedure concerning those events has not been contested. Subsequent to the offences and to analysis of the applicant's file, however, the inmate's application for a period of escorted temporary absence was denied, his eligibility for the private family visiting program was suspended for six months, and seven days of his earned remission were forfeited.

The applicant contends that these additional measures constitute an abuse of power, a policy of harassment and a double incrimination for the same offences.

ISSUE: Were the measures imposed on the applicant abusive, and did they warrant intervention by the court?

DECISION: The respondent argued that the Court was not competent to intervene because the actions contested by the applicant were administrative in nature and because those actions were taken in circumstances in which internal discipline in a penitentiary was applied with two basic requirements in mind: incarceration of the offender, and rehabilitation of the offender during the months he was serving his term. The respondent also claimed that the privileges granted to some inmates under the programs set up within the institutions were not rights such that offenders could demand their observance.

In its review of administrative decisions, this court does not have the powers of a Court of Appeal: barring an irregularity, a breach of natural justice, a board's acting beyond its jurisdiction or a board's making a finding perversely and capriciously, an administrative

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decision may not be contested even if the court does not subscribe to the administrative board's reasoning.

As for the allegation that the inmate was incriminated twice - in violation of section 11 of the Charter - the punishment awarded to the applicant for his offences of January 31 had a clearly disciplinary aspect that is not present in the other decisions made by the Correctional Service. Those other decisions were based on different regulations, under which the inmate was required to meet standards of conduct before being able to take advantage of programs set up within the institutions.

From its analysis of the applicant's Progress Summary and of the decisions made in his regard throughout this case, the court has not detected any procedural flaw that would justify its intervention.

The application was dismissed.

Serge Beaumier v. National Parole Board

Judgement of the Federal Court, Trial Division, rendered by Mr. Justice Dubé on July 16, 1980

Application by a penitentiary inmate for a writ of mandamus directing the National Parole Board to give effect to the granting of the inmate's day parole.

Facts:

The inmate had been granted day parole but prior to his release, the Board changed its mind and refused to grant the parole.

Issues:

1- Does the Board have power to review its own decision ?

According to s. 6 of the *Parole Act*, the Board has absolute discretion to grant or refuse to grant parole. It includes the power to review its own decisions. The inmate's parole has not been revoked as parole had been refused before it began, therefore the revocation provisions of the Act were inapplicable.

2- Was the Board subject to a duty to act quasi-judicially or to act fairly?

The decisions of the Board were not subject to a duty to act on quasi-judicial basis but the Board had the obligation to act fairly, that being a fundamental principle with respect to administrative decisions.

The Board has the obligation to hear the inmate on the application for day parole but did not have to hear him again and did not have to re-examine its decision according to s. 9 of the *Parole Act* with respect to revocation decisions.

The application is dismissed

Serge Beaumier v. National Parole Board (2)

REFERENCES: Martineau #1, #2
Howarth (F.C.) (S.C.)
Bruce
Dubeau
Cline
Ex parte McCaud (Nov. 1968)

BECHARD V. H.M.Q. AND HOWARD AZIZ (F.C.T.D. T-493-89)

This is an Application for a Writ of Certiorari to quash the decision of the Independent Chairperson at Warkworth Institution.

FACTS

Inmate Bechard brought an application for a Writ of Certiorari to quash the conviction imposed by the Independent Chairperson pursuant to section 39(k) of the Penitentiary Service Regulations.

The inmate was charged and convicted with the offence of doing "an act that is calculated to prejudice the discipline or good order of the institution", i.e. he put his hand containing granules of an unknown substance to his mouth while an officer was searching for contraband. The inmate admitted doing the act but claimed it was a joke.

ISSUE

Whether the inmate was properly charged under section 39(k) of the Penitentiary Service Regulations?

DECISION

Held per Teitlebaum J.

There was no breach of natural justice in the manner in which the hearing was conducted. Bechard may have thought his act was only a crude joke, when a search for contraband was in progress, to put his hand containing a known substance to his mouth and to swallow the substance, but Teitlebaum J. was satisfied that it is precisely this type of act that is contemplated to be stopped by a section 39(k) charge. In this case the inmate could not be charged with a section 39(i) offence as it would be difficult if not impossible to prove possession of contraband after it was swallowed.

The Application was dismissed.

Bédard v. The Correctional Service of Canada and the Director of the Leclerc Institution.

This is a judgement of Mr. Justice Muldoon of the Federal Court (Trial Division) rendered September 30, 1983.

The applicant sought a writ of mandamus, ordering the respondents to receive and to execute immediately all warrants of commital issued against him.

Facts: The applicant is presently serving a term of 5 years' imprisonment, at the Leclerc Institution, a federal penitentiary in the Province of Québec, upon a conviction of an indictable offence contrary to section 4 of the *Narcotic Control Act*.

The applicant alleges that there are 37 warrants of committal for non-payment of fines for offences against municipal parking by-laws and the *Highway Code of Québec*. In default of payment of these fines, the applicant has been sentenced to imprisonment for 123 non-concurrent days.

The applicant alleges that the refusal by the respondents to execute the warrants runs counter to section 659(2) of the *Criminal Code* and will cause him prejudice if not executed before the expiration of his present sentence.

Issues: Does subsection 659(2) comprehend sentences imposed not only pursuant to the *Criminal Code* and other laws of Canada, but also sentences imposed pursuant to the laws of a province and one of its municipalities?

Is there a public duty imposed on the respondents for which mandamus will lie?

Is there a remedy under the *Charter of Rights and Freedoms*?

Held: Mandamus will not lie to compel a public authority to do something which is not required by law.

No provision can be found in the *Criminal Code*, the *Penitentiary Act*, the *Parole Act*, or the *Prisons and Reformatories Act*, imposing any duty to execute the warrants. Section 659 of the *Criminal Code* creates no such obligation.

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Although the applicant has been deprived of his liberty because he is an inmate in a federal penitentiary, in regard to s. 7 of the *Charter* such deprivation of liberty upon a conviction, is not counter to the principles of fundamental justice. His right to liberty has not been infringed.

The Federal Court of Canada is not "a court of competent jurisdiction" for purposes of s. 24 of the *Charter* to compel the Québec authorities to credit the applicant's time in the penitentiary towards his provincial sentences.

In regard to s. 9 of the *Charter*, it is also not of competent jurisdiction where there is a complaint against the application of the laws of Québec. The Federal Court cannot interfere in the administration of the laws of Québec.

In regard to s. 11(b) of the *Charter* it was argued that "... to be tried within a reasonable time" should be read, by analogy, to mean "to undergo one's imprisonment within a reasonable time". The analogy is unworkable. Reasonable time for undergoing imprisonment can only be such as is provided according to a law which itself retains its force and effect in contemplation of the *Charter*.

Order: The application for mandamus is denied.

Bell v.Director of Springhill

Judgement of the Supreme Court of Nova Scotia rendered by Mr. Justice Mackeigan, Coffin and Macdonald on March 7, 1977.

The appelant, by Habeas Corpus, seeks an order to release him from Springhill so that he may serve the rest of his sentence at St-John's penitentiary.

Facts:

The appelant was sentenced to four and a half years of imprisonment in Her Majesty's penitentiary at St-John's, Newfoundland. He was further transferred to Dorchester Penitentiary at Dorchester pursuant to a transfer warrant delivered in conformity with s. 13(3) of the *Penitentiary Act*. He was later transferred to Springhill penitentiary again under s. 13(3) of the *Penitentiary Act*.

Issues:

Does the word "penitentiary" in s. 13(3) of the *Penitentiary Act* include only a penitentiary as defined by s. 2(1) of the *Penitentiary Act* in a restrictive sense?

S. 13(5) of the *Penitentiary Act* says that persons sentenced to imprisonment for life or for a term not less than two years shall be imprisoned in a penitentiary operated by the province of Newfoundland in St-Johns. The legislative history of the interpretation of s. 13(5) does not support the opinion that Her Majesty's penitentiary should be included in s. 13(3) of the *Penitentiary Act* to permit the transfer of inmate Bell.

S. 13(5) of the *Penitentiary Act* was designed to implement the agreement made between Newfoundland and Canada at the time of the Confederation. It was agreed that the Newfoundland Courts would sentence prisoners to imprisonment in a penitentiary under the control and legislation of the provincial authorities.

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The court concludes that the definition of "penitentiary" in s. 2 of the *Penitentiary Act* must be applied restrictively to s. 13(3) of the *Penitentiary Act* and does not include any other penitentiary like Her Majesty's penitentiary in St-Johns. Therefore the transfer of the inmate from Her Majesty's penitentiary was illegal.

Order: It is ordered that inmate Bell be transferred from Springhill Penitentiary to Her Majesty's penitentiary in St-Johns, Newfoundland.

Frank Belliveau v. Her Majesty the Queen

This is a judgement of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Collier on May 27, 1981 in Vancouver.

Claim against the Crown by an inmate who alleges that some of his privileged correspondence has been opened by penitentiary authorities and a declaration that his release date has been calculated incorrectly.

Facts

On May 27, 1977 the plaintiff was convicted and sentenced to seven years imprisonment at Dorchester penitentiary for rape. He appealed his conviction and a new trial was ordered. While awaiting his new trial he was transferred to a provincial institution. On June 1, 1978, he was again convicted of rape after the second trial. He was sentenced to six years in Dorchester penitentiary.

The practice at both institutions from 1977 to date was, and is, to open so-called ordinary mail, or general correspondence. Except where censorship of an inmate's mail had been ordered, the contents were not read by prison staff. The object of opening correspondence was to search for contraband.

The plaintiff tendered in evidence more than 140 pieces of mail which he swore were privileged correspondence but had been given to him opened. The evidence shows that very few of these letters that were truly privileged correspondence had been opened but were opened as a result of an error.

Issues

1. Can it be said that the penitentiary's staff was negligent in opening the plaintiff's mail?

No negligence as a basis of this claim, nor any evidence of deliberate or intentional opening of privileged mail addressed to the plaintiff has been established. If the Commissioner's Directives, providing that privileged mail must not be opened, have been breached, they do not necessarily support a

cause of action although Mr. Justice Collier does not express a final opinion on this matter. Even if a breach of the directive can support the plaintiff's cause of action, there has been, here, no breach meriting compensation in damages. The breaches were relatively few. They were *bona fide* errors.

2. Does an inmate, who is in custody, waiting for a new trial, have the right to be credited with earned remission?

> "There is no legislative authority for crediting to him any remission he might have earned during that period, when he was convicted, once more for the same offence, and a new sentence imposed. The statute is silent."

3. Should section 24.2 of the *Penitentiary Act* be declared inoperative because it limits the right of an inmate to earlier freedom and because it creates inequality among inmates, before the law?

> Parliament has the power to limit the amount of remission an inmate may be entitled to or credited with. The Supreme Court of Canada has said: "The *Canadian Bill of Rights* does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective."

The action is dismissed.

REFERENCE: Solosky

Belliveau v. Her Majesty the Queen (1984) (Fed. Ct. T.D.)

ACTION — Belliveau seeks a declaration that those sections of the Parole Act dealing with mandatory supervision are ultra vires the power of Parliament on the grounds that they deprive him of his liberty and impose upon him "double punishment" contrary to the Charter of Rights and Freedoms.

FACTS — Belliveau was sentenced in May, 1977 to 7 years imprisonment. In May, 1982 as a result of remission and pursuant to s. 15 of the Parole Act he was released and subject to mandatory supervision. On June 21, 1983 his release was suspended following a charge on 2 counts of trafficking in a narcotic. On September 22, 1983 he was convicted of the charges and sentenced to 6 months consecutive to the sentence he was then serving. Although no precise grounds were set out in the plaintiff's argument, the Court indicated that the only applicable sections of the Charter are ss. 1, 7, 9 and 12.

REASONS

1) Re: s. 2 (freedom subject to reasonable limits). The test to be applied is whether the mandatory supervision program as legislated by Parliament has a rational basis, whether it is within the bounds of reason acceptable in a democratic state. The mere fact that those who are directly affected by the system may not like it is no sufficient ground for holding that the program has no rational basis, is unreasonable, undemocratic, disproportionate to its objective, offends common sense, or is otherwise unacceptable to a democratic society.

2) Re: s. 7 (life, liberty, and security of the person). "Fundamental Justice" is a compendious expression intended to guarantee the basic right of citizens in a free society to a fair procedure. It also extends to substantive law.

There is no indication that principles of fundamental justice are disregarded in the Parole Act, or unobserved in the present case. All the procedural steps called for under the Act and the Regulations were taken in due course. The Plaintiff has been deprived of his liberty, but that deprivation was carried out in accordance with the principles of fundamental justice.

3) Re: s.9 (detention or imprisonment). The proscription against arbitrary detention in s. 9 is against detention without specific authorization under existing law, or without reference to an adequate determining principle or standard.

Those charged with the enforcement of the Parole Act are given some discretion but it is not unfettered. Tehy must act fairly and reasonably. They cannot reincarcerate a prisoner and take away his remission without good cause. The breaching of a key condition of the mandatory supervision program by the commission of another crime is good cause for triggering the application of the Parole Act. The plaintiff was therefore not arbitrarily detained or imprisoned.

4) s. 12 (cruel and unusual treatment or punishment). The test to be applied is "whether the treatment is so excessive as to outrage standards of decency and surpass all rational bounds of treatment or punishment".

The criteria set out in caselaw are as follows:

(1) Is it in accordance with public standards of decency and propriety?

(2) Is it unnecessary because of the existence of adequate alternatives?

(3) Can it be applied upon a rational basis in accordance with ascertainable standards?

Most industrialized countries in the world have some type of parole system involving the possibility of re-incarceration. A program which includes that possibility and the ensuing loss of remission such as the one in place in this country cannot be described as outrageous or excessive or beyond the rational bounds of morality. The Canadian mandatory supervision system is in accordance with Canadian standards of decency and propriety. It can be applied upon a rational basis in accordance with ascertainable standards.

HELD — For all reasons outlined above, the Court found that the Mandatory Supervision provisions in the Parole Act are intra vires the powers of Parliament of Canada. Plaintiff's action was dismissed.

Belmont v. Disciplinary Board of Millhaven Institution

(unreported)

This is a judgement of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Dubé on July 9, 1984.

This is a motion by the applicant for a writ of certiorari to quash the decision of Douglas Hardtman, Independent Chairperson, Millhaven Disciplinary Board.

FACTS The applicant, an inmate of Collins Bay Institution was charged with the disciplinary offence of doing an "act that is calculated to prejudice the discipline or good order of the institution" contrary to subsection 39 (k) of the Penitentiary Service Regulations. He was found guilty by the chairperson and sentenced to 7 days punitive dissociation and forfeiture of 7 days remission.

QUESTION Whether there was evidence to convict the applicant of the disciplinary offence of doing an act calculated to prejudice the discipline or good order of the institution contrary to section 39 (k) of the Penitentiary Service Regulations.

JUDGEMENT Mr. Justice Dubé stated that the standard of proof, as established by the Commissioner's Directive, was the same as for a criminal offence, beyond a reasonable doubt.

He also pointed out, that it was not for him, on a certiorari motion, to weigh whether or not there was sufficient evidence to convict the applicant and that certiorari would lie where there was no evidence at all to support the charge.

In the circumstances, the Court was of the opinion that not a scintilla of evidence existed to support applicant's conviction of "doing an act calculated to prejudice the good order or discipline of the institution".

Therefore, seeing the absence of any evidence to support applicant's conviction, a writ of certiorari was issued quashing the respondent's decision convicting the applicant of a disciplinary offence.

Motion granted.

R. c. Berrie

Judgement of the Provincial Court of British Columbia rendered by the Honourable Mr. Justice Govan on February 18, 1975 in New Westminster.

Facts:

In this case nine correctional officers were charged with assault on an inmate. The facts reveal that the inmate had been, several times, ordered to shave his beard. Pursuant to his refusal to obey, he was grabbed, handcuffed and thrown on a table by the officers who started to shave his beard. Upon the inmate's resistance, the shaving was discontinued. As a result the inmate received severe cuts to his neck which resulted in profuse bleeding. The inmate was obligated by institution directives to shave his beard.

Issues:

Was the use of force by the accused persons, in these circumstances, lawful ?

First the officers were not required nor authorized by law to shave the inmate Brown. The director wanted Brown to shave but he did not authorize the officers to lay hands on him. There were other disciplinary regulations which could have been applied to enforce the director's order.

If the director had ordered the officers to shave Brown and if the force used had been reasonable, the act would have been justified. In this case, the force used was unreasonable to enforce such a mere order.

The officers are guilty of common assault

BLANCHARD v. DISCIPLINARY BOARD OF MILLHAVEN INSTITUTION

Judgement of the Federal Court, Trial Division, rendered by Mahoney J. on June 29, 1982.

This is an application by an inmate for a writ of certiorari to quash the decision of the Independent Chairperson, Millhaven Disciplinary Board.

Facts:

During a frisk search the inmate was alleged to have used profane language towards a member of the Service. He was subsequently charged with the offence of being indecent, disrespectful or threatening in his actions, language or writing towards any other person. At the hearing the Independent Chairperson did not allow the inmate to call as a witness the guard who conducted the search, who was the recipient of the abusive language. The only witness who gave evidence was a second guard who apparently witnessed the incident.

Issue:

Was the refusal to grant the inmate's request improper?

Held:

Upon consent of the parties, that the refusal was improper. The failure to allow the applicant to call as a witness the guard who searched him denied to the applicant potentially relevant testimony and thus a fair opportunity to respond to the allegation against him and amounted to a breach of the duty to act fairly.

Blaquiere, et al v. The Director of Matsqui Institution, et al

This is a judgement of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Collier on June 28, 1983 in Vancouver.

The applicants seek relief in the nature of certiorari to quash the convictions and sentences which were handed down by the Independent Chairperson of a Disciplinary Board.

Facts

The incident from which the conviction arose occurred on November 28, 1982. A number of inmates were in one cell listening, or watching, a Grey Cup football game on television. The cell door was barricaded. After several orders were disobeyed with respect to opening the door, tear gas was used. The inmates were charged with the disciplinary offence of disobeying a lawful order of a penitentiary officer. The six applicants were found guilty by the Chairperson and were all sentenced to thirty days punitive dissociation (S.C.U.) and forfeiture of thirty days earned remission. At the time of sentencing, the Chairperson did not invite, nor did he give the applicants an opportunity to make submissions.

Judgement

Mr. Justice Collier stated that it is well settled law that prison disciplinary tribunals have, in carrying out their functions, a duty to act fairly. He held that in respect of the convictions here in question, there was no breach by the Chairperson of any principles of fundamental justice, nor was there any breach of any procedural fairness rules warranting review.

However, with respect to the sentences, he held that the applicants should have been given an opportunity to make submissions as to punishment. He stated that the right to make submissions before the imposition of punishment or penalties, seems to be a basic procedural entitlement in our system of law and legal procedure, and he could see no reason why it should not apply to penitentiary disciplinary hearings.

The sentences were quashed. The applicants' cases were referred back to the Independent Chairperson for further hearing as to sentences in accordance with Mr. Justice Collier's reasons.

Blaylock v. The Quen

Judgement rendered by Mr. Justice Muldoon, Federal Court of Canada, Trial Division on April 22, 1985.

Applicant seeks a writ of mandamus pursuant to section 18 of the Federal Court Act ordering the Correctional Service of Canada to recalculate his sentence in accordance with the law.

FACTS On November 27, 1981 the applicant was sentenced to a term of six months consecutive to the unexpired portion of any sentence he was serving at the time, following an offence of escaping lawful custody under paragraph 133(1)(a) of the Criminal Code.

On May 14, 1982, the Ontario Court of Appeal allowed the applicant's appeal from that sentence, and varied the sentence to one of three months.

The applicant submits that the Correctional Service of Canada, when considering the sentence imposed for the escape to be, as varied, consecutive to the sentence he was then serving, misinterpreted the Order of the Ontario Court of Appeal.

DECISION The sentence was varied in regard only to the quantum of number of months to be served. According to section 614 of the Criminal Code, since the sentence was not quashed, but only varied, the sentence passed by the trial court remains, as varied but otherwise undisturbed. The Court of Appeal would have had to order specifically that the sentence under appeal would be served concurrently to change the decision of the trial court in that aspect of the sentence.

The application is dismissed, without costs.

Allan Louis Blomme v. The National Parole Board et al

Judgement from Mr. Justice Toy, of the Supreme Court of British Columbia on April 2, 1985.

Petitioner applied for an order for his release from custody in the nature of habeas corpus, submitting that he had been illegally detained for several months.

FACTS On December 15, 1977 the petitioner was sentenced to 4 years imprisonment for living off the avails of prostitution.

On December 14, 1978 the petitioner was sentenced to 4 years consecutive for attempting to defeat the course of justice.

On January 31, 1979 he was sentenced again for living off the avails of prostitution to one (1) year consecutive.

The petitioner was unlawfully at large from August 31, 1981 until he was returned to the penitentiary on May 23, 1984 (he was extradited back to Canada, but the extradition pertained only to his conviction of December 14, 1978). No criminal charge or disciplinary action has been taken as a result of this "walk away".

ISSUE: The issue in this application is upon what date was, or is, the petitioner entitled to his release on mandatory supervision, considering the combined effects of s. 645(4) of the Criminal Code pertaining to consecutive sentences; s.14 of the Parole Act pertaining to the merging of sentences; s.24 of the Penitentiary Act concerning inmates' earned remission; and the Extradition Act and Treaty.

DECISION: The petitioner's counsel submitted that the combined effects of the Extradition Act and Treaty forced the penitentiary authorities to ignore the previously imposed sentences for living off the avails of prostitution as well as the merging of these sentences by the operation of s.14 of the Parole Act. The petitioner should then be deemed to have started serving his 4 year sentence on the date it was imposed, December 14, 1978.

On the other hand the respondents concede that no time served since the plaintiff's extradition could be attributable to either of the living off the avails of prostitution convictions, and that all of the petitioner's time in custody since the 23rd of May 1984 must be credited to the four year sentence for attempting to obstruct the course of justice, but they also state that this second sentence should start only when the sentence on the first conviction has been served, or at the date of the petitioner's recommittal (whichever is more favorable to the petitioner). The respondents therefore submit that the petitioner commenced serving the second four year term on May 23, 1984.

Both these arguments fail to recognize the combined effects of the relevant laws involved. The petitioner's interpretation would amount to change the second sentence from a consecutive to a concurrent one, which is inadmissible since the tenor of both section 33 of the Extradition Act and article 12 of the Treaty is directed at what the requesting State will or will not do after extradition and not at what has been done before. On the other hand, the respondent's way of determining the beginning of the second sentence is not in accordance with the interaction of s. 645(4) of the Criminal Code with s. 14 of the Parole Act and s. 24 of the Penitentiary Act.

Giving full and proper effect to those provisions, the petitioner's situation before he "walked away", was as follows:

- he had been sentenced to a total of nine consecutive years imprisonment and, according to s. 645(4) of the Criminal Code, the sentences were to be served one after the other;

- allowing for earned remission and the concept of mandatory supervision, the petitioner had reasonable expectation to earn remission such that the last third of his aggregate sentences would be served out of custody;

- the merging of the sentences (s.14 of the Parole Act) authorized the continued detention until the petitioner had served the in-custody portions of the three sentences; he would thereafter serve the three out of custody portions of the sentences on mandatory supervision; and

- by August 31, 1981 (when he first was unlawfully at large) the petitioner had served all of the in-custody portion of the first 4 year sentence, and part of the in-custody portion of the second one; it was only after the extradition and recommittal (May 23, 1984) that the Extradition Act, Treaty and Order came into play, affecting the unserved portion of the aggregate sentence.

CALCULATION OF DATES:

4 year sentence = 1,461 days
2/3 of that (in-custody portion) = 974 days
On August 31, 1981 petitioner had served 1,356 days
1,356 less 974 (first 4 year sentence) = 382

The remaining 382 days were served as in-custody time on the second conviction. The petitioner therefore still had 594 in-custody days to serve on his second sentence after the extradition and recommittal on May 23, 1984; accordingly, the date for the petitioner's release on mandatory supervision is over nine months away.

The application was dismissed.

Booth and Baker v. Attorney General of Canada

This is a judgement of the Supreme Court of Ontario, Appeal Division, rendered by Mr. Justice Jessup, Arnup and Zuber on September 18, 1979.

Facts

The appellants, while on mandatory supervision, committed an offence for which they were arrested and held into custody while awaiting their trial. Their mandatory supervision was suspended but a few days later, the suspension was cancelled. Later at their trial they were both sentenced to nine months concurrent to the sentence "then serving."

Issue

The question to be determined is whether sections 14(1)(a) or (b) of the *Parole Act* applies to the situation where an inmate is in custody after his mandatory supervision was suspended and the suspension cancelled.

During that period of time, an inmate is not deemed to be in "confinement" for the purpose of section 14(1)(b) of the *Parole Act* because the mandatory supervision was not revoked. Consequently, the inmates were not serving their sentence while in custody therefore the nine month sentence could not be concurrent to any sentence.

The appeals were dismissed.

R. v. CLAUDE BOUCHARD

Court of Criminal Jurisdiction, Superior (District of Drummond, Province of Québec)

Judgment on a voir-dire rendered by The Honourable Mr. Justice Mayrand on December 7, 1988

FACTS:

On July 30, 1988, the authorities had received a tip-off to the effect that Mr. Bouchard was trafficking in narcotics and had narcotics within the cavities of his body. He was legally arrested and put under surveillance. After having been asked to do so, he refused to consent to undergo x-rays. While under surveillance, he refused to eat and go to the washroom According to testimony, he had been informed of the potential dangers of keeping narcotics inside of his body. After three (3) days of continuous surveillance, Mr. Bouchard was brought to a hospital where he was to undergo x-rays. Upon his refusal to do so, a police officer had to furnish the necessary information to the admissions officer. During the x-ray procedure, he became very aggressive. In fact, he bit and hit several officers. Strength had to be employed in order to lay him down on the x-ray table. Four (4) people were used to stabilize him and a doctor gave him a dose of "largactil" (a tranquilizer that acts upon the brain). According to the doctor's testimony, the procedure was undertaken from fear that the package would open and poison the patient. Furthermore, the doctors testified that the procedure was done in conformity with the rules of medicine. Moreover, the patient was examined after the search in order to ensure that the procedure had not had any consequences on his health. However, the patient's medical history was never studied and consultation with other doctors was not undertaken. Mr. Bouchard was accused of trafficking in a narcotic inside a penitentiary. Fifteen (15) grams of hashish had been uncovered following a rectal search of Mr. Bouchard.

ISSUES:

Did the search breach section 8 of the Charter in that it was unreasonable? If so, should the evidence be excluded, pursuant to subsection 24(2) of the Charter, because its admission would bring the administration of justice into disrepute?

HELD:

The Court held that the search was unreasonable and, therefore, that it breached section 8 of the Charter. The Court stated that before it could accept that police officers could have resort to modern chemical and biological

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methods in the conduct of theirsearches, it had to be established that exceptional circumstances justified such recourse and that all of the necessary measures and precautions had been taken before the search was undertaken. The Court stated that it should have been established that the search was justified because it had been decided, before the search was undertaken, that there was no other course of action that could have been undertaken. At bar, the evidence did not demonstrate that, given the circumstances, the search was the only course of action that could have been undertaken.

The Court held that pursuant to section 24(2) of the Charter, in the eyes of a reasonable person, the admission of the evidence into the proceedings would bring the administration of justice into disrepute. Although the material evidence was obtained through a Charter violation, it was not brought into existence by this Charter violation. Resort to the employment of the tranquilizer was found to be in Mr. Bouchard's best physical interests. Furthermore, the officers acted conscientiously and in good faith. Moreover, the offence in question was found to be serious because it is punishable by life imprisonment. The Court stated that in order to establish that the administration of justice would not be brought into disrepute, the Defence must demonstrate that the accused did not himself provoke a situation that prompted the authorities to act in the way that they had. According to the Court, the standard of that which would be susceptible to bring the administration into disrepute varies according to the circumstances of each case. Given that the problem of the proliferation of prohibited substances in penal institutions is a serious one, it was held that to set aside the evidence and, therefore, prevent the prosecution of those who introduce prohibited substances into penitentiaries would be more apt ("susceptible") to bring the administration of justice into disrepute than would be the admission of the evidence.

The evidence was admitted.

Bruce and Meadley v. Reynett and Yeomans

Judgement of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Walsh on April 26, 1979 in Vancouver.

The applicants applied for a writ of mandamus ordering the respondent to respect the *Canadian Bill of Rights* in the taking of a decision concerning the applicant's marriage and in doing so, to act fairly.

In the alternative an injunction restraining the respondent from interfering in the marriage except in accordance with his jurisdiction and an injunction restraining the respondent Yeomans from transferring the applicant to Millhaven Institution before all matters pertaining to the marriage be completed.

The petition is primarily based on Mr. Reynett's decision as Director of British Columbia Penitentiary refusing permission to the wedding of Andrew Graydon Bruce to Sandra Gaye Meadley.

Issues:

1. Did Mr. Reynett, in taking the decision concerning the applicant's marriage, take away a fundamental right included in the *Canadian Bill of Rights ?*

   The Canadian Bill of Rights is not applicable in the present case since the right to marry is not one of the fundamental rights protected by the Act. If there were provisions in the *Penitentiary Act* providing for the marriage of prisoners, Bruce could contend that he was denied "equality before the law" and could claim discrimination, but those provisions do not exist.

   Even though, the decision refusing the permission to marry is administrative, it does not mean that Mr. Reynett did not have a duty to act fairly. The fact that the application for a permission to marry was under consideration for a lengthy period of time indicates that the duty to act fairly was respected.

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2. Can an injunction be taken to restrain Mr. Reynett from interfering in the marriage ?

   No. Mr. Reynett had the right authority to make this administrative decision, therefore he was acting within his jurisdiction and the Court cannot substitute its opinion for the conclusion which he reached.

3. Can an injunction be issued restraining the respondent Donald Yeomans from transferring applicant to Millhaven Institution before completion of matters pertaining to his proposed marriage ?

   The question of transfer is an administrative decision and the Court should not substitute its views for those of the Commissioner of Corrections, but aside from that, it would appear that no injunction should he issued to stop a transfer which may never take place.

   An injunction is taken to quash a decision, and if no decision has been made, it cannot be quashed.

The request for mandamus and injunction must therefore be refused.

Paul Thomas Bryntwick v. Donald Yeomans and Rene Rousseau

This is a judgement of the Federal Court, Trial Division, rendered by the Honourable Justice Walsh on October 1, 1982.

This is a petition for a Writ of Certiorari by petitioner, an inmate of the Leclerc Institution.

FACTS: On July 11, 1982 petitioner's common law wife paid him a visit at the Leclerc Institution as she had been doing regularly during his imprisonment, but after being admitted to the institution on this occasion she was asked to submit to a nude search, which she refused, as a result of which she was escorted outside the prison grounds, access being refused to her. Moreover she was advised that her right of visitation was suspended indefinitely from that date.

According to the matron who requested the check, the visitor "appeared nervous" on the day in question.

The mother of the petitioner's common law wife was dying from cancer and his wife had come under medical supervision which would account for her nervousness. It appears that the Leclerc Institution had knowledge of this situation four days before the said visit and that the petitioner had asked for a temporary absence because of this terminal illness. The petitioner was never suspected nor have his visitors of having introduced drugs into the institution.

ISSUE: In light of the facts, is the decision to suspend visiting privileges ureansonable in view of the petitioner's common law wife refusal to be strip searched?

HELD: If the original order for a body search was justified, and therefore the refusal to submit to same unjustified, then the suspension of visitation period for three months thereafter would not be unreasonable. In view of paragraph 41(2) of the *Penitentiary Service Regulations*, which uses the words "reason to believe" it is evident that unrestricted body searches are not permitted. There has to be a reason for requiring the body search, and the reason in itself must be if not "reasonable" at least credible and justifiable, with reference to the specific visitor to be searched.

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In deciding whether to order a strip search, the person who has the power to decide has a duty to act fairly.

The petitioner's common law wife was unfairly asked to subject herself to the indignity of a strip search based on reasons which were very unsubstantial and which were not even communicated to her, and that moreover the singling her out on this occasion for such a search was in contravention of section 41(2) of the *Penitentiary Service Regulations* and the directives issued by virtue thereof as there was no legitimate "reason to believe" that she had contraband in her possession.

Joyce Bull v. Helen King MacLeod, Chairperson of the Prison for Women Disciplinary Tribunal

This is a judgement of Rouleau J. of the Federal Court Trial Division rendered on December 5, 1986 concerning an application for certiorari to quash the decision of the disciplinary court.

FACTS

The applicant was convicted on two occasions in disciplinary court of being under the influence of an intoxicant. There was evidence from a nurse who stated that the applicant appeared intoxicated. The applicant took a urinalysis test, but the result was negative. The respondent decided that it was common knowledge that the urinalysis testing only revealed the presence of certain drugs and not others. She therefore found the applicant guilty.

Following the finding of guilt, counsel for the applicant made submissions on the appropriate sentence for the applicant. Subsequently the applicant and her counsel were requested to leave the room. In the absence of the applicant the respondent conferred with two correctional officials, one representing security and the other representing health care, concerning the appropriate sentence for the applicant. The discussion related to the applicant's disciplinary record, her dissociation record, the possible effects of further dissociation, her participation in institutional programs and her behaviour in general. When the applicant returned, the respondent discussed the factors which she had considered in making her determination as the appropriate sentence and a sentence of solitary confinement was imposed.

ISSUE

Did the respondent err in finding as a fact that it was common knowledge in the prison that the urinalysis facilities tested for only certain drugs?

Did the respondent violate the applicant's right to know the case against her and violate the duty to act fairly?

HELD

Motion for certiorari to quash the conviction refused. Motion for certiorari to quash the sentences granted. Rehearing ordered with respect to punishment.

REASONS

The Court does not rehear matters on a motion for certiorari but rather reviews the legality of what has transpired in the course of the hearing. The Federal Court, in these proceedings, is not empowered to reweigh the evidence and substitute its own view of the facts for that of the tribunal.

The respondent was entitled to formulate an opinion concerning the facts before her, and that opinion must prevail if it is capable of being supported as a reasonable conclusion based on the evidence. There was sufficient evidence given by the nurse who had the opportunity to examine the applicant with regards to her condition.

It has been established by the Supreme Court of Canada in Martineau (no 2) that a prison tribunal is not a court. The tribunal is not obligated when discharging what is essentially an administrative task to conduct a judicial proceeding observing all the procedural and evidentiary rules of a court of law. Nevertheless it is subject to a duty of fairness.

There was nothing inappropriate in having the applicant and her counsel absent from the hearing room while discussions took place between the respondent and the two correctional officers concerning the appropriate punishment. Often information contained within an inmate's file is of a confidential nature, the disclosure of which would endanger the security of the institution as well as the source of the information. Correctional officers who make negative comments or disclose adverse information concerning the inmate could endanger themselves or others were such comments to be made in the presence of inmates who had a history of violence for which they were serving lengthy sentences.

However, once the applicant and her counsel returned to the hearing room and were advised of the factors on which the respondent was relying in making her decision as to sentence, the duty of fairness incumbent on the respondent required that the applicant be afforded the opportunity to make a reply or to rebut any of the information which influenced or persuaded the respondent. This does not mean that the applicant had to be informed of every detail of the discussions nor that confidential sources of information had to be disclosed. But were certain information was relied on to conclude that solitary confinement was an appropriate punishment, the applicant was entitled to be informed of all the facts considered to be relevant and to refute the information on which the respondent relied.

Kenneth Burbidge and Daniel McClean and Her Majesty the Queen (1984) (Ont. H.C.J.)

This is a judgment rendered by the Honorable judge Parker September 27, 1984. Supreme Court of Ontario.

The plaintiffs presented a writ of habeas corpus claiming they had been detained illegaly in a provincial institution.

FACTS (1) McClean

80-05-29	4 years 1 month sentence imposed.
83-05-27	Released on Mandatory Supervision (MS) from Dorchester Penitentiary.
84-02-24	Mandatory Supervision suspended (s.26 parole Act).
84-04-06	Mandatory supervision revoked. (ss.10 and 18 Parole Act)
84-05-21	Date sentence expired.
84-06-21	Sentence of "one year consecutive to time being served" imposed.
	McClean was refused admission to the penitentiary.

(2) Burbidge

82-02-01	851 days sentence imposed.
83-09-09	Release on Mandatory Supervision.
83-11-16	Mandatory Supervision suspended.
83-11-17	Burbidge taken back into custody.
83-11-23	Suspension cancelled.
83-11-24	Release on Mandatory Supervision.
84-02-13	Mandatory Supervision suspended.
84-02-28	Mandatory Supervision revoked.
84-04-21	Date sentence expired.
84-05-29	Sentence of 23 months imprisonment and 2 years probation imposed.

NOTE McClean was entitled to be released on 21 May, 1984 with less than 60 days of remission and Burbidge had accumulated enough remission to be released on the expiration of his sentence - 21 April, 1984.

ISSUE When the second sentences were imposed on the respective parties, can they be considered to have finished serving their first sentences with the result that they may serve their second sentences in a provincial institution?

DECISION Appeal dismissed. The confinement in the provincial institution is lawful.

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REASONS

In both cases at bar, the first sentence had expired prior to the imposition of the second sentence. If the number of days of remission is less than 60 days, the sentence is served without mandatory supervision.

Furthermore, s. 14(1) of the Parole Act is inapplicable to the case at bar by virtue of the fact that the Appellants were not in custody on the date on which their second sentences were imposed.

Implicit in the Court's judgment is that s. 15(1) of the Parole Act interpreted a contrario provides that the release date also constitutes the expiry date of the sentence. (this would confirm the legal opinion given by CSC).

Gary Leroy Butler v. Her Majesty the Queen et al. (1)

This is a judgement rendered on March 31, 1983 by Mr. Justice Walsh of the Federal Court of Canada (Trial Division), in Vancouver.

This is a motion for an injunction to restrain the defendants or any other officers of the Correctional Service of Canada from transferring the plaintiff to the Edmonton Institution or to any other institution outside British Columbia pending determination of the plaintiff's action.

Facts:

The plaintiff and his cousin, Darelle Butler, two inmates at Kent Institution, were active members of the Native Brotherhood in connection with the arrangements for organizing and holding aboriginal religious ceremonies.

From July to December 1982, the plaintiff was convicted of a series of disciplinary offences, mostly for acting in a manner calculated to prejudice the discipline and good order of the institution. On January 2, 1983 he was placed in administrative segregation pending investigation of an altercation between him and another native inmate, resulting in a subsequent beating of that inmate.

On February 8, 1983 a report was completed recommending the plaintiff's transfer out of Kent. This recommendation was based on the role the plaintiff played as the enforcer of the Native Brotherhood, a role which was evidenced by the incident which led to the plaintiff's placement in segregation and another incident where Butler was involved in a fight. The report concluded the plaintiff and his cousin should be separated by the plaintiff's transfer to another institution. The document was shown to the plaintiff and, further, the warden personally met with him to inform him that he would recommend his transfer from Kent.

Some time after the placement of the plaintiff in administrative segregation, there was a general work stoppage at the institution, apparently for the purpose (at least partly) of putting pressure so the plaintiff could be transferred out of segregation.

The plaintiff denied his responsibility in the beating of the other native inmate and allegations that some of the unrest in the Native Brotherhood group could be attributed to his actions. He also pointed out he was never fully advised of the reasons for the proposed transfer and he had never been allowed an opportunity of making representations to rebut the allegations against him. He also alleged one of the grounds of the proposed transfer was his lawful activities in connection with the Native Brotherhood; thus

the transfer was recommended in violation of section 2 of the *Charter of Rights*. Finally, he argued the recommendation to transfer him was made in breach of sections 6, 7 and 8 of the *Charter*.

An interim injunction was granted pending decision on the present application.

Held:

On this application for injunction, it has been necessary to go to some extent into the facts in order to determine whether there is in fact a *prima facie* or even an arguable case for the issue of an injunction. The law is clear that a decision to transfer a prisoner from one institution to another is an administrative matter and should only be interfered with on the rare occasion when it is apparent that the applicant has not been dealt with fairly.

There was no obligation to hear the plaintiff in connection with making a decision to transfer him.

On the facts in the present case, the court did not find that the warden did not act fairly.

Except in clear and unequivocal cases of serious injustice coupled with *mala fides* or unfairness, judges, as a general rule, should avoid the temptation of using their *ex officio* wisdom and substituting their own judgement for that of experienced prison administrators. Similarly, courts should avoid laying down detailed rules of conduct for these administrators.

As regards the inmate's arguments based on the *Charter of Rights*, the judge ruled the only connection with the *Charter* is section 2, which deals with freedom of religion and freedom of association. On the plaintiff's freedom of association, the court said it is trite to state that an inmate of a prison cannot have unrestricted freedom of assembly or association and that these rights must be subject to the necessity of preservation of discipline. The court also ruled the institution had not interfered with Indian religious observances or education classes, and thus did not violate the plaintiff's freedom of religion.

Order:

The application for injunction is dismissed.

Reference:

Bruce v. Reynett
Cline v. Reynett
Martineau (No. 2)

Dennis Cadeddu and Kraig Nunery v. The Queen

Judgement of the Supreme Court of Ontario rendered by Mr. Justice Potts on December 31st, 1982.

The two applications are for writs of habeas corpus and subjiciendum with certiorari in aid thereof, seeking to have the applicants delivered from the custody of correctional institutions operated by the Ontario Ministry of Correctional Services.

On consent, Nunery's application was adjourned to permit cross-examination on the affidavits filed therein and therefore the judgement concerns Cadeddu's application only.

Facts:

On June 15th, 1981, the applicant was sentenced to a term of imprisonment of two years less one day. On August 5th, 1981, he was sentenced to a concurrent term of imprisonment of 21 months. The applicant was sentenced to a further 17 days' imprisonment for offences under the *Highway Traffic Act* on September 25th, 1981. This sentence was to be served concurrently with the two years less a day sentence by virtue of the *Provincial Offences Act*. Because the remanet of the applicant's 2 years less a day sentence and the 17 day sentence totalled less than 2 years the applicant's locus of confinement was not affected (*Criminal Code*, s. 659), and, for the purposes of an application for release on parole, the applicant fell under the jurisdiction of the Ontario Board of Parole (*Parole Act*, ss. 5.1(1) and (2)).

The applicant was granted parole by the Ontario Board of Parole on February 18th, 1982. On April 28th, 1982, the applicant was arrested on charges of breaking and entering, theft and possession of burglary tools and was taken into custody. On April 28th, 1982, the applicant appeared before a Justice of the Peace, who declined to conduct a judicial interim release hearing, because the applicant's parole had been suspended. The applicant had a meeting with his parole officer on May 4th, 1982. He elected to make no statement and requested that his parole be revoked.

On May 17th, 1982, the Ontario Board of Parole held a hearing in the absence of the applicant and decided to revoke his parole on the basis that the applicant had failed to keep the peace and be on good behaviour as set out in his parole certificate. The applicant received a copy of the decision

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in the mail and has not requested that the decision be reviewed.

Issues:

I.(A) Is the Ontario Board of Parole subject to a duty of fairness in exercising its parole jurisdiction?

Held

The Crown conceded that the Ontario Board is subject to a duty of fairness. The Court noted that this obliged the Board to inform the applicant why his parole was being reconsidered with a view to revocation and also obliged it to permit him an opportunity to respond. The applicant was informed why his parole was being reconsidered and he was informed that he could make submissions either through his parole officer or his lawyer.

(B) By reason of that duty of fairness and the fact that the decision to revoke the applicant's parole had serious consequences for him,is the Board required to provide the applicant an opportunity for an in-person hearing?

Held

(1) There is nothing in the federal regulations, which requires a provincial parole board to grant an in-person hearing (s.34 of *Parole Regulations*).

(2) With regard to revocation the *Ministry of Correctional Services Act Regulations (Ontario)*, s. 49(2), provides only that where the Board reviews the parole of an inmate, it shall ensure that the inmate has been informed of the reasons for his apprehension and return to custody pending the Board's decision and that the inmate is given an opportunity to provide information or make submissions to the Board in order to assist it in deciding whether to revoke parole. When Parliament either has made an explicit provision as to rights to a hearing or has delegated determination of that question and the delegate has exercised its delegated legislative authority to that effect, a court should not imply a right of hearing not provided for in the positive law.

(3) Applying Nicholson (1978) D.L. R. (3d) 671 (S.C.C.), although the Board is bound by a duty of fairness, there is no obligation to grant the applicant an in-person hearing.

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II. Did the Board violate the applicant's rights under sections 7 and 9 of the *Canadian Charter of Rights and Freedoms*, in revoking his parole without first granting him an in-person hearing?

Held

(A) The applicant's condition during parole was that he had a conditional or qualified liberty to be at large during the term of his imprisonment and although the liberty could be revoked, he came under the protection of s. 7 of the *Charter*. Accordingly, the Board, if it was not to violate the applicant's rights, could revoke the applicant's parole only in accordance with the principles of natural justice.

(B) The applicant could not be lawfully deprived of his liberty without being given the opportunity for an in-person hearing before his parole was revoked.

(C) Although nothing in the common law or in federal or provincial legislation required the Board to grant a hearing - or for that matter forbade the Board to do so- the *Charter* dictates that such an opportunity be given. The Board having revoked the applicant's parole without affording him the opportunity for a hearing, therefore exceeded any jurisdiction it could possess. As a result consideration of s. 9 of the *Charter* deemed unnecessary by the Court.

(D) The Court rejected the Crown's argument that because the powers of the Ontario Board of Parole were conferred by federal legislation, and it was therefore a federal board, commission or other tribunal as per the *Federal Court Act*, and because a Federal Court has exclusive jurisdiction to issue a writ of certiorari against a federal board, commission or other tribunal, the application ought to have been brought in the Federal Court. The court held that based on the decision in Re. Miller and the Queen (May 17, 1982) unreported, Ont. C.A.) a provincial superior court has jurisdiction to consider an application for habeas corpus either with certiorari in aid or with affidavit material in support, notwithstanding that a decision of a federal board, commission, or other tribunal is under review.

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(E) The Crown's argument that the Ontario Board of Parole was immunized from review by the very broad and sweeping exclusive jurisdiction and privative clauses found in s. 35 of the *Ministry of Correctional Services Act* was also rejected for the following reasons:

(1) no administrative tribunal can be immunized from review as to its jurisdiction: Crevier v. A.-G. Quebec, (1981) 2 S.C.R. 220;

(2) the Board exceeded its jurisdiction in revoking the applicant's parole without giving him an opportunity for an in-person hearing;

(3) the provisions of s. 10(c) of the *Charter* are not limited to habeas corpus with certiorari in aid and with affidavit material in support.

(F) Further the Court rejected the Crown's argument that the case was a criminal proceeding, and as Rules 4, 5, 6 and 7 of the Rules Regarding Criminal Proceedings had not been complied with, the application should fail. The Court held that Rule 4 had been complied with and that Rules 4, 6 and 7 were inapplicable.

(G) The Court also rejected the Crown's argument that the Court ought not to exercise its discretion in favour of the applicant because be failed to ask for a review of the decision to revoke parole and be delayed in bringing the application.

ORDER

The warrant suspending the applicant's parole and the Board's decision are quashed and the Crown's required to produce the applicant before a Justice of the Peace within 24 hours for a judicial interim release hearing, if a Justice of the Peace is available, and shall produce him before a Justice of the Peace within 48 hours in any event.

APPLICATION GRANTED.

DONALD CADIEUX and the Director of Mountain Institution and the National Parole Board

An application for certiorari to quash a decision of the National Parole Board cancelling the applicant's unescorted temporary absence program.

This is a judgment of the Federal Court, Trial Division rendered by Madam Justice Reed, on May 8, 1984.

FACTS: Applicant serving sentence of imprisonment for rape in 1979 was granted a first UTA in November, 1982 which was later cancelled because he breached one of the terms of his release. He applied for a second UTA program in May of 1983, and after a hearing for this purpose was conducted, he was notified in October 14, 1983 that the NPB had granted him a UTA program. Before the implementation of this program, the applicant was notified by the NPB that his UTA program was cancelled because it had received confidential information to the effect that he would be a risk to reoffend on any form of release. The applicant sought information as to the nature of this confidential information but the Board declined to give any.

ISSUES:

1. Are the rules and principles of fundamental justice applicable to the decision-making process respecting U.T.A.s.

2. If the answer to issue #1 is yes, have the rules of fundamental justice been infringed in this case.

   a) Practical effect of the rules of fundamental justice.

   b) Situations which can justify the NPB in not telling the inmate the gist of the reasons against him.

   c) What does disclosing the gist of the reasons against the inmate entail.

   d) What is the effect of information provided in confidence.

   e) What is the treatment to be accorded to class exemptions.

   f) When can non-disclosure be justified.

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g) Is the Board here justified in not disclosing the gist of the reasons for the revocation.

h) How could the NPB rectify this situation in the present case and in the future.

3. Was the refusal to grant access to the confidential information in question made pursuant to a "reasonable limit prescribed by law demonstrably justifiable in a free and democratic society" (s.1 of the Charter)

HELD:

1. There is an abundance of trail decisions that hold that the revocation of parole attracts the protections of section 7 of the Charter and clearly the interest of an inmate affected by a decision of the NPB revoking his UTA is similar to that affected when either his day parole or full parole is revoked. Thus, although this is liberty of a more limited nature than either full parole or day parole, it is similar in character to the latter and as such decisions respecting UTAs fall within the scope of the rules respecting certiorari at common law as well as being subject to the requirements of fundamental justice prescribed by section 7 of the Charter. The fact that a UTA program might be considered a "privilege" carries no weight given the decision in Martineau no. 2 which abandoned the distinction between "rights" and "privileges".

2. (a) Under both the rules of fairness and the rules of fundamental justice as set out in the Charter, a cardinal principle is that the person whose liberty is being decided upon should have the right to know the case made against him and an opportunity to respond. However there are circumstances in which an inmate may be denied knowledge of the reasons underlying the revocation of his UTA program. Only in rare cases can the NPB justify not telling the inmate at least the "gist" of the reasons against him.

(b) In the context of the prison situation, safety and order within the prison may particularly require the non-disclosure of the identity of informers. Non-disclosure might also be necessary if such disclosure would automatically lead to the revealing of information collection methods. However, there must be an element of necessity to justify not telling the inmate at least the "gist" of the reasons against him, more convenience for the functioning of the Board is not enough.

(c) Disclosing the "gist" of the reasons against the inmate does not mean that the inmate is entitled to know the identity of the source of information, a production of the actual documents and all the details of the case against him. This only means that he is entitled to know the substance of the reaons for the revocation of his UTA (or full parole or day parole as the case may be).

(d) Mere fact that information was provided in confidence is not, in itself, sufficient reason to justify non-disclosure of that information expecially when one is considering the rules of fundamental justice required by section 7 and when a person's liberty is at stake.

(e) Regarding class exemptions (documents relating to Cabinet proceedings, conduct of foreign affairs, national defence, etc.), courts are becoming increasingly reluctant to accept claims for privilege framed in terms of class exemptions. In this case, non-disclosure of the gist of the case against the applicant cannot be justified on the basis of a class exemption.

(f) While there may be occasions on which non-disclosure of the gist of a case against an inmate is justified, the reasons therefore must relate to the specific content of the information in question. There must be a nexus between the content of that information and the protection of the public interest said to be served by non-disclosure.

(g) The affidavits filed in this case (by a member of the NPB and regional manager of case preparation) do not address the issue as to why the gist of the reasons, or part thereof, for the cancellation of the applicant's UTA program could or could not be disclosed to him. The overall tone and content of the affidavits is one of claiming a blanket class exemption.

(h) If sufficient reasons exist in this case for refusing disclosure of even the gist of the case against Mr. Cadieux, then new affidavits, containing a greater degree of specificity can cure this defect. In this case, the NPB can bring a second application and the Board should be prepared to produce for the court the documents in question. This might be done in a sealed envelope together with a specific explanation as to why, in its view, non-disclosure is justified.

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3. The Privacy Act and the Canadian Human Rights Act were enacted for the purpose of giving individuals access to information held by the government concerning them. The exemptions from the requirement to disclose are much broader than those applicable to decision-making by either an administrative or a judicial body. If such exemptions are specifically made applicable by statute to either an administration or a judicial decision-making body, then, in the absence of a constitutional guarantee to the contrary, this would constitute a valid limitation on the rules of natural justice. However, the exemption in section 17(3) is too broadly framed to be a reasonable limit pursuant to section 1 of the Charter.

CAMPHAUG v. HMQ ET AL (F.C.T.D.) APRIL 10, 1990 - T-775-90

Application for a Writ of Prohibition to quash the decision of the respondent to transfer the Applicant from Kent, a maximum security institution to the high maximum security facility of Saskatchewan Penitentiary.

FACTS

The Applicant was notified of a recommendation by the Warden to the Deputy Commissioner for his involuntary transfer to a high maximum security institution. The main reason for the transfer was that he represented an extreme escape risk as a result of his intimate sexual relationship with a female staff member which gave him access to technical, mechanical and security information.

ISSUE

Was the decision to transfer this inmate taken in accordance with the principles of fundamental justice pursuant to section 7 of the Charter.

HELD

Application denied. It was not for the Deputy Commissioner (decision-maker) to retry all the allegations against the inmate on the basis of detailed evidence. It was sufficient that he form a reasonable opinion that Camphaug should be moved after Camphaug had an adequate opportunity to comment on that issue. There was no breach of the principles of fundamental justice or the duty of fairness.

THE QUEEN v. OSWALD AND CARDINAL

This is a judgement of the Supreme Court of British Columbia rendered by the Honourable Chief Justice on December 30, 1980 in Vancouver.

Inmates Oswald and Cardinal applied for habeas corpus with certiorari in aid for the purpose of securing their release from administrative dissociation in Kent Institution.

FACTS: Inmates were transferred from Matsqui to Kent on July 28, 1980, the same day on which they allegedly took a guard hostage.

The Warden at Kent issued on that same day oral instructions that should these inmates be brought to Kent, that they be placed in segregation pursuant to section 40(1)(a) of the *Penitentiary Service Regulations*.

On July 29, 1980, the Warden reaffirmed his verbal instructions and specified that they would remain in dissociation until he could review the individual circumstances of their case and the need for continued segregation.

The Warden stated, when he tesfified, that it was fair to say that the main basis for placing and keeping Oswald and Cardinal in segregation is because of allegations yet to be decided in court that they were involved in a hostage-taking incident at Matsqui and that his intention was that they would remain in dissociation until the charges against them were decided one way or another.

Pursuant to section 40 of the *Penitentiary Service Regulations*, their case was reviewed every thirty days by the Segregation Review Board. After its review on October 7, 1980, the Board recommended that these two inmates be returned to general population.

The Warden declined to accept this recommendation. His reasons were that "this inmate was involved in hostage-taking at Matsqui for which he is now awaiting trial".

The Board has continued to recommend their return to general population but the Warden refused to accept such a recommendation.

PRINCIPLES: 1. Is the remedy of habeas corpus available or is it only when it is to gain a complete liberty of the applicant?

Habeas corpus may be an appropriate means by which the court may scrutinize the different forms of detention to which our citizens may be subjected. I have no doubt that there may be imprisonment within a prison that could be lawful or unlawful depending upon the circumstances of each case.

2. The initial decision to segregate these petitioners was lawful. However, did the continued segregation of the petitioners become unlawful?

   The proper limit to impose upon the apparent absolute power of the Director is a continuing obligation of fairness which, in my view, controls the exercise of this kind of public power. While the initial decision was lawful, the process by which they were kept in segregation slipped into unfairness at some stage. In spite of the Review Board's recommendation of October 7, the Director decided that Oswald and Cardinal would remain dissociated. "The Director had jurisdiction to disregard the recommendation of the Review Board, but to do so with fairness, it seems to me, the petitioners ought to have been informed of the reasons of the Director for continued segregation, and they should have been given a fair opportunity to answer the case against them. Their explanation for the incident should be given consideration".

3. Is the remedy of habeas corpus with certiorari in aid available to the petitioners?

   Habeas corpus with certiorari in aid is an appropriate remedy to terminate a detention which has become unlawful and for which there is no warrant. Other remedies may also be available in the Federal Court, but the existence of a parallel or companion statutory remedy in another court does not, in the absence of specific parliamentary enactment, repeal or abrogate the historic jurisdiction of the common law courts to grant writs of habeas corpus with certiorari in aid in proper cases. Unlawful detention has always been the grounds for invoking habeas corpus with certiorari in aid.

ORDER: That Oswald and Cardinal be released into the general population, but, subject to that, they remain subject to all the jurisdiction of the Director as set forth in the applicable statutes and regulations.

Although this is not the basis for the decision reached by the Honourable Chief Justice of British Columbia, it is interesting to note that he made some remarks on the fact that the dissociation order was expressed orally. He said: "I cannot express my disapproval of verbally directed detentions (except in emergencies) in strong enough terms. I do not say, however, that the decision and written reasons for segregation must, in every case, be contemporaneous. I would hope that the potential mischief inherent in such a procedure, that is, detention on oral instructions, would ensure that it will not continue. Prolonged verbally directed segregation must be severely condemned".

RE: Hass

OSWALD AND CARDINAL v. DIRECTOR
OF KENT INSTITUTION

This is a judgement of the British Columbia Court of Appeal rendered on March 31, 1982 in Vancouver.

It is an appeal from a decision of McEachern, C.J.S.C. ordering in habeas corpus proceedings with certiorari in aid that the respondents, prisoners lawfully detained in Kent Institution, be released from segregation in the general population of the institution.

Facts:

In July 1980, Oswald and Cardinal were placed in solitary confinement by the Director of Kent "for the good order of the institution" pursuant to section 40 of the *Penitentiary Service Regulations*, after they allegedly took a guard hostage at Matsqui Institution. The Classification Board referred to in section 40 conducted a monthly review of the circumstances relating to the segregation of the inmates and in October 1980, recommended that they be returned to the general population. The Director declined to accept this recommendation and Oswald and Cardinal remained in solitary confinement.

Issues:

1. Does the Supreme Court of British Columbia have jurisdiction to order habeas corpus with certiorari in aid against a federal board or tribunal (the Director)?

2. Assuming that certiorari in aid is not available, does the Supreme Court of British Columbia have jurisdiction to order habeas corpus against a federal board or tribunal by determining the issue of jurisdiction of the federal board or tribunal on the basis of affidavits filed, in support of the motion for habeas corpus?

3. Is habeas corpus available to obtain the release of a person from detention in solitary confinement to detention in the federal population within a prison?

4. Did the Director so fail to observe the principles relating to the procedural fairness that it could be held that he acted without jurisdiction in making his decision to keep Oswald and his co-accused in solitary confinement?

Judgement:

1. As to the first issue, the Court concluded that habeas corpus with certiorari in aid is available. A clear distinction must be made between certiorari as an independent remedial process and certiorari in aid of habeas corpus.

2. On the second issue, the Court also found in the affirmative.

3. On the third question, the Court decided that while the inmates have the right to proceed in the Federal Court by way of certiorari proceedings, they have an alternative right to bring habeas corpus proceedings in the Supreme Court of British Columbia to seek his release from a "prison within a prison" on the ground that he was unlawfully detained in such "prison within a prison".

4. As to the last issue, while all members agreed that the Director of Kent was under a general duty of fairness, they were divided on the question whether he lost jurisdiction by reason of his failure to comply with that duty. The majority decided the Director acted fairly and therefore acted within his jurisdiction.

Accordingly, the appeal was allowed.

Oswald and Cardinal v. Director of Kent Institution

This is a judgment of the Supreme Court of Canada rendered on December 19, 1985.

The appellants appealed for a relief in the nature of habeas corpus to be released from administrative segregation in Kent Institution into the general population of the penitentiary.

Facts:

> In July 1980, Oswald and Cardinal were placed in solitary confinement by the Director of Kent "for the good order of the institution" pursuant to section 40 of the Penitentiary Service Regulations, after they allegedly took a guard hostage at Matsqui institution. The classification Board referred to in section 40 conducted a monthly review of the circumstances relating to the segregation of the inmates and in October 1980, recommended that they be returned to the general population. The Director declined to accept this recommendation and Oswald and Cardinal remained in solitary confinement.

Issues:

1. Does the Supreme Court of British Columbia have jurisdiction to order habeas corpus with certiorari in aid against a federal board or tribunal?

2. Could the Supreme Court of British Columbia on an application for habeas corpus alone consider affidavit evidence to determine whether there had been an absence or an excess of jurisdiction?

3. Is habeas corpus available to obtain the release of a person from detention or solitary confinement to detention in the general population within a prison?

4. Did the Director so fail to observe the principles relating to the procedural fairness that it could be held that he acted without jurisdiction in making his decision to keep Oswald and his co-accused in solitary confinement?

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Judgment:

1. The Supreme Court of Canada stated that the Court of Appeal of British Columbia correctly concluded that the British Columbia Supreme Court had jurisdiction to issue certiorari in aid of habeas corpus;

2. The Supreme Court of Canada stated that the British Columbia Supreme Court could on an application for habeas corpus alone consider affidavit evidence to determine whether there had been an absence or excess of jurisdiction; and

3. The Supreme Court of Canada stated that habeas corpus would lie to determine the validity of the confinement of an inmate in administrative dissociation or segregation, and if such confinement be found to be unlawful to order his release into the general population of the institution.

4. With respect to the last issue, procedural fairness requires that the Director inform the appellants of the reasons for his intended decision to continue the appellant's segregation despite the recommendation of the Segregation Review Board that they be released into the general population of the penitentiary and give them an opportunity before him, however informal, to state their case for release.

   By his failure to afford the appellants a fair hearing on the question on whether he should act in accordance with the recommendation of the Segregation Review Board, the Director rendered the continued segregation of the appellants unlawful. They, therefore, had a right on habeas corpus to be released from administrative dissociation or segregation into the general population of the penitentiary.

Held:

The appeal was allowed.

Dale William Chalk v. Roland Bouwman, in his capacity as the Independent Chairperson of the Disciplinary Court of Matsqui Institution

This is an application for certiorari to quash a conviction of the applicant under paragraph 39(k) of the Penitentiary Service Regulations.

This is a judgment of the Federal Court, Trial Division, rendered by Mr. Justice Strayer on April 15, 1987.

FACTS — The applicant was convicted under paragraph 39(k) of the Regulations for fighting with another inmate. The conviction is attacked on the grounds that the respondent acted without jurisdiction because he either convicted without any evidence before him to support the charge or he considered a written report by an officer of the Institution without calling the author to testify or be available for cross-examination.

ISSUE — Whether there was evidence to convict the applicant under paragraph 39(k).

DECISION — Though the Chairman's intervention with the officer's report was improper, there was evidence quite apart from the report upon which the applicant could be convicted and it is not at all clear that the Chairman did take the contents of the report into account as an additional factor.

The application was dismissed.

Michel Charron v. Marc-André Lafleur, director of Laval Institution. (1984) Québec Court of Appeal.

This is a judgment rendered by the Quebec Court of Appeal July 19, 1984 by judge Claude Bisson in chambers.

FACTS — In May, 1984, the Appellant was sentenced to imprisonment for a period of two years less a day. On July 6, 1984 he sought a writ of habeas corpus from the Superior Court. The judge refused to issue the writ. The Appellant appealed to the Court of Appeal. The Appellant then filed a Petition requesting his conditional release pending the appeal. The Respondent entered a preliminary objection on the ground that, if a writ of habeas corpus is not granted, a judge does not have the jurisdiction to release an offender as this jurisdiction can only be exercised after the issuance of a writ when, pursuant to the writ, the offender is no longer under the exclusive jurisdiction of the gaoler, but also under that of the court called upon to determine the legality of the detention.

ISSUE — Does a judge have jurisdiction to release an offender when a writ of habeas corpus has not been granted?

HELD — Appeal dismissed.

REASONS — Section 608 of the Criminal Code (release pending appeal proceedings), does not give the court jurisdiction to release an accused when a Superior Court has refused to issue a writ of habeas corpus.

Rule 59 of the Rules of Criminal Procedure of the Quebec Court of Appeal prescribes the application of Article 855 of the Quebec Code of Civil Procedure. Article 855 stipulates that conditional release can only be granted when a writ of habeas corpus has been granted.

In addition, the old common law principles relating to habeas corpus are to the same effect.

NOTE — A contrario, a court does have jurisdiction to release an accused once a writ of habeas corpus has been issued but before the validity of the detention has been determined. (see Reddekopp v. R.), Correctional Case Law.

Chester v. The Queen

This was a judgment of the Supreme Court of Ontario rendered by Mr. Justice Holland on May 1, 1984.

The applicant Joseph Chester sought a writ of habeas corpus ad subjicidendum with certiorari in aid to secure his release from Special Handling Unit at Millhaven Penitentiary.

FACTS — The applicant was transfered from Kent Institution, B.C. to the Special Handling Unit (S.H.U.) of Millhaven Penitentiary on being classified as particularly dangerous by the National S.H.U. Committee. The Committee in making its decision to transfer Chester considered various documentary material not given to Chester prior to the hearing. Chester was not allowed to be present when the Committee met nor was he allowed to present witnesses or be represented by counsel but he was allowed to make written representations to the Committee.

ISSUES — The applicant sought to challenge the decision to place him in an S.H.U. by alleging that statutory authority for its creation did not exist, that the S.H.U. involved such deprivations of liberty and security of the person within the meaning of the common law and the **Charter of Rights and Freedoms**, that even if lawful, it would have to be accompanied by greater procedural protection than given; that the procedures whereby the applicant was placed in the S.H.U. were unfair and contrary to fundamental justice and that the transfer to S.H.U. was effected in breach of the common law duty to act fairly and principles of fundamental justice.

HELD — 1) That following **Re Miller** while section 18 of the **Federal Court Act** gives exclusive jurisdiction to the Trial Division of that court to issue an injunction, writ of certiorari, prohibition, mandamus, quo warranto or to grant declaratory relief against any federal board, commission or other tribunal, it does not remove the jurisdiction of a provincial Superior Court to deal with habeas corpus with supporting affidavit material, or with **certiorari in aid** where relief is sought against a federal board, commission or other tribunal.

2) That section 13 of the **Penitentiary Service Regulations** authorizes the establishment of the S.H.U. by reason of the requirement that an inmate be confined to an institution with facilities capable of providing protection to the public and rehabilitation to the inmate. An institution under the Regulations is defined as including a "facility of any description ... that is

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operated by the Service for the custody, treatment or training of persons sentenced or committed to a penitentiary ..." Thus an S.H.U. is an institution within the meaning of the term in the **Penitentiary Service Regulations.**

That by virtue of section 13(3) of the **Penitentiary Act** the Deputy Commissioner of Security is authorized to transfer an inmate from one institution to another. That power, coupled with the general power of the Commissioner and his Deputies to pass rules, orders and directives binding upon their subordinates gives the Deputy Commissioner authority to direct the Warden of the receiving institution to place an inmate in a section of the institution which is more secure than others.

3) That the Commissioner's Directive on S.H.U.s is a valid exercise of the statutory power given to the Commissioner to issue directives which are not law but are binding upon all within the Penitentiary Service, and that its provisions do not conflict with the provisions of the **Penitentiary Act** or **Penitentiary Service Regulations.**

4) That an inmate confined in an S.H.U. has a right to procedural fairness. The measure of procedural fairness is the same whether it is considered under the common law, the **Bill of Rights** or the **Charter.** However, the courts are not likely to interfere with the exercise of administrative authority by prison officers when considering the duty to act fairly.

5) That section 7 of the **Canadian Charter of Rights and Freedoms** deals with procedural rights only and not substantive ones.

6) That the procedure set out in the Commissioner's Directive dealing with the transfer of an inmate to an S.H.U. does not violate procedural fairness.

7) That the applicant was entitled under the established practice to take notice of the fact that his transfer to the S.H.U. was to be considered and allowed to respond in writing. The notice given in this case was misleading and inadequate having in mind the severity of life in the S.H.U. in relation to life in the general population and therefore failed the test of fairness.

In order to ensure procedural fairness the notice should have included at least, a comprehensive list of the available material to be considered by the Committee and a summary of the contents of such material. That copies of such materials subject to restrainsts in respect of confidentiality should be provided to the inmates.

That procedural fairness was not followed in that the decision to transfer the applicant was not made by the Deputy Commissioner Security, the person with the primary decision making authority but by the National S.H.U. Review Committee.

ORDER Application Granted

JOHN ALBERT CHESTER V. NATIONAL PAROLE BOARD AND WARDEN OF KENT INSTITUTION

Decision of the British Columbia Court of Appeal rendered April 13, 1989.

FACTS

Chester appealed a decision by the B.C. Supreme Court rejecting his Application for Habeas Corpus with Certiorari in Aid. The appellant was serving an aggregate sentence in excess of nine years and would have been entitled to be released on mandatory supervision on September 27, 1987. He was granted day parole on June 25, 1987, which was suspended two days later for breach of special conditions. At his revocation hearing on July 28, 1987, the Board considered whether to re-credit any of the earned remission that otherwise was automatically forfeited upon revocation of the parole. Chester was notified on July 30, 1987 that his parole was revoked and on August 5, 1987, he was told that 852 days of remission were re-credited. However, on September 24, 1987 Chester received an additional notification of another Parole Board review decision, to which he had not been given an opportunity to respond, that effective September 22, 1987, instead of a re-credit of 852 days the Parole Board decided only to re-credit 305 days of earned remission. This change was apparently effected because the Board had always intended that Chester be released in January 1989 rather than January 1988. However, due to an error in sentence calculation, he was re-credited sufficient remission to be released in January 1988.

ISSUE

Whether the Parole Board had authority to act on its own motion to correct the mistake to reduce the remission credit to 305 days.

DECISION

Even if the Parole Board's first decision could be considered as one containing a mistake or as not accurately reflecting the Board's intention, having pronounced and published its decision to re-credit 852 days, the Board had no inherent power to change it at a later date. If a mistake has been made in favour of an inmate, that mistaken decision must stand. There is no authority in either the Parole Act or Regulations to permit the Board to reconsider one of its decisions, except pursuant to section 22 of the Regulations which gives inmates certain rights to request the Board to reexamine its decision to revoke parole. No similar rights have been given to any parole authority or the Parole Board by its own motion.

The Appeal was allowed and Certiorari issued to quash the decision of the Parole Board to reduce the re-credit to 305 days. Habeas Corpus was also issued to direct the release of Chester.

City of Saint John v. Williams et al. and Chubb Industries Ltd

This is a decision of the New Brunswick Court of Appeal delivered on behalf of the Court by the Honourable Chief Justice Stratton on November 6, 1985.

FACTS

On June 21, 1977 Kenny, a prisoner in a padded cell at the Saint John city police lock-up, intentionally set fire to the padded wall in the cell. As a result of the fire 21 of 27 prisoners in the lock-up where suffocated by the intense heat and smoke given off by the burning foam padding. Several of the prisoners had recently been transferred to the city lock-up because of three fires at the provincial gaol. The personal representatives of 12 of the 21 dead prisoners brought a negligence action against the City of Saint Johns and the personal representatives of 7 of the 12 also brought a negligence action against the Province of New Brunswick.

The New Brunswick Court of Queen's Bench, Trial Division, dismissed the action against the province on a finding that the province reasonably relied on the City's facilities to house its prisoners. The court allowed the action against the City and held that it was negligent in using dangerously flammable padding in the padded cell and in failing to install a sprinkler system, which would have immediately extinguished the fire. The court held that Chubb was liable to indemnify the City for 50% of its damages and held that it was negligent in supplying the inherently dangerous foam padding, when it should have been aware that it was dangerously unsuitable, and in failing to warn the City about its dangerous properties.

ISSUES AND DECISION

1. The personal representatives of the deceased prisoners appealed the dismissal of their claims against the Province of New Brunswick.

The court held that the trial judge was not clearly or palpably wrong in determining:

(1) that there was no evidence that matches from provincial prisoners were somehow obtained by Kenny; and

(2) that the Province had acted reasonably in the emergency situation that it faced when it relied on the City to provide safe facilities and adequate supervision.

The trial judge's conclusion that the Province did not breach any duty that it owed to its prisoners should therefore be upheld.

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2. The City appealed the finding of liability against it and, in the alternative, as to the failure to find that it was entitled to full indemnity from Chubb.

In dismissing the City's appeal the Court held as follows:

1) that there was evidence before the trial judge from which he could reasonably conclude that the City was negligent in failing to install a sprinkler system in the lock-up;
2) that the negligence of the City was an effective cause of the loss;
3) that the City was jointly and severably liable to make good the entire loss of the personal representatives of the deceased prisoners; and
4) that the trial judge's apportionment of the damages was proper in the circumstances, and that therefore the City was not entitled to full indemnification from Chubb.

3. Chubb appealed against the City as to the finding of liability against it.

In dismissing Chubb's appeal the Court held as follows:

1) that the deaths were caused in part by the negligence of Chubb in failing to take reasonable care to ascertain the major industrial hazards of the S.B.R. padding marketed by it and to give warning of such hazards to their customers;
2) that the consequences of Chubb's negligence could fairly be regarded as within the ambit of the risk created by that negligence; and
3) that the result of Chubb's negligence was not freakish, fantastic or highly improbable but rather was foreseeable and proximate and constituted a substantial factor in the loss that occurred.

CLEARY V. CSC AND NPB (F.C.A.) April 3, 1990

FACTS:

The Applicant was sentenced to imprisonment in a penitentiary for seven years. His warrant expiry date was June 24, 1992. With his earned remission his presumptive release date was March 4, 1990. He was properly referred for detention pursuant to sections 21.1 and 21.6 of the Parole Act.

Paragraph 16.1(2)(a) of the Parole Regulations requires that the hearing by the Board take place no later than thirteen weeks prior to the inmate's presumptive release date. Section 17 of the Regulations requires that the Board "shall provide" the inmate with a written summary of the relevant information in its possession at least fifteen days before the date set for the hearing.

Due to a strike involving CSC employees the "relevant information" was delivered only nine days before the hearing. The Board offered to grant an adjournment to allow extra time to prepare. The Applicant declined the adjournment and conceded before the Court that he had had ample time to prepare for the hearing. The Applicant contends that the wording of the Regulations is clear and that by not adhering to the timeframes the Board erred in law, even though he was not prejudiced by the error.

In dismissing the application for certiorari, the Federal Court, Trial Division, held that the provisions of the Parole Act were not penal in nature and therefore the provisions regarding timeframes were only directory and not mandatory.

The Appellant appealed this decision to the Federal Court of Appeal.

ISSUE:

Did the Board err in law by not adhering to the timeframes as expressed in the legislation?

HELD:

In looking at the notice provision in the context of the Parole Act and Regulations as a whole, the importance of the subject matter before the Parole Board and its consequences to the Applicant, the Federal Court of Appeal disagreed with the Trial Division of the Federal Court and concluded that the timeframes were intended to be and are in fact imperative. The Court found that "without more, the Applicant would have been entitled to certiorari". However, as the granting of certiorari is discretionary and the Applicant had conceded that he had suffered no prejudice, the Trial Division ought to have exercised its discretion to refuse to grant certiorari.

ORDER:
The appeal was dismissed.

Collin v. Lussier (1)

Judgement of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Décary on February 24, 1983.

Collin applied for a writ of *certiorari* quashing the respondent's decision to transfer him from Leclerc, a medium security institution, to Laval, a maximum security institution.

He also applied for a writ of *mandamus* ordering the respondent to respect his constitutional, statutory, regulatory and legal rights and to transfer him to a medium security institution.

The applicant also applied for an order under section 24 of the *Constitution Act, 1982,* granting him such remedy as the court considers appropriate and just in the circumstances.

Facts:

The applicant alleges in support of his application that:

(1) the respondent's decision is illegal and *ultra vires* as the transfer was really a disguised form of punishment.

(2) the respondent's decision is contrary to sections 13 and 14 of the *Penitentiary Service Regulations* and section 22 of CD 600-2-04.1 since the applicant was transferred to an institution where the degree of security is in excess of what his case requires.

(3) the decision is contrary to section 7 of the *Canadian Charter of Rights and Freedoms* as far as the applicant's right to the security of his person is endangered.

The applicant claims that in 1979 he suffered a coronary thrombosis and that subsequently he suffered two more heart attacks. He also claims it would be impossible for him to have immediate access to medical care which his state of health could require at Laval institution.

The facts show that the applicant served as "Legal affairs clerk" during his stay at Leclerc institution. On October 26, 1982 he was transferred to Laval institution. The respondent alleged that his decision to transfer the applicant was based on his inacceptable attitude and behavior within the institution. Décary, F.C.J. found however, that the respondent's decision to transfer the applicant was based on the latter's activities as a "jailhouse lawyer".

Judgement:

- Held:

(1) Transferring an inmate from a medium security institution to a maximum security institution effectively lessens his freedom and therefore constitutes a punishment.

As the respondent has not revealed any clear motives for justifying his decision to transfer the inmate, this transfer was in fact a way of punishing the inmate. This decision is illegal and *ultra vires* the powers of the respondent as he has not respected the duty to act fairly.

(2) With regards to the applicant's allegation that he was transferred to an institution where the level of security was in excess of that which his case required, the judge concluded that considering the fact that Collin was always kept amongst the general population until the eve of his transfer and that his authority to move about the institution had never been revoked, the respondent had transgressed the duty to act fairly as there was no indication that the applicant constituted such a risk to the security of the institution as to warrant his transfer to a maximum security institution.

Section 13 of the *Penitentiary Service Regulations* refers specifically to the Commissioner's directives. By this fact the directives become more than simple guidelines. The inmate is therefore justified in demanding that the criteria contained in these directives concerning where he is to be kept and the level of security applicable to him be respected.

The respondent argues that his decision to transfer Collin was based on the latter's arrogance and impoliteness towards the institution's officers. These could, at the limit, warrant a transfer to another medium security institution. They do not, however, warrant a transfer to a maximum security institution.

Counsel for the respondent has cited many decisions rendered in the Trial Division of this Court which have held that, due to the large discretionary powers delegated by the statute and its regulations to the

Canadian Penitentiary Service, the Court should refrain from intervening in matters of transfer. This caselaw is entirely based on the Ontario Court of Appeal decision in *Re Anaskan v. The Queen*. The *Martineau No. 2* decision rendered by the Supreme Court of Canada has now definitely overturned this caselaw.

(3) With regards to the applicant's third ground supporting his application, to the effect that the decision to transfer him threatened the security of his person thereby constituting a denial of his constitutional rights guaranteed by the *Charter*, the judge held that the transfer effectively did deprive the applicant of his right to the security of his person as it increased his anxiety which was due to his state of health, thereby increasing the risks of aggravating his health problems and as it deprived him of access to adequate medical care.

- Order:

The writ of *certiorari* quashing the respondent's decision to transfer Collin to Laval institution is issued.

The Court commands the respondent to transfer Collin to a medium security institution and to respect his constitutional, statutory and regulatory rights.

The Court orders the respondent to pay the applicant the sum of $18,136 with interest.

Note:

This judgement is being appealed.

Reference:

Cline v. Reynett
Morin v. Comité national chargé des causes d'USD (Fed. Ct.)
Bruce v. Yeomans
Martineau #1, #2
Sauvageau
Pagé
In Re Anaskan
Plante
MacGrath

Lussier v. Collin:

This was a judgement of the Federal Court of Appeal rendered by Mr. Justice Pratte on December 12, 1984.

The appelant appeals from a decision which granted a writ of certiorari quashing a decision ordering the transfer of the respondent from Leclerc to Laval and furthermore, which condemned the appelant to pay to the respondent $18,136.00 in damages resulting from the infringement of section 7 of the Canadian Charter of Rights and Freedom.

HELD

1. The portion of the judgement appealed from concerning the damages resulting from the alleged violation of section 7 of the Charter, that the transfer deprived the respondent of his right to the security of his person is not good law. Nothing in the evidence could establish such a conclusion and furthermore the respondent could not proceed by way of a simple writ to establish such a claim.

2. Because the respondent is on parole on the day of the hearing the question as to the transfer was now without object.

Granted in part.

Comité des Détenus du Centre Fédéral de Formation, et al v. Solicitor General of Canada and Donald R. Yeomans
Collin, Nadeau, et al v. Solicitor General of Canada and Donald R. Yeomans

Judgment of the Federal Court, Trial Division, rendered by the Honourable Mr. Justice Dubé on September 23, 1982.

Petitioner in both cases are applying for interlocutory injunctions ordering the defendants not to authorize "double-bunking" within federal penitentiaries, particularly at the Leclerc Institution and the Federal Training Centre. The same judgment applies to both applications.

Facts:

The evidence presented in this case indicated that in order to deal with the increasing inmate population, CSC has decided to resort to "double-bunking" of newly arrived inmates, as a temporary measure, until other Institutions under construction or renovation are ready to receive new inmates.

The petitioners based their application on two arguments:
1. a United Nation convention wherein a disposition which provides that there should be one inmate for each cell.

2. double-bunking constitutes cruel and unusual treatment or punishment, contrary to section 12 of the *Canadian Charter of Rights and Freedoms*.

Held:

1. The solicitors for the petitioner were unable to cite any canadian statute or order in council declaring this convention to have force of law in Canada. This argument cannot therefore support an application for an interlocutory injunction.

2. In the absence of Canadian Case Law on the matter - due to recent proclamation of the *Charter* - Mr. Justice Dubé referred to certain american cases on the same subject matter. In a case similar to the present one, the U.S. Supreme Court decided in *Rhodes* v. *Chapman et al*, that double-bunking was not cruel and unusual punishment.

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> Mr. Justice Dubé found that in principle, double-bunking is not recommendable. However, since the measure is a temporary one according to the evidence produced and in the absence of proof of cruel and unusual punishment, he refused to issue the interlocutory injunction.

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Mr. Justice Dubé also concluded that as the practice of "double-bunking" does not directly affect the petitioners, they do not have the necessary *locus standi*. Also the present judgment does not exclude the possibility of other applications for injunctions made by inmates directly affected by this practice. They must however, in order to be successful, prove that the situation constitutes "cruel and unusual punishment".

R. v. Conway

Judgment of the Federal Court of Appeal, rendered on July 13, 1990.

Justice Strayer of the Federal Court of Canada, Trial Division, held in his decision of June, 1987, that it was unlawful, except in emergency situations, for female guards to view male inmates in their cells at Collins Bay Penitentiary without their express or implied consent where such viewing was neither previously scheduled to the general knowledge of inmates affected nor previously announced to them by reasonable means. He also held that frisk searching of male inmates by female correctional officers was not in contravention of the Charter.

The Crown appealed the case to the Federal Court of Appeal and Conway cross-appealed on the narrowness of the decision on cross-gender viewing in cells and on the issue of cross-gender frisk searching.

ISSUES: 1) Did the trial judge err in concluding that it was unlawful, except in emergency situations, for female guards to view male inmates in their cells at Collins Bay Penitentiary where such viewing was neither previously scheduled nor previously announced?

2) Did the trial judge err in concluding that frisk searching of male inmates by female guards was not in contravention of s.8 of the Charter?

DECISION: 1) The Court of Appeal held that the presence of female guards in the living areas of the inmates for professional reasons, at all times, was not unreasonable. The decision of the Court, written by Madame Justice Desjardins, was that the inmate's reasonable expectation of privacy in prison must be balanced against the public interest which encompasses three objectives: a)the need for adequate security in prisons; b) the goal of allowing women equal access to employment in federal prisons; c) the goal of rehabilitating inmates. The Court stated that on balance, these goals pursued by the state override the concerns of the inmate. Therefore, there is no breach of section 8 of the Charter when women guards unexpectedly view male inmates in their cells.

The Court of Appeal held that unexpected viewing of male inmates during surprise counts is necessary to maintain order in the carceral institutions and ensure

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that inmates are alive: it is no more unreasonable when women perform the counts than when men do. Vestibuling female guards while male guards do the counts keeps women from working the whole spectrum of the Penitentiary Service. Finally, the Court noted that the presence of women guards in general has some significant positive impact for the inmates and the institutions. The Crown's appeal on this issue was therefore allowed while Conway's cross-appeal was denied.

2) The Court accepted the assessment of the trial judge that frisk searches of male prisoners by female guards do not constitute a breach of the rights guaranteed by sections 7,8 or 15 of the Charter. Conway's cross-appeal in this issue was therefore denied.

Mr. Justice Marceau concurred in the result but wrote his own reasons. He wrote that he did not consider that unexpected viewing or surveillance by female guards of male inmates in their living quarters would constitute a breach of s.8 of the Charter because such viewing or surveillance in plain view would not constitute a search within the meaning of s.8 of the Charter. However, even if such viewing is a search within the meaning of s.8, that section does not guarantee protection for personal interests and feelings such as Conway has invoked.

He held further that were the search unreasonable, it could not be justified by the affirmative action program under s.15 of the Charter because such a program has no bearing on the reasonableness of the search. Finally, he held that s.15 was not brought into play merely by the fact that male inmates are treated differently from female inmates: "Not only is this so-called inequality created by a hiring policy and a special directive and not by law, it does not appear to me to prejudice men in a way significant enough to speak of discrimination."

Robert Cunningham v. the Queen
(Ont S.C. May 2/89 unreported)
(Ont C.A. Oct 11/90 unreported)

FACTS:

The inmate filed an Habeas Corpus application seeking his release on mandatory supervision. He alleged that his case was referred less than 6 months prior to his MSD and not by reason of "information received within 6 months" of that date.

ISSUES:

Smith J. (Ont S.C.) dismissed the application. He stated that the information obtained within the 6 months must be new information, that is, information not reasonably expected to have been within the knowledge of the Commissioner or the Service.

The Ontario Court of Appeal agreed with the conclusion of Smith J. but did not agree with hiw view that information must be new in the sense Smith J. attributed to it. They adopted the decision of McKay J. (G.C.) in Ford v the Commissioner of Corrections, 1990, who stated that the information must be new in the sense that the content be unknown to both the Commissioner and the Service for which he is responsible prior to the 6 month period; it should come into their possession for the first time during that period.

DECISION:

Appeal dismissed.

Robert Dalpé v. Her Majesty the Queen

Judgement of the Federal Court, Trial Division, rendered by Mr. Justice Rouleau, September 30, 1982.

This is a claim for the loss of an inmate's effects.

Facts:

Inmate Dalpé was placed in dissociation at his own request on or about May 28, 1978. On June 25, 1978, he asked the authorities to remove his personal effects from his previous cell and to place them in a secure area. On August 9, 1978, the authorities informed him that his effects would remain in his cell and that the cell had been "dead-locked". The inmate was then transferred to Leclerc Institution. On his arrival, he inquired into the whereabouts of his personal effects; the authorities informed him that they were unable to find them.

Held:

Divisional Instruction 329 provides the procedure to be followed regarding the handling of an inmate's personal effects. The fact that the cell was placed under dead-lock was insufficient to exonerate the authorities from their legal duty to protect the inmate's effects. The authorities at Archambault Institution, having neglected to follow the procedure specified by D.I. 329, were held responsible for the loss of inmate Dalpé's personal effects.

The Queen v. Carol Maureen Daniels

This is a judgment of the Court of Queen's Bench for Saskatchewan rendered by the Honourable Madam Justice Wedge on July 15, 1990.

FACTS:

The applicant filed a Notice Pursuant to Section 8 of the Constitutional Questions Act that Federal and Provincial laws, regulations, administrative practices and agreements which require or have the effect of forcing female prisoners of native ancestry form the Prairie Provinces to serve any or part of their sentences at the Kingston Prison for Women is unconstitutional.

ISSUE:

Whether all Federal and Provincial laws, regulations, policies or agreements and all government administrative practices and procedures, including but not limited to the Penitentiaries Act and regulations made thereunder, and the Criminal Code of Canada, are invalid insofar as they violate the rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms, and more specifically those rights guaranteed by Section 7, 12, 15, and 28 of the said Charter, and are therefore to that extent inconsistent with the supreme law of the land, as stipulated by Section 52 of the Charter.

DECISION:

The Court found that women have been discriminated against in the federal penal system on the basis of sexual gender contrary to Sections 15 and 28 of the Charter in that federal penitentiaries for men have superior programs to those offered to women and exist across the country.

The Court was also satisfied that women of Native ancestry from the prairie region in general, and Carol Daniels in particular, would be discriminated against if they must serve any time in the Prison for Women in Kingston. These potential discriminations arise out of Section 731 of the Criminal Code, which requires that women who are sentenced to more than two years must serve their time in a federal penitentiary, Section 15 of the Penitentiaries Act, which gives the Commissioner dicscretion to direct where a prisoner must serve her sentence, and the various regulations and directions under that Act.

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The Court found that Carol Daniels' Section 7 Charter rights to life and security would be violated by being imprisoned far from home, in a "medieval, castle-like prison" in which she would be at a high risk for death by suicide.

The Court further found that Carol Daniels' Section 12 Charter rights not to be subjected to cruel and unusual punishment would be violated if incarcerated in Prison for Women, and adopted the view of Mr. Justice McIntyre in the Smith case:

> "There are conditions associated with the service of sentences of imprisonment which may become subject to scrutiny under the provisions of Section 12, not only on the basis of disproportionality or excess, but also concerning the nature or quality of treatment. Solitary confinement is practiced in certain circumstances affords an example...
>
> And imprisonment at locations far distant from home, family and friends, a condition amounting to virtual exile, which is particularly relevant to women since there is only one federal penitentiary for women in Canada."

This judgment has been appealed to the Saskatchewan Court of Appeal.

Robert Daoust v. Her Majesty the Queen

Judgement of the Exchequer Court of Canada, Walsh J., March 26, 1969.

FACTS:

- The petitioner injured his left foot during an escape. He was unlawfully at large for 1 year before he was incarcerated again.

- The petitioner complained of pains in his foot as soon as he was admitted to St. Vincent de Paul Penitentiary on October 16, 1963. The pains were diagnosed by a Dr. Lefebvre as being due to flat feet and plantar supports were provided.

- Following his transfer to Leclerc Institution in May, 1965, he was found to have a fracture in his foot, aggravated by lack of care.

- The petitioner was then transferred to Queen Mary Hospital in Montreal where he was given emergency treatment.

- The petitioner claims from Her Majesty the Queen in right of Canada the amount of $15,000.00 in damages for injury due to error, carelessness, incompetence and gross negligence on the part of the respondent's employees.

- respondent's liability, if there is a liability, is as provided at paragraph 3(1)(a) ans subsection 4(2) of the Crown Liability Act.

ISSUES:

Was Doctor Lefebvre a servant of the Crown acting in the performance of his duties pursuant to paragraph 3(1)(a) when he examined an treated the petitioner on October 16, 1963?

> It would appear that when a patient is treated in a hospital, if he has neither engaged nor chosen a particular physician, he is treated by a physician acting as a servant of the hospital. The same priniciple applies to penitentiaries, where inmates do not choose their own physician.
>
> [Translation] "In the provision of this care, the Crown's liability attaches to the actionable acts or omissions of its servants, professional or non-professional, provided that the servant himself can be actioned personally in tort."

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Was Doctor Lefebvre responsible in tort to the petitioner?

> While the Civil Law recognizes the principle of gross fault, there are no degrees of fault at Common Law. If fault is established, the doctor's liability is incurred, as no consideration is given to the degree of fault. Consequently, a duty of care and diligence is owed by the physician.

HELD:

Doctor Lefebvre was negligent, as he himself examined the x-rays, when he should have consulted a specialist or referred the petitioner to an orthopedist.

There can be no doubt that the Crown is liable for the actions of its servant. However, the quantum of damages is reduced to $300.00, the petitioner's disability being due entirely to his fall and his failure to obtain medical attention during the year he was at large and in hiding. The amount of $300.00 is awarded for the period of excess pain the petitioner suffered as a result of the respondent's failure to provide treatment, as compared to the pain the petitioner is now experiencing.

Constance Diane Davidson v. Disciplinary Board of Prison for Women and Helen P. King (Independent Chairperson)

This is a judgement of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Cattanach on July 6, 1981 in Ottawa.

The applicant seeks relief in the nature of certiorari to quash the decision of the respondents.

Facts

The applicant is an inmate at the Prison for Women in Kingston and was charged on January 2, 1981 with a disciplinary offence contrary to paragraph 39(k) of the *Penitenitary Service Regulations*. Her counsel requested that the applicant be permitted to appear at the disciplinary hearing accompanied by counsel. The request was rejected by the A/Warden and the Independent Chairperson on the ground that the institutional policy did not allow for representation. The disciplinary hearing proceeded on January 26, 1981 and the applicant was found guilty of the offence and sentenced to ten days in punitive dissociation.

Issue

The question to be determined is whether the applicant's request for legal counsel at the disciplinary hearing should have been denied by reason of the Correctional Service of Canada's policy expressed in the annex to Commissioner's Directive No. 213.

> A prisoner has no absolute right to be represented by legal counsel but the presiding officer of a disciplinary tribunal has the discretion to allow an inmate to be represented. In this case, the Independent Chairperson did not appreciate that she had that discretion as she based her decision solely on the policy expressed in the Annex to C.D. 213. The failure to exercise that discretion amounts to a denial of natural justice which is contrary to the principles of fairness in administrative hearings emphasized by Pigeon, J. and Dickson, J. in Martineau #1 and #2.

However, when a statutory provision specifies to the contrary, the discretion of the disciplinary court, regarding this matter, no longer exists and a problem of this kind would not arise. But in this case, neither the *Penitentiary Act* nor the *Regulations* thereunder preclude that discretion therefore it still subsists.

REFERENCE: Minott

Ref.: Martineau No. 2

CONNIE DAVIDSON v. THE PRISON FOR WOMEN
DISCIPLINARY COURT AND HELEN P. KING

This is the summary of a judgement rendered on April 15, 1982 by Mr. Justice Dubé of the Federal Court, Trial Division, in Ottawa.

This was an application for certiorari to quash two sentences of 30 days imposed upon the applicant by the Chairperson of a disciplinary court, to be served in dissociation and to run consecutively to another sentence of 30 days.

Issue:

Does the Independent Chairperson have jurisdiction to impose such sentences to run consecutively?

The principle applicable in the criminal law context that authority to impose consecutive sentences must be specifically provided by statute does not apply in the present circumstances. We are not dealing here with a criminal offence but with a disciplinary offence, and there are no provisions either in the *Penitentiary Act* or the *Penitentiary Service Regulations* analogous to subsection 649(1) of the *Criminal Code* to the effect that a punishment for a disciplinary offence shall commence when it is imposed. The applicant, having been convicted of three separate disciplinary offences, may be ordered to serve three consecutive terms not exceeding 30 days each.

Accordingly, the motion was denied with costs.

VINCENZO DEMARIA v. THE REGIONAL CLASSIFICATION BOARD ET AL.

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Jerome on February 28, 1986.

This is an application for orders in the nature of certiorari and mandamus, quashing the Regional Classification Board's decision to increase the security classification of the applicant, and to transfer him from Collins Bay Institution to Millhaven Institution.

FACTS On January 1985, the applicant commenced serving a life sentence for second degree murder at Millhaven Institution. Following a reclassification, he was transferred on March 12, 1985, to Collins Bay, a lower security institution. On March 18, he was placed in segregation; he was given written notice that this measure had been taken pending an investigation into his suspected dealing in contraband. He was also advised of information from Millhaven staff that he had allegedly brought cyanide into Collins Bay. The applicant appeared before the Segregation Review Board on March 21 and 28, where he was again advised of the allegations against him.

On April 9, he was given a 48 hours notice of transfer, outlining as a reason that there were reasonable and probable grounds to believe that he had brought cyanide into the institution. The applicant denied having done so, in writing. His counsel requested the right to be present at the Regional Classification Board's hearing, which request was denied . Written representations were therefore submitted.

The transfer was subsequently approved, and executed on May 2.

ISSUE Whether the procedural steps which were followed in this case responded adequately to the duty to act fairly towards te applicant.

DECISION The learned judge cited parts of his judgement in the McInroy case, where he stated that even though it was well established that prison authorities have a duty to act fairly in respect to administrative decisions concerning transfers and classification of inmates, there was no right to be present when a transfer decision is being made.

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Accordingly, the duty to act fairly in this case did not require that the applicant be given an oral hearing before the Regional Classification Board. The respondents have discharged their duty of fairness when the notice of the allegations on which the reclassification and transfer were being considered were given to the applicant, and when he was given an opportunity to respond to such allegations.

The application was dismissed.

(This decision is being appealed)

VINCENZO DEMARIA v. THE REGIONAL CLASSIFICATION BOARD ET AL.

Judgment of the Federal Court of Appeal, rendered by the Honourable M. Justice Hugessen on August 13, 1986.

This is an appeal from a decision of the Federal Court of Canada, Trial Division, dismissing an application for orders in the nature of certiorari and mandamus quashing the decisions reclassifying the appellant's security level and transferring him from Collins Bay to Millhaven Institution.

FACTS

Serving a life sentence, the appellant was transferred to Collins Bay Institution on March 12, 1985, following a security reclassification. After being placed in segregation on March 18, he was advised of information from Millhaven staff that he had brought cyanide into Collins Bay. He appeared on March 28 before the Segregation Review Board and was advised again of these allegations against him.

On April 9, he was given a 48-hours notice of transfer, stating that there were reasonable and probable grounds to believe that he had brought cyanide into the institution. The applicant denied having done so in writing. His counsel requested the right to be present at the Regional Classification Board's hearing, which request was denied. Written representations were therefore submitted. The transfer was subsequently approved and executed on May 2.

ISSUE

Whether the authorities complied with their duty to act fairly in this case, more particularly with their obligation to give the appellant an adequate notice of the case against him.

DECISION

The only relevant communication given to the appellant was the 48-hours notice of transfer outlining as a reason that the appellant was suspected of having brought cyanide into the institution.

The requests of the appellant and his lawyer to be given more precisions on that allegation were refused, on the ground that the information was confidential and could not be disclosed.

The purpose of giving a notice is to allow the person to have an opportunity to respond intelligently to the case against him. Where, as in this case, no hearing is to be held, it is particularly important that the notice contain as much details as possible, otherwise the right to answer becomes illusory. In this case, the appellant was faced with a bald allegation, and was reduced to a simple denial and futile speculations as to what the case against him really was. The authorities are entitled to protect there informers' identity, if there is indeed an informer involved, but it should always be possible to give the substance of the information while protecting the identity of the informant. The burden is always on the authorities to demonstrate that they have withheld only such information as is strictly necessary for that purpose.

The appeal was allowed.

Vincenzo Demaria v. Regional Transfer Board and Mr. Tom Epp, Warden of Joyceville Institution

This is a decision of the Federal Court Trial Division rendered by the Honourable Madame Justice Reed on January 29, 1988.

The applicant sought a writ of certiorari to quash a decision to transfer him from Joyceville, a medium security institution, to Millhaven, a maximum security institution. In addition, the applicant sought a writ of mandamus requiring his transfer back to Joyceville or some other medium security institution. The third relief sought by the applicant was to quash the charge that an offence contrary to s. 39(k) of the Penitentiary Service Regulations occurred.

FACTS As a consequence of serious disturbances at Joyceville in August 1987, stringent controls were imposed on the prison population . The applicant, elected Chairman of the Inmate Committee at Joyceville met with the warden of Joyceville on October 19 at which time it was agreed they would meet October 23 to discuss an agenda relating to the lessening of the restrictions which had been placed on the inmates. On October 21 the applicant had a telephone conversation with his MP's office discussing the situation inside the prison. As a consequence of the information communicated to his MP's office, the warden prepared to transfer the applicant to Millhaven the next day. The reasons for transfer were 1) inciteful remarks made to the MP's office threatening incidents at Joyceville should inmate demands not be met 2)failure to negotiate in good faith with the warden on serious matters regarding the normalization routine.

ISSUE Was the decision to transfer the applicant an arbitrary or unreasonable exercise of administrative authority and therefore taken without regard to principles of fundamental justice, in violation of s. 7 of the Charter?

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DECISION While it was recognized that the courts, in general, are reluctant to second guess administrative decision makers, acceptance of this position was held not to preclude judicial review of arbitrary decisions, that is, one's made without factual bases to support them. In this case there was held to be absolutely no evidence that a transfer was necessary on an 'emergency basis'.Nor was there evidence marshalled by prison officials to indicate they thought the applicant was causing or planning to cause disturbances within the institution. It was held to be repugnant to label communications of information about the situation inside a prison to one's MP as inciteful activity. In addition, the Commissioner's directive which treats written communications between inmates and MP's as privileged was held for policy reasons to be equally applicable to telephone communications. To base a decision to transfer an inmate from a medium to a maximum security institution on the fact that the inmate had a telephone conversation with his MP was held to be an arbitrary exercise of administrative authority. On this basis an order of certiorari was issued, quashing the decision of the warden to transfer the applicant.

The issue of the PSR charge was held to become somewhat moot in light of the decision given in respect to the transfer. While the court was unprepared to formally grant the remedy sought in this regard it was pointed out that if there is a lack of factual basis to support a decision to transfer the inmate, there is equally a lack of factual basis on which a charge could be supported.

Finally,while Reed J. refused to grant the order of mandamus sought, it was indicated refusal of appropriate prison officials to transfer the applicant either back to Joyceville or to another medium security institution would constitute a breach of the certiorari issued.

Dempsey v. Attorney General of Canada et al.

Judgement of the Federal Court, Trial Division, rendered by the Honourable Mr. Justice Rouleau, on May 13, 1985.

The plaintiff seeks a declaration that he is entitled to have all unexecuted warrants of committal arising from sentences under provincial statutes and municipal by-laws received by the Correctional Service of Canada and duly executed.

FACTS

On January 31, 1980, the plaintiff was sentenced to prison terms totalling twelve (12) years pursuant to convictions under the Criminal Code; he is now serving those terms in the Kingston Penitentiary.

The plaintiff is also subject to thirty-two (32) warrants of committal with respect to provincial offences and municipal by-laws' contraventions.

On or about March 22, 1984 a constable of the Kingston Police Department attended at Kingston Penitentiary and sought to execute the thirty-two (32) warrants of committal for the imprisonment of the plaintiff regarding his provincial offences; the officials of the Correctional Service of Canada in Kingston refused to accept the above mentioned warrants.

ISSUE

1) Whether subsection 659(2) of the Criminal Code applies to provincial offences, and forces the Correctional Service of Canada to accept and execute the warrants arising from sentences imposed under a provincial statute;

2) if it does, whether the said subsection is a constitutionally valide exercise of federal legislative powers;

3) if the subsection is valid and applies to provincial offences, whether the sentences for the provincial offences should be served consecutively or concurrently with the plaintiff's current penitentiary sentences for convictions under the Criminal Code.

DECISION

Counsel for the plaintiff submits that there are good policy reasons, (when it can be avoided, there should be no outstanding warrants of committal against a prisoner at the time of his release), and a number of

statutory indices, (subsection 7(1) and section 20 of the Parole Act), which support the vision that subsection 659(2) of the Criminal Code encompasses sentences for provincial offences. The plaintiff further states that the subsection is a constitutionally valid exercise of the federal power over criminal law and penitentiaries. On the other hand, the defendants argue that if subsection 659(2) had been meant to apply to provincial offences, Parliament would have specified it; the defendants further assess that mentioning provincial offences in that disposition would have been risking trenching on exclusive provincial authority over the imposition of penalties for violation of any law of the province.

Subsection 659(2) cannot be regarded, as it is presently worded, as extending to sentences imposed under provincial statutes. No other statutory provision allows the subsection to be interpreted as the plaintiff would have it. Section 7 of the Parole Act ,makes a specific mention of "an enactment of a provincial legislature"; such words are absent from subsection 659(2). Evidently, subsection 20(1) of the Parole Act may provide strange consequences if a prisoner on parole from a penitentiary is sentenced to a provincial jail and then has his parole revoked: the prisoner would have to be transferred back to the penitentiary, according to 659(2). Nevertheless, it is the task of Parliament, and not the courts, to remedy to that situation.

Having reached that conclusion, it was not strictly necessary to deal with the other two issues raised by the case. However, commenting briefly on the constitutional question, the judge stated that appropriately worded legislation amending subsection 659(2) to require that sentences imposed under provincial statutes on a prisoner in a federal penitentiary be served in the federal penitentiary would be intra vires Parliament, without any need for provincial delegation; indeed, such a provision would only incidentally affect provincial powers over punishment of provincial offences and over prisons, and it could easily be viewed as necessary to assure the coherence, smooth operation, fairness and justice of the overall system of punishment for federal sentences.

The declaration was denied and the action failed, each party bearing his own costs.

Brian James Dempsey v. A.G. of Canada et al.

Judgment of the Appeal Division of the Federal Court of Canada rendered on March 25, 1986.

This is an appeal of a decision of the Federal Court of Canada, Trial Division, dismissing the appellant's action, in which he sought a declaration that he was entitled to serve sentences from unexecuted provincial warrants of committal in a federal penitentiary, and concurrently to his Criminal Code sentences.

FACTS: The appellant, having been convicted for offences to the Criminal Code, was incarcerated in a penitentiary. The institutional authorities refused to execute provincial warrants of committal resulting from imprisonment sentences for parking by-law contraventions. The appelant challenged this refusal before the Federal Court of Canada, Trial Division, but was unsuccessful.

ISSUES: Whether subsection 659(2) of the Criminal Code applies to provincial offences, and forces the Correctional Service of Canada to accept to execute the provincial warrants.

If so, whether the provincial sentences in this case should be concurrent to the Criminal Code sentences.

DECISION:

a) M. Justice Hugessen

The Constitution divides the jurisdiction over corrections in allowing Parliament to legislate with respect to penitentiaries and the provinces to public and reformatory prisons. According to the historical background, it is clear that the word "penitentiary" was used to describe a prison to which persons serving sentences of two years or more were sent.

There is nothing in section 659 of the Criminal Code to indicate that it is limited to sentences imposed for breach of federal statutes; to limit that section on the grounds of a perceived absence of federal legislative power to deal with persons who are serving both federal and provincial sentences would lead to

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astonishing results and frustrate programs such as mandatory supervision and parole, as someone in the appellant's situation, when released under such programs, would be subject to immediate rearrest pursuant to his provincial sentences. The appellant is consequently entitled to serve his sentences of imprisonment for fine defaults in a penitentiary.

However, the Ontario Provincial Offences Act stating that multiple sentences are to be served consecutively unless otherwise provided, the provincial sentences should be served consecutively to the Criminal Code ones.

b) M. Justice Urie

By historical custom, Parliament's jurisdiction to legislate respecting penitentiaries contemplates a place for service of sentences of two years or more. However, the jurisdiction also comprises the power to legislate as to who shall be imprisoned therein, regardless of the legislative source under which the imprisonment sentence was imposed. The federal power thereby extends to the control and treatment of any person serving a sentence in a penitentiary. Therefore, subsection 659(2) may be applied to the apellant.

c) M. Justice Pratte (dissenting)

A provision which, like section 659, deals with sentencing, applies to the sentencing pursuant to the Code: it would require very clear language to extend the application of the sentencing provisions of the Code so as to make them applicable to sentences imposed under provincial enactments. Furthermore, Parliament lacks the jurisdiction to determine how a provincial sentence of imprisonment must be served. Such power is ancillary to the power to enact laws providing for sentences of imprisonment. Parliament can therefore not regulate the manner in which a sentence imposed pursuant to a provincial statute shall be served.

The appeal was allowed.

Wayne Desjardins v. The National Parole Board, The National Parole Board Appeal Division, Jean-Paul Lupien, Jean-Paul Perron, The Attorney General of Canada

Judgment of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Pinard on October 5, 1989.

Facts:

Pursuant to Sections 21.3 and 21.4 of the Parole Act, the applicant's case was reviewed and referred by the Correctional Service of Canada to the National Parole Board which decided that the applicant should be detained until the completion of his full sentence. An appeal to the National Parole Board Appeal Division was dismissed. This is an application for certiorari to quash the above decisions.

Issue:

Whether the authorities breached their duty to act fairly or whether there had been an infringement of section 7 of the Charter.

Decision:

The court stated that an administrative decision affecting an inmate's parole requires the observance of fairness.

The court dismissed the applicant's claim that there was no satisfactory recording of the proceedings at the hearing as required by law. In order to succeed on such a ground, the applicant must demonstrate that prejudice was suffered. The transcript was found, despite some gaps, to have provided a good ventilation of the issues and the appearance of fairness.

The court dismissed the applicant's claim that he was not fully informed of the allegations made against him. The applicant was found to have been sufficiently informed of the essence of the allegations and did not need to be given the specific information included in the confidential reports which would only have served to identify the sources of information.

Thirdly, the court dismissed the applicant's submission that the Board admitted evidence which was both irrelevant and illegal. The court held that whereas the evidence in question (pictures of the applicant's victim's body parts) may have operated unfortunately for the accused, it had substantial probative value and may have been related to any of the factors that the Board took into consideration in detaining the inmate.

The court dismissed the applicant's argument that he had difficulty understanding what was being said by the Board members as they were not English speaking. This allegation was unsubstantiated and not supported by any relevant complaint made prior to the original Board's decision.

Lastly, the court ruled that the applicant had totally failed to establish that any of his rights or freedoms as protected by the Charter had been infringed or denied.

The application was dismissed.

DINARDO v. THE QUEEN

This is a judgement of the Ontario Court of Appeal rendered by the Honourable Mr. Justice J.A. Martin on June 8, 1982.

This is an appeal from the decision of the Supreme Court of Ontario refusing to issue a writ of certiorari.

Facts:

The appellant as a result of a number of sentences imposed in March 1979, was serving a penitentiary sentence and was an inmate in Millhaven Federal Institution. On September 28, 1981 he was released from Millhaven on mandatory supervision. Immediately upon his release, the appellant was arrested. He was detained at the Quinte Regional Detention Centre until November 13, 1981 when he pled guilty to a charge and was sentenced to 18 months. It is clear that the sentencing hudge contemplated that the sentence would be served in a provincial institution. Following his conviction and sentence the appellant was transferred pursuant to section 659(2) of the Criminal Code from the Quinte Regional Detention Centre, where he had been detained in custody until he pled guilty, to Millhaven Institution.

Issue:

Does section 659(2) apply to an inmate who has been released on mandatory supervision?

The Court felt that the meaning of section 659(2) is placed beyond question by the provisions of the Parole Act. Section 13(1) of the Parole Act states that the term of imprisonment of a paroled inmate continues to be in force until the expiration thereof according to law. This section also applies to inmates under mandatory supervision by virtue of paragraph 15(2) of the Parole Act. It is apparent that an inmate who has been released on mandatory supervision continues to serve the sentence originally imposed upon him and that the sentence has not expired until the expiration of the period of mandatory supervision.

The appeal was dismissed.

Canada (Attorney General) v. Dion

This was a judgment of the Québec Court of Appeal rendered in May 31, 1990.

Facts

In this case, the Québec Superior Court had held in its judgment of August 14, 1986 that sections 39(i.1) (offence to consume an intoxicant) and 41.1 (urinalysis) of the Penitentiary Service Regulations were invalid and inoperative.

Issue

Are sections 39(i.1) and 41.1 of the Penitentiary Service Regulations contrary to the Charter?

Decision

On appeal, the Attorney General of Canada did not contest the decision of the Québec Superior Court with respect to section 41.1 given that in the Jackson case, the Federal Court of Canada had decided that the wording of s.41.1 was contrary to the Canadian Charter of Rights and Freedoms and that this decision seemed well-founded.

However, the Attorney General did maintain the appeal with respect to PSR 39(i.1) and the Québec Court of Appeal allowed the appeal with respect to this section, reversing the decision of the Superior Court which had rendered this section invalid.

Her Majesty the Queen v. Yvan Dozois

This is a judgement of the Ontario Court of Appeal rendered by Mr. Justice Lacourcière on July 22, 1981.

Facts

The respondent was an inmate, in Canada, serving a sentence for various offences when he failed to return from a temporary absence in January 1978.

He committed some offence in the U.S.A., was arrested in March 1978 and was sentenced on July 6, 1978 to 3 years and 8 months imprisonment. He was then credited for the time spent in custody prior to sentence. He was transferred to Canada on November 7, 1979 pursuant to the Transfer of Offenders Act in order to serve the remaining of his sentence.

On April 25, 1980 he was sentenced to 6 months imprisonment consecutive for being unlawfully at large in January 1978.

Issue

Can the time spent by the respondent in custody in the United States reduce the length of an unserved sentence in Canada?

The provisions of the Transfer of Offenders Act deem the foreign sentence to be a sentence imposed by a court of competent jurisdiction in Canada. The actual sentence served in the foreign jurisdiction receive a more limited treatment and is only to be credited at the date of the transfer. The credit of this time towards a remaining Canadian sentence is not provided for. Penal statutes must be construed with reference to their true meaning and intention. One cannot strain the language to find ambiguity so as to interpret the clear words of the statute in a way more favourable to the liberty of the subject than that extended by parliament.

In the absence of an express statutory authority it follows that the appeal must be allowed.

Claude Dubois v. Pierre Goulem, in his capacity as Director of the Special Handling Unit, et al.

Judgment by the Honourable Mr. Justice Bergeron of the Criminal Chambers of the Superior Court of Quebec, handed down on November 14, 1986.

It involves an application for a Writ of Habeas Corpus and ancillary certiorari to overturn the applicant's transfer from Archambault Institution to Ste-Anne-des-Plaines Institution Special Handling Unit.

FACTS — The inmates of Archambault Institution began a stike on September 8, 1986. Acting on highly confidential information, the penitentiary authorities identified certain inmates as having a role in a concerted action that went beyond the limits of a mere strike and was liable to cause trouble that could degenerate into a riot, hostage-taking or loss of life. On October 9, once the relevant files and reports had been studied, seventeen inmates were transferred to several institutions; the applicant and three others were transferred to the Special Handling Unit at Ste-Anne-des-Plaines. The Notice of Transfer that he received gave several reasons for the transfer, including the existence of confidential security information reports about him. The applicant is contesting the transfer and alleges that he was deprived of his residual freedom, in violation of Section 7 of the Canadian Charter of Rights and Freedoms.

ISSUE — Was the applicant's transfer to the S.H.U. in violation of Section 7 of the Charter?

HELD — In the case at hand, it was impossible to communicate even a summary of the confidential information in question without risk of disclosing the identity of the sources and jeopardizing the security and control of the institution. None the less, when the freedom of some individuals must be hampered in order to protect the security of a community, the restrictions imposed must remain within reasonable bounds, even if a principle of confidentiality is involved. Even in emergencies, care must be taken not to use most draconian measures to remedy a situation.

It has been clearly established that transfer to S.H.U. constitutes a deprivation of freedom that calls for the application of the laws of natural

justice provided for in Section 7 of the Charter. The limitations that may be placed on these laws depend on the nature of the emergency itself and on the means for remedying matters without overstepping certain norms. In this case, care should have been taken not to go to extremes in applying the desired remedy in a situation where it was necessary to act primarily on the basis of confidential information that would not be disclosable. The applicant could have been transferred outside Québec or the S.H.U. could have been used simply as a temporary place of detention in order to re-establish calm at Archambault; instead, the authorities leant towards the arbitrary in opting for the extreme solution of the applicant's definitive transfer to S.H.U.

In another vein, the applicant's claim that the Regional Deputy Commissioner was not empowered to make the decision to transfer him to S.H.U. is without ground. The decision was made in accordance with a rule of law, and the only issue to be settled is whether or not the action taken was reasonable. Under the circumstances that prevailed at Archambault on October 9, 1986, the authorities were justified in not giving advance notice and in refusing to hold a hearing for the applicant before transferring him; it was the severity of their actions that exceeded the bounds of the reasonable, however, in as much as other means could have been used to the same end.

This decision quashes only the applicant's permanent stay in S.H.U. The selection of the temporary measures to be taken in his regard is the responsibility of the prison authorities and it is not up to the Court to intervene.

The application is granted.

NOTE: This decision is being appealed to the Québec Court of Appeal.

Alain Dumas v. The Director of the Leclerc Institute et al.

Judgment of the Supreme Court of Canada rendered by the Honourable M. Justice Lamer, on November 6, 1986.

This is an appeal of a decision of the Québec Court of Appeal dismissing an appeal from a decision of the Superior Court who had rejected an application for a writ of habeas corpus with certiorari in aid challenging a decision of the National Parole Board to delay the day parole of the applicant.

FACTS : The appellant was sentenced to five years and ten months's imprisonment; on his full parole eligibility date, the National Parole Board (NPB) refused to grant him parole. One year later, the NPB denied him full parole again, but decided to grant him day parole. His release, however, was conditional to his acceptance by the Community Residential Centre with which the appropriate arrangments for his day parole were to be made. Before the date of his interview at the Centre, he was accused and charged of disciplinary offences. As a result, the NPB decided to delay his day parole by six weeks so that his case could be reviewed.

The applicant then proceeded by way of application for a writ of habeas corpus with certiorari in aid before the Superior Court of Québec; he did not apply for remedy under subsection 24(2) of the Charter, but simply referred to it in asserting his right to habeas corpus. The Superior Court refused the issuance of the writ, stating that the appropriate remedy was mandamus, a matter for the Federal Court; that decision was upheld by the Court of Appeal.

ISSUES : 1) Whether the remedy sought by the applicant was appropriate in the circumstances.

2) Whether such remedy was of the jurisdiction of the Superior Court.

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DECISION: The decision of the Courts below were rendered prior to this Court's judgments in the Miller, Cardinal and Oswald and Morin cases, in which the jurisdictional issue was settled: a provincial court has jurisdiction to issue certiorari in aid of habeas corpus to review the validity of a detention authorized or imposed by a federal body, as defined by section 2 of the Federal Court Act. The only issue that remains to be decided in this case is thus the availability of habeas corpus in these particular circumstances.

In the Miller case, this Court widened the availibility of habeas corpus. The lower Courts erred in holding that this remedy was available to attack only the initial warrant of committal since it is in fact available to challenge any deprivation of liberty which can be, in the correctional context, the initial deprivation, a substantial change in conditions amounting to a further deprivation, or an unlawful continuation of the deprivation. The present case is one of continuation of deprivation of liberty, so the question to determine is whether such continuation is unlawful.

In the context of parole, the continued detention of an inmate becomes unlawful when such inmate becomes a parolee. If parole is granted effective at some later date, the status of parolee is acquired by the inmate at that date rather than at the date of the decision itself. In this case, the NPB delayed and subsequently reversed the decision to grant the appellant day parole before the term or prerequisite condition (his acceptance by the Centre) was fulfilled. He consequently never became a parolee, and therefore has no right to habeas corpus.

The appeal was dismissed.

John Dunbar v. The Warden of Millhaven et al

Judgment of the Supreme Court of Ontario, rendered by the Honourable Mr. Justice Chadwick on May 4, 1989.

This is an application for a Writ of Habeas Corpus ad subjiciendum pursuant to ss. 24, 7 and 9 of the Canadian Charter of Rights and Freedoms to return the applicant from Millhaven Institution to Collins Bay Institution.

Facts: The applicant was a prisoner of Millhaven Institution serving a life sentence for a triple murder contract killing. The administration of the institution received confidential third party information, confirmed by both CBI Security and O.P.P. Penitentiary Squad, which indicated the applicant had been plotting an escape and had introduced weapons and explosives into Collins Bay to aid his escape.

On March 15, he was removed from his cell in Collins Bay, given an "Emergency Transfer Notice" providing reasons for his transfer and was immediately transferred to Millhaven. The notice, while providing particulars, was devoid of those details which, in the opinion of the Warden, would have endangered the informant's anonymity.

A search of the applicant's cell, subsequent to his transfer resulted in the discovery of some hacksaw blades, two $20.00 bills, a pair of steel-toed runners and a hand-drawn map of the institution with a possible escape route. The applicant received a hearing regarding these matters and was convicted of being in possession of the money but was acquitted in respect of the blades and the boots. A search of Collins Bay Institution failed to discover the guns and ammunition alleged to have been smuggled into the institution.

Issue: Whether sufficient information had been revealed to the applicant so as to allow him to properly defend the allegations against him.

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Whether the contraband items found in the inmate's cell could be considered in the transfer decision even though the inmate was acquitted on contraband charges.

Decision: In citing the Jameson case, the learned judge stipulated that the jurisprudence and the application of ss. 7 and 9 of the Charter have made it clear that there is a requirement of prison administrators to act fairly when decisions and procedures are adopted to transfer prisoners within the prison system. The duty is imposed on the prison administration to ensure that enough information has been revealed to the prisoner to allow the person concerned to answer the case against him. In recognizing this duty to act fairly, Chadwick J. also acknowledged the need to protect confidential informants.

The learned judge found that the prison authorities had gone much further than in the Demaria case in providing particulars and that there was no evidence or suggestion of harassment of the applicant by the administration in the past. While the failure to find the alleged contraband within Collins bay did weaken the case of the prison administration, it was not fatal. The fact that the applicant was not convicted of possession of hacksaw blades did not prohibit authorities from looking at the overall picture in reaching their decision. It was found on the facts that the Warden satisfied the burden of providing the accused with sufficient particulars of the alleged offences against him and was justified in withholding the balance of the information.

The application was dismissed.

Timothy Engen v. Disciplinary Board of Kingston Penitentiary

This is a judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Denault. The order dismissing the application was issued on July 24, 1987.

This is an application for certiorari to quash a conviction by the Disciplinary Board of the Kingston Penitentiary.

ISSUE

Whether the applicant who was charged with an intermediary disciplinary offence was entitled to representation by counsel.

FACTS

On June 26, 1986 the applicant was charged under section 39(b) of the Penitentiary Service Regulations (P.S.R.) with having assaulted or threatened to assault a correctional officer, an offence classified as intermediary.

On July 10, 1986 the applicant appeared before the Disciplinary Board whereupon he asked to be allowed representation by counsel during the disciplinary hearing. The President of the Board adjourned the case in order for the two parties to submit written arguments to him on the point of law as to whether the applicant should be represented by counsel.

At a hearing held on October 15, 1986 the Disciplinary Board concluded that in the circumstances of the case the applicant was not entitled to the services of a counsel. The applicant was found guilty of the offence stated in section 39(b) of the P.S.R. and sentenced to pay a fine of $40. He was also sentenced to 21 days of punitive dissociation which was suspended for a 90 day period (if the applicant was not found guilty of committing another intermediary or flagrant offence during this period, he would not have to serve the sentence of dissociation).

DECISION

In reaching its decision, the Court applied the criteria set out by Thurlow C.J. in the Howard case. With respect to the nature and gravity of the offence, the Court was of the view that a guilty verdict by the Disciplinary Board could greatly influence the decisions made subsequently by the Earned Remission Committee and the National Parole Board. In terms of the complexity of the offence, the Court held that

there were no legal traps into which the applicant could fall. Regarding the applicant's ability to present his defence himself, the Court concluded that he was a very articulate individual well prepared to face the charges against him. Further, it was not the applicant's first appearance before the Disciplinary Board and he therefore could not argue that he was not familiar with the procedure followed. The applicant also had about four months during which to obtain information and prepare his case.

Despite the severe consequences which could result from the applicant's conviction (failure to earn remission and impact on the decision of the National Parole Board to grant parole), the Court could not, in light of the other criteria stated by Thurlow C.J., conclude that the applicant was unable to present his case adequately without counsel. Hence, the Court considered that there was no breach of section 7 of the Charter.

The application was dismissed.

Obiter Dictum

The fact that a case raises only questions of fact does not always mean that counsel is not necessary. The Court quoted professor Michael Jackson's article entitled "The Right to Counsel in Prison Disciplinary Hearings" and Pett v. Gray Hound Racing Association Ltd. From these two quotations, the Court concluded that one of the essential points to be considered in deciding whether a right to counsel exists is whether a person is able to defend himself. The Court then gives the example of an inmate who is easily irritated or slightly maladjusted and would therefore not be in a position to present his case calmly and concisely. The Court added that in practice an inmate will probably appear before the same presiding officer several times during his period of imprisonment. In such circumstances, a presiding officer would be all the more able to determine whether the inmate was capable of representing himself.

Ross William Evans v. Rémi Gobeil, Warden of Kingston Penitentiary et al.

Judgment of the Supreme Court of Ontario rendered by the Honourable M. Justice Smith on September 30, 1986.

This is an application for a writ of habeas corpus with certiorari in aid, and for remedy under subsection 24(1) of the Charter ordering release upon conditions of the applicant, or, failing such releasing order, a new hearing.

FACTS

The applicant is serving concurrent seven years sentences on counts of rape, possession of weapon and robbery. He was to be released on mandatory supervision as a result of earned remission on August 5, 1986. However, following the amendments to the Parole Act deriving from Bills C-67 and C-68, which became law in July 1986, the applicant was subjected to a "detaining order" by the National Parole Board.

ISSUES

Whether the new provisions of the Parole Act can be applied to inmates who were already serving their sentences and earning remission at the time such provisions were enacted.

If so, whether there were breaches of procedural fairness in the hearing which was conducted in this case.

DECISION

It is clear from the definition of the word "inmate" in section 15.2 of the Parole Act as well as from a transitional provision of Bill C-67, that the amendments were meant to apply to inmates already being in the system.

The legislation, even if it can be said to cause a penalty in preventing automatic release on mandatory supervision in certain cases, does not amount to arbitrary detention within the meaning of section 9 of the Charter: it limits parole in cases where a Board properly constituted withholds its parole-granting privileges in the interests of public safety and following legislative guidelines.

As for section 7 of the Charter, it should be noted that the new legislation changes not the sentence but the manner in which it will be served. There is nothing fundamentally unjust in revising parole rules in the course of a sentence being served. Furthermore, even if the withdrawal of the right to release on mandatory supervision in some cases and

not in others might be held not to be in conformity with section 7 when dealing with inmates who had already earned remission time prior to the coming into force of the legislation, such legislation is justifiable under section 1 of the Charter. The criteria set out for the application of section 1 in the Oakes case, that the objective of the legislation be of sufficient importance to warrant overriding a constitutionally protected right and that the means chosen be reasonable and demonstrably justified are clearly satisfied in this case.

However, the procedural duty to act fairly was breached in this case. The applicant was denied the assistance to which he was entitled under the Charter and the Parole Regulations. An interim hearing was held, the applicant having been given notice of such hearing on the same morning, in which the Board determined after a very perfunctory inquiry that there were sufficient grounds to detain him. The applicant then waived his procedural rights after being advised that if he dit not, he would be held for four weeks for a regular hearing. He also waived his specific right to the information.

It is inherently unfair that a decision carrying such serious consequences for the inmate should be made so quickly and summarily without any opportunity for him to prepare, to seek advice, to review the evidence or to adduce some that could have had an influence on the ultimate decision.

However, the release of the inmate in the circumstances of this case would be against the interests of both him and society. A new hearing should therefore take place, on adequate notice, to afford the inmate a reasonable opportunity to prepare, seek assistance, and call evidence.

The application was allowed.

EDWARD GREGORY FAULKNER v. THE DIRECTOR OF STONY MOUNTAIN INSTITUTION ET AL.

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable M. Justice Cullen on June 30, 1986.

This is an application for writs of certiorari and mandamus quashing the decision of the Inmate Disciplinary Court of Stony Mountain Institution and ordering the re-instatement of the 20 days remission taken by order of the said Disciplinary Court.

ISSUE Whether the applicant should have been allowed to be represented by counsel before the Disciplinary Court.

DECISION There is no absolute right to counsel in every instance; in this case, the applicant was given time to contact his counsel, so that he could make a written submission concerning why counsel was required. No communication was received from the lawyer, and none of the applicant's affidavits explain why the lawyer did not contact the independent chairperson in that respect.

Furthermore, the unexplained delay of 20 months in making this application is a bar in granting the relief sought.

The application was dismissed.

Her Majesty The Queen v. Edward Gregory Faulkner

Judgment of the Manitoba Court of Appeal rendered by the Honourable M. Justice Philip on April 11, 1986.

This is an application for an order staying the execution of a transfer of the applicant pending the hearing of his appeal on a conviction for robbery.

FACTS : The applicant was convicted of robbery on December 17, 1985. The hearing of the appeal filed by him on this conviction was scheduled for June 16, 1986. On February 12, 1986, his transfer from Stony Mountain Institution to a maximum security unit which had been pending for some time, was authorized through the issuance of a transfer warrant. The applicant argued that this transfer would severely restrict his right to instruct counsel in relation to the impending appeal; he therefore sought an order a staying in the execution of the transfer warrant.

ISSUE : Whether the Court should issue the order staying the execution of the transfer warrant pending the appeal on the conviction for robbery.

DECISION: Two questions of jurisdiction arise from this case. Firstly, a decision in this matter may not be within the jurisdiction of a judge of the Court sitting in chambers. The application had been filed in criminal appeal proceedings, but it may not be truly incidental to the accused's appeal. Furthermore, the matter should be determined by the Court, rather than a judge of the Court of Appeal sitting in chambers.

It is not necessary to decide the jurisdiction questions since the accused's application is premature. No case has been made out for the infringement or denial of the rights guaranteed by the Charter.

.../2

There is a policy not to transfer an inmate out of an institution if he has a court appearance in the jurisdiction within thirty days. If the transfer is executed in this case before this period comes into play, it is possible for the Commissioner or an officer designated by him to issue, pursuant to section 16(2) of the Penitentiary Act, written directions to the receiving institution in relation with the hearing of the criminal appeal. It can be expected that the Commissioner or his designate will have regard to the special requirements that may arise in this case, the accused having retained for the purpose of the appeal counsel who did not represent him at trial.

The application was dismissed.

FREDERICK FEUERSTEIN v. THE QUEEN & C.S.C.

This is a decision of Mr. Justice Pinard of the Federal Court Trial Division rendered July 11, 1986. The applicant applied for a Writ of Certiorari quashing the Warrant of Transfer made by the Correctional Service of Canada. The applicant also applied for an Interim Injunction to prevent the transfer pending consideration of the motion and for an Order of Prohibition to prohibit the Correctional Service of Canada from acting on the Warrant of Transfer.

FACTS — The applicant was an inmate at Bowden Institution. After conviction for five disciplinary offences over a period of one year combined with altercations with staff and other inmates, the applicant was placed in segregation on March 10, 1986. The applicant was advised of the reason for his segregation and was provided with a Notice of Involuntary Transfer to Stony Mountain Institution. The applicant requested transfer to the Ontario Region and demanded to be able to make submissions personally. He stated that he feared for his personal safety at Stony Mountain Institution. The applicant then submitted a grievance and asked that a new case management study be done. The respondent stated that the applicant had been seen by the Case Management Team a total of thirteen times and that the applicant's case had been reviewed by the Segregation Review Board. The Transfer Warrant was issued at Regional Headquarters in Saskatoon.

ISSUE — Was the applicant given an opportunity to know and refute the case against him and was the transfer done in accordance with the duty to act fairly?

HELD — Application dismissed.

REASONS — The Correctional Service of Canada acted fairly, in good faith, without bias and in a judicial temper, having also given the applicant the opportunity to adequately state his case. The discretion as exercised by the Correctional Service of Canada in transferring the applicant from Bowden Institution to the Stony Mountain Institution ought not to be interfered with by the Court. A Superior Court ought not to substitute its decision for that of the administrative body whose decision is challenged in maters involving pure appreciation of facts and credibility.

Lawrence Grant Fontaine v. the Correctional Service of Canada

This judgment has been rendered by the Associate Chief Justice of the Federal Court, the Honourable James Alexander Jerome on August 21, 1990.

This application for an order in the nature of mandamus attacking the calculation of a term of imprisonment came on for hearing before him at Toronto, Ontario, on July 24, 1990.

Facts:

The applicant was released from custody subject to mandatory supervision on February 2, 1987. His mandatory supervision was suspended on Janaury 17, 1988. On August 18, 1988, the applicant was convicted of a further offence and sentenced to twelve months in custody consecutive to all other offences. On October 31, 1989, the applicant was convicted to a further offence of being an accessory to a robbery resulting in a sentence endorsed as "eighteen months in prison to be served concurrently to any sentence now being served".

Issues:

Did the sentencing judge intend the sentence to be concurrent to all sentences being served, including the initial sentence imposed and the subsequent sentence of August 18, 1988?

Decision:

Judge: ... section 20 of the Parole Act restricts the authority of the sentencing judge in awarding a concurrent sentence. The effect of subsection (1.3) is that the term of "eighteen months in prison to be served concurrently to any sentence now being served" must be concurrent only with the sentence of twelve months which had been imposed on August 18, 1988 (which is the later sentence) and not with any other sentences.

EDWARD FORD V. COMMISSIONER OF CORRECTIONS
AND NATIONAL PAROLE BOARD

Decision of MacKay J. of the Federal Court (Trial Division) on an application to quash a referral for detention by the Commissioner to the National Parole Board.

FACTS

In July 1989 inmate Ford was referred by CSC to the NPB for a detention hearing. Subsequently, in October 1989 information was received which indicated that Criterion B was not met since the victim did not suffer serious harm. The Service referral was therefore withdrawn. A Commissioner's referral was later made based on "new information" consisting of a psychiatric report received in October 1989 (i.e. after the six month cutoff date for a Service referral).

ISSUE

Whether there was "new information" which would support a Commissioner's referral.

DECISION

The information could be relied upon by the Commissioner for a referral. Nothing in the statute implies that the information must be created or that it originate or be commissioned or requested in the six months prior to the presumptive release date. It is the content of the information which must be new in the sense that it is unknown to both the Commissioner and the Service prior to the six month period; it should come into their possession for the first time during that period. The psychiatric report in this case was not simply a reinforcement of the views already reached by the case management team. The report provided a professional opinion of the psychiatric condition of the inmate and was therefore information which was not available to the Service or to the Commissioner prior to its receipt in October 1989, even though it could have been requested earlier so that it would have been received prior to the six month cutoff date.

This decision is being appealed to the Federal Court of Appeal.

R. v. Frankland Prison Board of Visitors, ex parte Lewis
[1986] 1 All E.R. 272 (U.K.)

This is a judgement of the Queen's Bench Division of the United Kingdom rendered October 1985.

FACTS — The applicant was found guilty by the prison disciplinary tribunal of having breached prison rules since he had been found in possession of a controlled drug. After the hearing the applicant realized that the chairman of the disciplinary tribunal had been a member of a parole review committee which had interviewed him previously. Consequently, the chairman must have known about the applicant's previous appearances before the disciplinary tribunal and in particular about the applicant's previous drug related convictions. The applicant sought an order of certiorari contending that the chairperson's previous knowledge prevented him from being an impartial judge and that therefore there had been a breach of the rules of natural justice.

ISSUE — Did the chairperson's previous knowledge of the inmate's offences create a breach of the rules of natural justice.

HELD — Application dismissed.

REASONS — Prison disciplinary tribunals are required to perform administrative functions as well as judicial ones. In order to deal with prison disciplinary offences it is important that those who adjudicate them should have knowledge of the workings of prisons in general and the particular prison of which the prisoner concerned is an inmate. A disciplinary tribunal should not be too ready to disqualify a member because that member has background knowledge concerning a particular prisoner. It is inevitable that members of the disciplinary board will have considerable knowledge of the background of a particular prisoner. In judging whether it is possible for a particular member of a disciplinary board to adjudicate fairly on disciplinary offences, the reasonable fair-minded bystander would have to take into account the nature of the proceedings and the nature of the duties which the board has to perform.

WILLIAM PAUL ROBERT FREDERICK v. THE SOLICITOR GENERAL OF CANADA, THE ATTORNEY GENERAL OF CANADA AND THE ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO

Judgment of the Supreme Court of Ontario, Toronto Weekly Court, rendered by Mr. Justice Henry on November 24, 1989.

The applicant sought an order of the Court directing he be at liberty to serve, file and pursue an application for a reduction of parole ineligibility under subsection 745(1) of the Criminal Code

FACTS:

The applicant was arrested on October 13, 1977, on a charge of first degree murder arising out of the killing of a police officer acting in the execution of his duty. The applicant pleaded guilty to the charge of first degree murder and was sentenced to imprisonment for life without eligibility for parole until twenty-five years of the sentence had been served. He had been in custody continuously since that date - a period of twelve years and a few days.

Pursuant to section 746(a) of the Code the applicant was deemed to have commenced serving his sentence on October 13, 1977 and would therefore have served fifteen years on October 13, 1992.

The relevant provisions in the Code were as follows:

> 742. The sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be,
>
> (a) in respect of a person who has been convicted of high treason or first degree murder, that he be sentenced to imprisonment for life without eligibility for parole until he has served twenty-five years of his sentence;
>
> 745.(1) Where a person has served at least fifteen years of his sentence,
>
> (a) in the case of a person who has been convicted of high treason or first degree murder,
>
> he may apply to the appropriate Chief Justice in the province in which the conviction took place for a reduction in his number of years of imprisonment without eligibility for parole.

.../2

747.(1) Unless Parliament otherwise provides by an enactment making express reference to this section, no person who has been sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act shall be considered for parole or released pursuant to the terms of a grant of parole under the Parole Act or any other Act of the Parliament of Canada until the expiration or termination of his specified number of years of imprisonment without eligibility for parole.

(2) Notwithstanding the Penitentiary Act and the Parole Act, in the case of any person sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act, until the expiration of all but three years of his number of years of imprisonment without eligibility for parole, no absence without escort may be authorized under the Penitentiary Act, no absence with escort for humanitarian and rehabilitative reasons may be authorized under the Penitentiary Act without the approval of the National Parole Board and no day parole may be granted under the Parole Act.

ISSUE:

Whether, notwithstanding the fact that the applicant had not served at least fifteen years of his sentence, a mechanism existed to permit the applicant to commence an application for reduction of the period of ineligibility for parole pursuant to subsection 745(1) of the Code.

JUDGMENT:

The Court stated that, the sentence for murder being precise and mandatory as imposed by section 742, the terms of such a sentence cannot, other than by way of appeal, be altered unless there is further statutory authority so providing. Subsection 745(1) was found to be such a provision. The Court held that prima facie subsection 745(1) cannot be invoked until the period of fifteen years has been served, and found no exception to that condition. The Court found this provision, on its face, to be both clear and unambiguous.

The Court stated that section 742 clearly contemplates that a conviction for murder carries with it a period of ineligibility for parole for a specified number of years, in the applicant's case twenty-five years. The language employed is clear in that he may not apply for judicial review under section 745 until he has served fifteen years of his sentence.

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Therefore, the only exception presently provided is in subsection 745(1) whereby an inmate after serving fifteen years of his sentence can apply for judicial review with a view to reducing the period of ineligibility.

As there is no definition of "parole" in the Code Henry, J., was of the opinion (citing section 15 of the Interpretation Act) that the definition in the Parole Act governs and that would include day parole. Section 2 of the Parole Act (R.S.C. 1985, C. P-2) states:

> "parole" means the authority granted under this Act to an inmate to be at large during his term of imprisonment and includes day parole.

That being so, fifteen years must be served, as set out in subsection 745(1), before the inmate can apply for parole, including temporary absence and day parole. By definition is would also include any authority to be at large during his term of imprisonment. It would embrace the types of release that are mentioned in subsection 747(2).

Furthermore, while the regulations made under the Parole Act and the Policy and Procedures Manual of the National Parole Board expressly refer to subsection 674(2), (now subsection 747(2)), of the Code as authority for the eligibility rules (the manual) and as section 5 of the Regulations states that they are subject to section 674 (now section 747) of the Code, the Court could find no authority for the granting by the Parole Board of temporary absences or day parole as mentioned in subsection 747(2), unless it was couched in the terms of subsection 747(2) itself. As regards subsection 747(2) while contemplating that Parliament may provide for these temporary types of parole within the period of three years prior to the expiry or termination of the fixed period of ineligibility, its language and intent do not confer any positive authority but rather impose a limiting condition on any authority that can be provided elsewhere. Subsection 747(2), in the opinion of Henry J., looks to an authority of Parliament elsewhere which must meet the following criteria:

> "(a) It must be a clearly stated exception to the general rule prescribing the sentence in section 742.

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(b) It must be a specific provision enacted with reference to section 747(1) whereby Parliament expressly sets aside for a particular case the general prohibition in that subsection precluding in general terms the grant of parole (as defined above) until "the expiration or termination" of the period of non-eligibility."

The Court could find no authority in other statutes or in the Code which fulfilled the exception anticipated by subsection 747(2). As well, the Court did not consider that subsection 747(2) provided the necessary authority.

In any event, the Court found no justification for ignoring or modifying the plain words of subsection 745(1) to the effect that the application can only be made for judicial review after the inmate has served fifteen years of his sentence.

The application was dismissed.

Jason Gallant v. Arthur Trono, Deputy Commissioner, Pacific Region Correctional Service Canada

Judgement by the Honourable Mr. Justice Dube of the Federal Court of Canada, Trial Division on March 2, 1988.

The applicant sought a writ of certiorari quashing the decision to transfer him from Kent, a maximum security institution, to the high maximum security facility at Saskatchewan Penitentiary.

FACTS The applicant was a prisoner at the Kent institution serving four sentences of life imprisonment for first degree murder. The Warden of the institution received confidential information from informants both inside and outside the institution which indicated the applicant had been involved in a scheme to extort money from inmates and convert that money into drugs which were imported into the institution. The applicant received a Notification of Recommendation for Transfer which was devoid those particulars which would, in the opinion of the Warden, endanger the informants' anonymity. The inmate had tried on several occasions to obtain particulars of the allegations against him but these requests were refused on the ground that the information was confidential.

ISSUE The substantial ground for attacking the decision in this case was whether or not sufficient information had been revealed to the applicant so as to allow him to meet the case against him.

DECISION Prison authorities who recommend the transfer of an inmate to a higher security institution have a duty of fairness toward the inmate. This requires them to provide him with an outline of the reasons for their recommendation. Acknowledging that the respondent was indeed entitled to protect confidential informants, it was found on the facts that they could have nonetheless protected the identity of the

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informants in this case while providing more information to the applicant. There was also found to be no intention of holding a hearing or otherwise giving the applicant a right to confront the evidence against him directly. The judge stressed the importance that the notice given to the inmate contain as much detail as possible so as not to frustrate his right to answer the allegations against him. On the basis of the actual notice given the decision of the respondent to transfer the inmate was accordingly quashed.

This case is being appealed.

Jason Gallant v. Arthur Trono, Deputy Commissioner, Pacific Region Correctional Service Canada

Judgment by the Federal Court of Appeal issued on January 16, 1989.

The applicant sought a writ of certiorari quashing the decision to transfer him from Kent, a maximum security institution, to the high maximum security facility at Saskatchewan Penitentiary.

FACTS:

The applicant was a prisoner at the Kent Instiurion serving four sentences of life imprisonment for first degree murder. The Warden of the institution received confidential information from informants both inside and outside the institution which indicated the applicant had been involved in a scheme to extort money from inmates and convert that money into drugs which were imported into the institution. The applicant received a Notification of Recommendation for Transfer which was devoid those particulars which would, in the opinion of the Warden, endanger the informants' anonymity. The inmate had tried on several occasions to obtain particulars of the allegations against him but these requests were refused on the ground that the information was confidential.

ISSUES:

Did the Trial Division err in determining that CSC breached the duty to act fairly and section 7 of the Charter in respect of the reasons for transfer provided to the inmates?

DECISION:

Per Pratte J.A.

In the present case, the notice to the respondent inmate was drafted in such general terms that it probably did not really enable him to refute the case against him. However, it was the uncontradicted evidence of the Warden that he could not give further particulars without jeopardizing the safety of the six informants. In Pratte J.'s view, the circumstances were sufficient to relieve the CSC from the obligation to give a more detailed notice. Parliament cannot have intended that the Commissioner and his delegates be bound by the rules of procedural fairness when the application of those rules would endanger the lives of other inmates.

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The rules of substantial justice under section 7 of the Charter are not "variable or flexible". The transfer decision here was therefore in violation of section 7 since the inmate was not given a real opportunity to answer the allegations made against him. However, the transfer provisions in the Penitentiary Act are demonstrably justified under section 1 of the Charter. In a free and democratic society, it is reasonable, perhaps even necessary, to confer a wide discretion on penitentiary authorities.

Per Marceau J.A.

The question is not whether the rule of confidentiality respecting informers can relieve a decision-maker of his duty to act fairly, it is rather whether the rule can influence, as much as it did here, the content of that duty. The audi alteram partem principle (to hear the other side) should depend on the circumstances of the case and the nature of the decision to be made, whether the principle is being applied through the duty to act fairly or the principles of fundamental justice under section 7 of the Charter. In respect of a transfer made for the orderly and proper administration of the institution, there is no basis for requiring that the inmate be advised of the particulars of all the wrong doings of which he may be suspected. In a transfer, it is not guilt which must be confirmed, but whether the information received was sufficient to raise a valid concern and warrant the transfer.

Per Desjardins J.A. (dissenting):

The transfer of a prisoner is a disciplinary measure. When a disciplinary measure is taken, the burden is on prison authorities to demonstrate that the circumstances are such that they cannot inform the inmate of the facts on whcih the charge is based. That burden was not satisfied here as more information could have been provided without identifying the informers. Nothing in the transfer notice indicated why the information was considered reliable, nor was there an independent investigation to establish the reliability of the information. The appeal should be dismissed for lack of satisfying affidavits.

Phillippe Germain v. Daniel Therrien

This is a judgement of the Quebec Provincial Court rendered by the Honourable Judge Roland Robillard on March 21, 1983 in Montreal.

Civil actions for damages against a federal penitentiary guard by an inmate who alleges that he was assaulted.

Facts

On May 27, 1980, the plaintiff was an inmate at a federal penitentiary known as the "Centre de Développement Correctionnel". He was serving three nights confinement in his cell without activities as a disciplinary punishment. Around 1:30 p.m., four guards attempted to remove a television set from his cell. The inmate objected and the guards left. Fifteen minutes later, they returned, took hold of the inmate and moved him to another cell. A scuffle ensued. The inmate attempted to keep the cell door from being closed, and was injured under the left eye by a blackjack ("garcette") which the defendant guard was holding. The inmate suffered a permanent scar.

In his defence, the guard claimed he was exercising authorized orders and that the inmate refused to cooperate. He claimed that the force used was reasonable and necessary in the circumstances and asked for a dismissal of the action.

The plaintiff seeks $5,700 in damages for physical injuries, pain and suffering and exemplary damages.

Issues

1. Can the penitentiary guard be held to have been negligent for causing the injuries to the inmate during the scuffle?

   The guard was held to be contributorily negligent (50%) for the injuries sustained by the inmate. Although the injuries were not intentional, the use of the blackjack was unjustified under the circumstances. The decision reinforces the legal notion of civil responsibility that where damages are caused by one individual to another, whether intentional or not, that individual is responsible unless the negligence can be attributed totally to the other individual.

2. What heads of damages and quantum of damages will be awarded?

In pre-trial proceedings, the parties reached an agreement on the following damages:

(a) physical injuries - $200
(b) pain & suffering - $300

On the issue of exemplary damages, no compensation was awarded because pursuant to section 49 of the Quebec Charter of Human Rights and Freedoms, the act was not intentional and the plaintiff was partly responsible for the incident.

The action is granted in favour of the plaintiff for $250 plus interest.

Her Majesty the Queen v. Daniel Gingras

This is a decision of the Court of Queen's Bench of Alberta rendered by Mr. Justice Agrios on April 20, 1989.

FACTS:

During the course of a trial for first degree murder, and exparte application under section 699(2)(b) of the Criminal Code was made to subpoena the institutional and medical files of a penitentiary inmate who was a Crown witness in the murder trial. The subpoena of the witness' file was issued on the basis of an affidavit filed by Defence Counsel which stated: "I verily believe that the institutional and medical file of this inmate contains information that is material to the defence...".

ISSUE:

1. Is a subpoena duces tecum the proper means of obtaining production of documents alone?

2. Can an affidavit in support of the subpoena be based upon belief rather than fact?

DECISION:

1. Although the Court agreed that a subpoena duces tecum (which requires a party summoned to bring documents to court), was the proper means to obtain production, the Court also stated that such a subpoena may only be used in compliance with section 698 of the Criminal Code which states: "Where a person is likely to give material evidence in a proceeding... a subpoena may be issued...:".

   The Court therefore determined that documents may be produced under the subpoena only if the files sought are likely to give material evidence. The Court found that, in this case, the affidavit did not disclose any information to indicate that the files were "likely to give material evidence". Counsel in fact had no idea what would be contained in the files, he was merely hoping to find something of significance.

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Mr. Justice Agrios therefore quashed the subpoena on the basis that no evidence was before him which indicated that the files would provide material evidence; rather, they were subpoenaed by Counsel to assist him on a "fishing expedition":

> "...what was being attempted was the equivalent of the civil procedure of discovery of third party documents: particularly where the confidential files had not been created to be produced. Such a procedure was capable of gross abuse and would result in gross evils: particulary where the information related to Crown informants. Inmates could be compromised and endangered; this was contra to the principle of confidentiality of information and could potentially create great harm in rehabilitation medical programs for prisoners, to reveal such confidential documents."

2. The Court further found that the Affidavit which formed the basis of the issuance of the subpoena was flawed:

> "...the affidavit must be confined to statements of fact within the knowledge of the deponent which would not allow for an affidavit on belief. No source and grounds of belief are given here. The subpoena could be quashed for this reason alone."

Larry Gosselin v. Roland Bouwman, in his capacity as the Independent Chairperson of Disciplinary Court of Matsqui Institution

This is a judgment of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Strayer on April 15, 1987.

This is an application for certiorari to quash a conviction entered by the Disciplinary Court of Matsqui Institution.

FACTS — The applicant was convicted under paragraph 39(k) of the Penitentiary Service Regulations for drinking a form of contraband, malt liquor, in a cell.

ISSUE — Whether there was evidence to convict the applicant under paragraph 39(k).

DECISION — The evidence can only establish that the applicant entered a cell in which there were two cups of "brew". There is no evidence to suggest that the applicant was drinking the brew while he was in the cell. Paragraph 39(k) of the Regulations requires the necessary intent, or perhaps a reckless disregard, with respect to prejudicing the discipline or good order of the Institution. No such evidence was presented in this case.

A conviction in the absence of any evidence amounts to an error of law which is reviewable by certiorari.

The application was allowed.

WILLIAM GRAZDANOWSKI v. H.M.Q. AND THE WARDEN OF COLLINS BAY PENITENTIARY

Judgment of the Supreme Court of Ontario, rendered by Mr. Justice Smith on March 21, 1989.

FACTS

The inmate applied for a Writ of Habeas Corpus after he was held in Administrative Segregation for a period of eight months. He had been stabbed, but refused to identify his assailants and had not requested protection.

When he requested to be released from segregation regional authorities held that he could not re-enter the population, nor could his safety be assured in another institution as long as he refused to provide information regarding the incident.

ISSUE

Was the inmate wrongfully detained in administrative segregation.

DECISION

Mr. Justice Smith found that Administrative Segregation in these circumstances equates to solitary confinement and this constitutes punishment. He further found that the refusal to name an aggressor is not sufficient reason to maintain an inmate in administrative segregation beyond a short initial period of investigation. This procedure was arbitrary and offended sections 9 and 12 of the Charter.

Application allowed.

David Greenberg v. National Parole Board and
the Honourable Robert Kaplan, es qualité

Motion:

Motion for an order of *certiorari* pertaining to a hearing held before the National Parole Board whereby the parole of petitioner was revoked.

Facts:

1. On February 16, 1976, the petitioner was incarcerated after having been sentenced to imprisonment for a term of 10 years, with respect to charges laid pursuant to s. 5(1) and (2) of the *Narcotic Control Act*, 1970 R.S.C., c. N-1, and to s. 423 (1)(d) Cr.C., to which he pleaded guilty.

2. On September 10, 1979, Greenberg was granted full parole subject to restricted travelling privileges.

3. On July 25, 1981, he travelled to U.S.A. without having the necessary authorization from his parole officer, and on July 28, he was charged with possession of narcotics after having been arrested in Willmington, North Carolina.

4. On July 29, Greenberg's parole was suspended mainly on the ground that he had violated one of the conditions of his parole in leaving the country without having obtained the necessary authorization.

5. During February 1982, the petitioner was acquitted of the charge above-mentioned and on March 15, 1982, the suspension of Greenberg's parole was cancelled.

6. On April 14, 1982, after the respondent completed a document entitled "Rapport de Manquement", an arrest warrant was issued against Greenberg and again his parole was suspended.

7. On September 9, 1982, Greenberg received notice of the decision rendered by the National Parole Board on August 27, 1982, with respect to his post-suspension hearing held on July 19, 1982, revoking his parole.

8. On October 6, 1982, Greenberg made a motion for an order of *certiorari* pertaining to the re-suspension of his parole on April 14, on the ground that it was "null and void", to the hearing held before the Board on the ground that it was "affected with gross irregularities thereby prejudicing "his right to a full fair hearing resulting in an abuse of process", and to the judgment rendered by the respondent on the ground that it was "based on information and documentation which respondent could not and should not have considered thereby constituting a breach of natural justice".

Held:

1. Re-suspension of parole is fully within the jurisdiction of the Parole Board and its decisions regarding either the granting or the revocation of parole are constantly subject to review by the Board on its own initiative.

2. The hearing contemplated in such cases is purely administrative in nature, and where there is a statutory obligation to hold a fair hearing having regard to all the circumstances, there is no resulting obligation that all evidence be actually heard, adduced or examined by the administrative body in the presence of the person affected.

3. The fact that petitioner was acquitted of the drug charges laid in U.S.A. does not in any way prevent the Board from considering and reviewing any of the facts and circumstances surrounding those occurrences.

4. Bad faith on the part of the Board has not been established nor has it been shown that the decision was capricious, frivolous or arbitrary and consequently, there is no breach of the general duty to act fairly.

5. Even if some grounds had been established for *certiorari*, the Board has not been requested to re-examine its decision as provided for in section 22(2) of the Regulations and, under those circumstances, the court should not interfere.

Conrad Gunn v. Donald Yeomans & Nicholas Caros

This is a judgement of the federal court of Canada, Trial division rendered by the Honourable Mr. Justice Walsh, on January 24th, 1979, in Ottawa.

Inmate Gunn seeks an interlocutory injunction restraining defendants from ordering any further searches of Plaintiff's person except those in accordance with Regulations 2.31(2) *Penitentiary Service Regulations*, pending decision on the merits of the action which seeks similar relief.

Facts:

Plaintiff was ordered, on November 10, 1978 to remove his clothes for skin search procedure. Such procedure was being conducted because of an accident which occurred one week earlier when another inmate had assaulted a guard with a knife. Inmate refused to obey.

Regulations provide for such searches when it is suspected on reasonable grounds that a person has contraband in his possession (s. 2.31(2)).

Issue:

Did regulation 2.31(2) permit the skin search procedure on the plaintiff?

Regulation 2.31(2) requires that institutional head must suspect "on reasonable grounds" that the "inmate""is in possession" of contraband before he may order "that" person to be searched.

It would in the Court's view require stronger wording to justify a general body search of all inmates.

Therefore an interlocutory injunction will be issued as sought by Plaintiff.

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Conrad Gunn v. Donald Yeomans & Nicholas Caros (2)

Order:

Defendants are hereby enjoined from ordering any further searches of Plaintiff's person except those in accordance with regulations 2.31(2) of the *Penitentiary Service Regulations* pending the ruling of the court on the merits of Plaintiff's action.

RE: Robertson
Gunn (Permanent injunction)

Conrad Gunn v. Donald Yeomans & Nicholas Caros

This is a judgement of the Federal Court of Canada, Trial Division, rendered by The Honourable Mr. Justice Cattanach, on June 11th, 1980 in Ottawa.

Inmate Gunn seeks relief by applying for an injunction and declaration, to restrain defendants from searching his body except in accordance with s. 41(2) of the *Penitentiary Service Regulations* and to declare that his conviction on the charge of failing to obey a lawful order was wrong in law.

Facts:

Plaintiff was ordered to remove his clothes on November 10, 1978 to be skin frisked upon departure to go out for medical treatment. He refused to obey the order.

Penitentiary Service Regulations provide for such search procedure when it is suspected on reasonable grounds that a person has contraband in his possession (S.41(2) P.S.R.).

The plaintiff was then charged to have refused to obey a lawful order.

Issue:

Is it lawful for the Institutional Head to order the indiscriminate search of all inmates for contraband on leaving and returning to the institution ?

It is not within the Institutional Head's authority to do so if the order made by him conflicts with an order on the same subject matter in the *Penitentiary Service Regulations* s. 41(2).

He must suspect, on reasonable grounds, that the inmate to be searched is in possession of contraband as a condition precedent to ordering the search. The suspicion must be specific and not a suspicion generally held.

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The Court concludes that the standing order requiring employees in charge of escorts to ensure that all inmates be thoroughly skin frisked before leaving and when returning to the institution is unlawful in that it is in conflict with s. 41(2) of the P.S.R.

Order:

Standing Orders inconsistent with s. 41(2) of the *Penitentiary Service Regulations* are unlawful. Order made by Penitentiary Officer Scott to plaintiff on March 10, 1978 was not a lawful order.

The conviction of plaintiff on the charge that he failed to obey a lawful order was wrong in law. Such conviction must be set aside and any record thereof must be expunged.

The defendants must not conduct any searches of plaintiff's person except in accordance with s. 41(2) of the P.S.R.

RE: Robertson
Gunn v. Yeomans (interlocutory injunction)

Ken Hanna v. Matsqui Institution Disciplinary Court

This is a decision of the Federal Court, Trial Division, rendered by the Honourable Mr. Justice Teitelbaum on July 13, 1990.

FACTS:

Mr. Hanna, an inmate at Matsqui Institution, was asked by a sheriff who was escorting him to Court to submit to a strip search. When the inmate refused to comply with the request, the keeper was called and he ordered the inmate to submit to the strip search. The inmate asked the keeper if he had reasonable and probable grounds to believe he was in possession of contraband. The keeper replied that it was a routine procedure to have inmates strip when leaving the institution. The inmate continued to refuse to submit to a strip search.

As a result of his refusal, the inmate was charged pursuant to section 39(a) of the Penitentiary Service Regulations with disobeying or failing to obey a lawful order of a member of the Correctional Service of Canada. The inmate appeared before an Independent Chairperson of Matsqui Institution Disciplinary Court for a hearing on the charge and was found guilty of having disobeyed a lawful order and sentenced to serve two days of administrative segregation.

ISSUES:

1. Does a Disciplinary Court have jurisdiction to rule that a section of the legislation is contrary to the Charter and of no force or effect pursuant to section 52 of the Constitution Act, 1982?

2. Does a Disciplinary Court have jurisdiction to declare a section of legislation contrary to the Canadian Charter of Rights and Freedoms pursuant to section 24(1) of the Charter?

3. Within the circumstances of this case, does section 41(2) of the Penitentiary Service Regulations infringe upon the rights guaranteed by section 8 of the Charter?

DECISION:

1. On the matter of the Disciplinary Court's jurisdiction regarding section 52 of the Constitution Act, 1982, the court held that it was open to the Independent Chairperson to consider, which he failed to do, if section 41(2)(c) of the Penitentiary Service Regulations is contrary to the Charter and therefore, of no force and effect.

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2. On the issue of whether the Disciplinary Court has the jurisdiction to declare a section of legislation contrary to the Charter pursuant to section 24(1) thereof, the Court ruled that only Superior Courts have the jurisdiction to declare a section of legislation, in this case section 41(2)(c) of the Penitentiary Service Regulations, contrary to the Charter, and therefore, invalid.

3. On the remaining issue of whether section 41(2)(c) of the Penitentiary Service Regulations infringes upon the right to be secure against unreasonable searches (section 8 of the Charter), the Court held that the routine search procedure (whereby all inmates of the institution are strip searched prior to being escorted out of the penitentiary), was reasonable in light of the circumstances of the case. The search allowed the guards an opportunity to ensure their safety with the inmate.

The Court ruled that the Independent Chairperson was correct in finding that the inmate had contravened section 39(a) of the Penitentiary Service Regulations.

PATRICK HARRIS v. HER MAJESTY THE QUEEN

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Muldoon on June 13, 1986.

Having just had his mandatory supervision revoked, the applicant seeks a declaration that he is entitled to credit for remission earned applicable to a period during which he was in custody following the suspension of a previous mandatory supervision.

FACTS

The applicant was released on mandatory supervision on June 11, 1983; this mandatory supervision was suspended on December 5, 1983, and revoked on February 16, 1984. He was credited for earned remission relative to the period when he was incarcerated after the suspension (from December 5 through February 16 - 37 days) pursuant to paragraph 20(2)c) of the Parole Act.

He was released again on mandatory supervision on March 25, 1985; this mandatory supervision was suspended on May 13, 1985, and revoked on June 14, 1985. At that time, he was credited with 40 days earned remission relative to the period when he was incarcerated after the suspension, from March 25 through June 14.

ISSUE

Whether the crediting of subsection 20(2)c) of the Parole Act is only applicable to the period of suspension connected to the revocation that occurs in the same series of events.

DECISION

When Parliament enacted paragraph 20(2)c), crediting the inmates "any remission earned after the coming into force of this subsection and applicable to a period during which his parole was suspended", it surely meant all and every remission, otherwise another wording would have been used. This interpretation appears to be consonant with the objects of the Parole Act.

Furthermore, when dealing with a penal statute, ambiguous wording should be resolved by giving the statute the meaning which is the most favourable to the persons liable to penalty.

The applicant is therefore entitled to be credited for remission earned and applicable to the period from December 5, 1983 to February 16, 1984.

The application was dismissed.

(This decision is being appealed).

Jerome Jonathan Hass

Judgement of the Supreme Court of Ontario (In Chambers) rendered by the Honourable Mr. Justice Mordex, on March 28th, 1978.

The inmate Hass has applied for a writ of Habeas Corpus ad subjiciendum with certiorari in aid to challenge the lawfulness of his confinement in the Guelph Correctional Centre.

Facts:

On May 11th, 1976, applicant was sentenced to two terms of six months imprisonment, to be served concurrently. On June 21, 1976, he was sentenced to a term of one year's imprisonment definite and two years less one day indeterminate.

From August 6th, 1976 to October 17th, 1976, he was unlawfully at large. On September 30, 1976, he committed an offence on which he was convicted on February 9th, 1977 to twelve months imprisonment consecutive to any sentence now serving. On that day, he was also convicted to have escaped and sentenced to a term of three months in a provincial jail by virtue of s.137 of the *Criminal Code of Canada.*

Issues:

In determining the length of the "additional" term, for the purpose of s. 137, is the indeterminate sentence of 729 days included ?

"I am of the view that the words "term of imprisonment" in subsections (1) and (2) of s. 137, and s. 14(1) of the *Parole Act* and the words (additional term" used in s. 137(3) include the indefinite, or indeterminate, period of imprisonment imposed upon the applicant on June 21, 1976. This being the case, "the aggregate of such terms" is two years or more. Thus, according to s. 137(3) the total sentence "shall" be served in a Penitentiary."

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HAWLEY v. HER MAJESTY THE QUEEN (F.C.T.D. Joyal J - Judgment Rendered April 24, 1990)

FACTS

Former inmate John Hawley filed a claim in Federal Court for the return of an acrylic painting he completed while he was at Frontenac Institution, plus damages.

The Plaintiff claimed that while incarcerated in Frontenac Institution he completed an acrylic painting with materials which he purchased and supplied. He further claimed that the work on the painting was exclusively or largely performed on the Plaintiff's own time, outside of work assigned to him, with the knowledge and approval of the employees of the defendants, who waived any claim on the painting. The painting was not returned to him when he was released from Frontenac Institution.

ISSUE

Who was the legal owner of the painting in question?

HELD

Mr. Justice Joyal dismissed the action, but made no order as to costs "by reason of the novel circumstances of the case". He found that ownership of the painting rested with the Institution. He stated that Frontenac Institution policies, as found in similar institutions, provide only circumscribed conditions under which an inmate can profit or gain from his own labours exerted during leisure hours. He further stated that the product of such an inmate's labour during working hours is something else, and therefore any accommodation which the Correctional Services would otherwise have been able to provide in dealing with the claim would have seriously undermined both from an institutional and moral point of view, the scheme of the whole work program in force at the institution.

Hay v. The National Parole Board et al.

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Muldoon on July 12, 1985.

The applicant seeks writs of certiorari and mandamus quashing the warrants ordering his transfer from the Saskatchewan Farm Institution to the Saskatchewan Penitentiary, and cancelling his return to the latter institution; he further seeks to have the decision denying him a program of escorted temporary absences quashed, and to compel the consideration of his application for such a program.

FACTS

- The applicant was sentenced to life imprisonment in February 1977.

- In March 1984, he was transferred to the Saskatchewan Farm Institution, on the recommendation of his Case Management Team, the Warden, and with approval of Regional Headquarters.

- On June 12, 1984, he was transferred back to the penitentiary; this transfer was conducted following a change of policy at Regional Headquarters, and had nothing to do with any unsatisfactory performance on the applicant's part while at Saskatchewan Farm.

- Furthermore, the National Parole Board refused to approve temporary absences for the applicant, stating that his 1977 offence outweighed his institutional progress.

ISSUE

Whether the transfer from the minimum security institution to the maximum security institution, and the denial of the program of escorted temporary absences contravenes the applicant's legally protected rights.

DECISION

The courts are ordinarily reluctant to interfere with the penitentiary authorities' decisions to transfer inmates from one institution to the other, so long as those administrative decisions are not demonstrably unfair. However, in this case, the decision to effect an involuntary transfer without any fault nor

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misconduct on the part of the inmate is the quintessence of unfairness and arbitrariness. The policy change invoked by the respondents, in the absence of fault, cannot prevail over the inmate's individually guaranteed legal rights. The applicant has been deprived of his right to the qualified liberty and security of the person which he possessed at the farm annex, in derogation of the principles of natural justice, and was arbitrarily subjected to intensified imprisonment. The detriment imposed upon the applicant's class of inmate by administrative policy cannot in those circumstances deprive him of the rights conferred upon him as an individual by constitutional imperative.

As for the National Parole Board's decision to deny escorted temporary absence to the applicant, the court will not intervene, although a strong suggestion is made that the Board should reconsider its position; as rehabilitation is still one of the important objectives of penal law in Canada, and in view of the applicant's excellent institutional record, he seems to deserve an opportunity to demonstrate his probable rehabilitation.

The application was allowed in part.

WILLIAM HENDRICKSON v. DEAN FOX

Decision of Denault J. of the Federal Court (Trial Division) on an application for certiorari rendered January 11, 1990.

FACTS

Hendrickson was charged with assaulting or threatening to assault a guard. The guard who was the alleged victim of the assault testified and the inmate then gave his testimony. At the close of the inmate's testimony, the Independent Chairperson indicated that he had to hear more evidence because he had conflicting stories before him. Three more staff members were then called to provide additional evidence. The inmate was given an opportunity to call further evidence, but he declined. He was subsequently convicted of the offence.

ISSUES

(1) Whether the Independent Chairperson misinterpreted the law applicable to a charge of assault.

(2) Whether by calling three witnesses after the inmate had given his evidence he violated section 19 of Commissioner's Directive 580 and the general rule of law that the Crown or Plaintiff cannot split their case.

DECISION

Commissioner's Directives do not have the force of law and the Independent Chairperson is not obliged to follow them. In any case, the Court was not satisfied that section 19 of CD 580 was breached. That section provides that the inmate shall be informed of the opportunity to give evidence after all of the witnesses against him/her have been heard.

There was no breach of the duty to act fairly. The inmate was present, was given full opportunity to hear evidence, to give his version of the case, to cross-examine the witnesses and was even offered the possibility of an adjournment to call other witnesses, which he declined. The mere fact that the Independent Chairperson, faced with two contradictory versions, decided to further investigate and hear more evidence does not mean he failed to comply with section 19 of CD 580. Nor did he breach the duty to act fairly. The inmate was not prejudiced or treated unfairly by the Independent Chairperson.

With respect to the question of whether the Chairperson misdirected himself on the assault charge, it was held that it is not up to the Court to review the evidence but merely to consider whether there has been a breach of the duty to act fairly. There was no such breach here.

Ivan William Mervin Henry v. Commissioner of Penitentiaries

This is a decision of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Strayer on April 2, 1987.

FACTS: Application for a writ of mandamus ordering the Commissioner of Penitentiaries to take the necessary steps to ensure that the applicant be permitted to withdraw funds in his savings account required by him for the purposes of litigation.

On May 28, 1985 the applicant, an inmate at Saskatchewan Penitentiary, having been unable to obtain from penitentiary officers the full use of his savings account for his legal proceedings, applied to the Commissioner of Penitentiaries for release of these funds. Access to his savings account was denied, as the applicant did not have the minimum balance set out in the Commissioner's Directive in force at the relevant time.

The applicant maintains that this denial of access to the total balance in his account for his use in legal proceedings is contrary to sections 7, 8, 9, 11(d), 12 and 15(1) of the Charter.

DECISION At the wish of the parties, the matter was decided on the basis of the present law, Directives and Standing Orders.

Subsection 32(2) of the Penitentiary Service Regulations, sections 8 and 10 of the Commissioner's Directive, dated October 1, 1986 and sections 12 and 13 of Standing Order 860 (as well as the predecessor Orders and Directives) are cast so broadly as to prevent access by inmates to their financial resources which they may need in seeking to protect through litigation their "liberty and security of the person" as referred to in section 7 of the Charter. The requirement that a minimum balance be retained in the savings account restricts the ability of an inmate to pursue his legal remedies.

Once a prima facie infringement of a Charter right has been found, the onus shifts to the party invoking section I to justify the limitation. This onus was not met with respect to the previously quoted Penitentiary Service Regulations, Commissioner's Directive and Standing Order.

The application was granted.

Ivan William Mervin Henry v. The Queen

This is a decision of the Federal Court, Trial Division, rendered by Mr. Justice Strayer on April 2, 1987.

FACTS

Application for an injunction forbidding any further deliberate or reckless opening of mail unless instructed by Commissioner, Warden, Regional or National Headquarters if in doubt to what is "privileged matter" and restraining prison staff from acting unjustly against the plaintiff.

The applicant also seeks damages in the amount of $150,000.00 pursuant to sub-section 24(1) of the Canadian Charter of Rights and Freedoms.

ISSUE

Whether the penitentiary authorities violated certain of the applicant's rights under the Canadian Bill of Rights, the Charter and under the Commissioner's Directives and the Standing Order respecting inmate correspondence.

Whether there has been a violation of the International Covenant on Civil and Political Rights.

DECISION

With respect to the Canadian Bill of Rights, the property right under paragraph 1(a) was extinguished by the applicant's sentence of imprisonment and it has not been demonstrated that a new right has been created by or pursuant to the Penitentiary Act. Paragraph 2(e) has no application to the exercise of administrative discretion. Paragraphs 2(f) and (g) raised by the applicant are irrelevant in the present case.

Sections 7, 9 and 12 as well as paragraphs 10(b) and 11(d) of the Charter invoked by the applicant are irrelevant.

With respect to sub-section 15(1) of the Charter and paragraph 1(b) of the Canadian Bill of Rights, the Court was unable to find any denial of equality.

The International Covenant or Civil and Political Rights does not have force of law within Canada and is not enforceable by Canadian Courts.

On the matter of whether the opening of the applicant's mail classified as "solicitor-client correspondence" and "privileged correspondence" by penitentiary officials constituted a violation of section 8 of the Charter, the Court was satisfied that what was done with respect to the plaintiff's mail did not amount to an "unreasonable search" in the meaning of this section.

The Court concluded that there was no violation of the plaintiff's rights.

The application was dismissed.

RODNEY HICKEY v. THE CORRECTIONAL SERVICE OF CANADA

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable M. Justice Pinard on August 7, 1986.

This is an application for an order quashing the respondent's present calculation of the applicant's warrant expiry date.

FACTS

On April 21, 1969, the applicant was sentenced to a term of 18 years imprisonment. On February 27, 1980, he was sentenced to a term of 10 days imprisonment, to be served concurrently to the 18 years sentence.

On April 19, 1981, due to an administrative error, the applicant was released upon expiration of sentence rather than on mandatory supervision.

On March 31, 1982, he was sentenced to 4 years imprisonment. The respondent determined that the mandatory supervision period should be retro-actively activated to be calculated from April 19, 1981, with there being no penalty for the period between that date and March 31, 1982, in view of the administrative error. The respondent therefore determined that both terms of incarceration (the remainder of the 18 year sentence and the 4 year sentence) would run concurrently with a warrant expiry date of April 20, 1987.

On June 14, 1982, the applicant was sentenced to an additional 2 months incarceration, to be served consecutively to the 4 year sentence. On January 16, 1985, he was released on mandatory supervision; such mandatory supervision was suspended, and revoked on April 15, 1985. Upon the revocation, the respondent directed that the said revocation be based upon a merger of the 18 year term and the 4 year, 2 month term. Based upon this merger, the warrant expiry date would be April 20, 1987, which is derived from the 18 year term, which commenced on April 21, 1969.

The applicant now argues that the respondent was not entitled to cure its administrative error, and that the lawful sentence calculation should be based solely upon the sentence of 4 years, 2 months from March 31, 1982, thereby making the warrant expiry date May 30, 1986.

ISSUE

Whether the Correctional Service of Canada was entitled to cure its administrative error in the above-described manner, and whether the applicant's rights in view of the Canadian Charter of Rights and Freedoms were infringed in this case.

DECISION

The sentence of imprisonment imposed by the Court in 1969 remains in effect despite the erroneous release of the applicant; therefore, it must be taken into account in computing the time during which the applicant is to be subject to parole.

The applicant was not subjected to any additional incarceration or parole time than prescribed by the original sentence, and even received a benefit, since the time he spent at liberty following his mistaken release was credited as time served. Consequently, he was dealt with fairly and none of his Charter rights were infringed.

The application was dismissed.

REGINA v. KENNETH REX HILLS

This is a judgement of the Supreme Court of British Columbia rendered by the Honourable Mr. Justice Dryer on March 10, 1981 in Vancouver.

This is an application for a writ of habeas corpus with certiorari in aid.

FACTS:

on February 21, 1978, applicant was sentenced to three years of imprisonment.
On January 30, 1978, he was released on day parole.
On April 6, 1979, his day parole was revoked.
He was then at large.
On July 17,1980, he was apprehended and has remained in custody since then.

ISSUE:

Should an inmate be credited with the time during which he was at large from April 6, 1979 to July 17, 1980 ?

When a parole is revoked, an inmate starts a new sentence, he does not continue to serve the sentence serving while he was on parole. This does not mean that he must serve that sentence in custody but anything other than custody must be authorized and no such authorization has been given in this case. Further it is known at common law that "the period of imprisonment begins when the warrant of commitment is executed..."

The application is dismissed.

RE: Norman Douglas McCaud; June 9, 1975
September 26, 1975

Robert McDonald

Re: Kenneth Ferdinand Hipke

This is a decision of the Supreme Court of Ontario, Toronto Weekly Court, rendered by Sutherland, J., on May 28, 1985.

The applicant, an inmate incarcerated at Joyceville Institution, sought a writ of habeas corpus with certiorari in aid, asserting that there was no lawful authority for his continued detention.

FACTS — The applicant, a Canadian citizen, had been convicted in 1972 in Florida of three offences and sentenced to serve terms of imprisonment of 10 years, 2 years consecutive and 15 years concurrent to the other 2 sentences. On or about March 5, 1980 the applicant was returned to Canada, pursuant to the Treaty Between Canada and the United States of America on the Execution of Penal Sentences and the Transfer of Offenders Act, to serve the balance of his Florida sentences in Canada. At the time of his return to Canada, the applicant had served 2,917 days in prison of his 5,474 day sentence. The applicant had also accumulated "gain time", which is roughly parallel to the Canadian concept of remission. The applicant was released on mandatory supervision, but after he violated the terms thereof he was returned to prison. As a result, the applicant forfeited his remission time, including his Florida "gain time".

ISSUE — Whether the "gain time" credited in Florida against the applicant's Florida sentences and credited against such sentences when the applicant was transferred to Florida is subject to forfeiture upon revocation of mandatory supervision under the Parole Act?

HELD — "Gain time" credited in Florida is not subject to forfeiture upon revocation of mandatory supervision under the Parole Act.

REASONS — Subsection 11(1) of the Transfer of Offenders Act provides for crediting against sentence remission credited to an inmate in the foreign state from which he is transferred. Subsection 11(2) states that such credit is subject to forfeiture for a disciplinary offence as if it were remission credited under the Penitentiary Act or the Prisons and Reformatories Act. The credit is therefore not the same as remission under the Canadian statutes referred to in subsection 11(2),

but rather the credit is something that for limited purposes is to be treated as if it were such a remission credit under those statutes. The forfeiture in this case was not in respect of a disciplinary offence.

It is nowhere stated in the Transfer of Offenders Act that remission credited at the time of transfer into Canada under that Act is subject to forfeiture as a consequence of a revocation of parole or mandatory supervision as distinguished from commission of a disciplinary offence.

It is not clear that "statutory or earned remission" in subsection 20(2) of the Parole Act includes remission credited to the inmate in the foreign state from which he is transferred. The Parole Act is a statute applicable to Canadian inmates generally. The Transfer of Offenders Act focuses on offenders transferred into the Canadian corrections system in accordance with its provisions. Subsection 11(2) of the Transfer of Offenders Act, by stating in effect that credits such as the applicant's "gain time" would be subject to forfeiture for a disciplinary offence, raises the negative implication that there would not be forfeiture of such credits for other breaches such as breaches of the terms of parole or mandatory supervision.

Where a statutory provision is ambiguous it should be applied in such a manner as to favour the person against whom it is sought to be enforced. The relevant statutory provisions in the within case are ambiguous. The negative implications of subsection 11(2) of the Transfer of Offenders Act and the uncertainty as to the meaning of the term "statutory and earned remission" in subsection 20(2) of the Parole Act are such that the applicant's "gain time" is not subject to forfeiture pursuant to the said statutory provisions.

ORDER Application allowed. Applicant to be discharged from custody.

Roger Hnatiuk v. The Queen

This is a judgment of the Federal Court, Trial Division, rendered by Mr. Justice Denault on July 13, 1987.

This is an application for certiorari and mandamus in relation to a decision to transfer the applicant from Matsqui Institution to Millhaven Institution.

FACTS

In the year 1986, the applicant was incarcerated in Matsqui Institution. On May 26, 1986 the applicant's cell was searched. A folded map of British Columbia and a drill bolt compatible with use as a "zip gun" were found. They suspected that the applicant had planned an escape with several other inmates.

On May 27, 1986 the applicant was put in administrative segregation by virtue of section 40(1)(a) of the Penitentiary Service Regulations. He was served with a notice outlining the reasons for his placement therein.

On June 10, 1986 the applicant was notified that his transfer to Kent Institution had been recommended by institutional officials. The applicant did not specify at that time, in the space allotted for that purpose on the transfer notice that he wished to present written reasons which could justify a new case study. However, the institutional transfer officer at Matsqui alleges that he did in fact orally advise the applicant of his right to do so when he served him with the notice.

On June 11, 1986 the applicant was notified in writing that a recommendation had been made to have him transferred to a Special Handling Unit (SHU). The notice outlined the reasons justifying this recommendation and also stipulated that the inmate was allowed to make any comments in writing within three working days and that these comments would accompany the forementioned recommendation. On that same day, the applicant received a memorandum entitled "Segregation Review Board Hearing Minutes". The memorandum confirmed that the investigation relative to an escape plot from Matsqui was now complete. It further confirmed

that the investigation had implicated the applicant in the plot. The decision to transfer the applicant to Kent Institution was also mentioned in the memorandum as was his right to respond in writing to the transfer recommendations.

On June 12, 1986 the applicant submitted a written reply to the notice of transfer to a SHU. On June 26, 1986 the Regional Special Handling Unit Review Committee recommended that the applicant be placed in Kent Institution but did not recommend a transfer to a SHU.

On July 16, 1986 the applicant was served with a written notice that his transfer to Millhaven Institution was being recommended rather than Kent. The applicant was advised of his right to reply in writing and the inmate availed himself of this right. The applicant submitted a written response to the proposal to transfer him to Millhaven Institution.

By notice dated July 30, 1986, the applicant was again advised that his response had been received and considered and that the transfer recommendation was upheld. This recommendation was accepted by Regional Headquarters and the applicant was transferred to Millhaven.

ISSUE

Whether the penitentiary administrators complied with the duty to act fairly in transferring the applicant to Millhaven Institution.

DECISION

The Court was unable to conclude that the institutional authorities failed to fulfill their duty to act fairly in ordering the transfer of the applicant. First, the notice served on May 27 referred expressly to the discovery of incriminating evidence (zip gun and map). It was not simply a "bold allegation that there were grounds to believe ...", as in the DeMaria case, that the applicant was involved in an escape plot. Second, on two occasions, the applicant was given an opportunity to respond to the allegations made against him and both times he did so. These

written submissions were indeed taken into consideration by the institutional authorities. Finally, the applicant was duly informed on August 13, 1986 of the confirmation of his transfer.

Although the failure to answer questions on the "involuntary transfer check list" constitutes a breach of the Interim Instruction on Involuntary Inmate Transfers, it does not in the view of the Court constitute a breach of the duty to act fairly (Martineau No.2).

The application was dismissed.

Glen Howard v. The Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution

This is a judgment of the Federal Court, Trial Division, rendered by Mr. Justice Nitikman on September 1, 1983 in Winnipeg.

This is a motion for an order prohibiting the respondent from continuing or concluding the hearing of certain disciplinary charges against the applicant in the absence of legal counsel.

Facts: The applicant while an inmate at Stony Mountain Institution was charged with several disciplinary offences. He requested that he be allowed to have legal counsel represent him at his disciplinary hearing. After having considered submissions made both by the applicant and the Department of Justice, the request was rejected by the respondent.

Issue: In view of the Canadian Charter of Rights and Freedoms is there a right for an inmate charged with disciplinary offences to be represented by counsel at disciplinary hearings?

Held: Neither section 7 nor paragraph 11(d) of the Charter guarantee nor include the right to legal counsel at inmate disciplinary hearings. And it is well established that in disciplinary proceedings there is no right of an inmate to representation by counsel unless the refusal to counsel representation would breach the principles of fairness and natural justice.

The principles of fundamental justice in section 7 of the Charter are equated with the principles of natural justice which do not guarantee in the present context the right to legal counsel.

As far as paragraph 11(d) is concerned, Mr. Justice Nitikman is in accord with the statement made by the Presiding Officer to the effect that the question of fair hearing falls within the procedural guidelines set forth in Davidson. Sections 7 and 11 do not create any new principle of law.

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Dealing further with paragraph 11(d), Mr. Justice Nitikman does not believe an inmate's disciplinary offence is included in the term "offence" as set out in the said section. He agrees with the decision of Mr. Justice Toy in R. v. Mingo on the subject.

The motion is therefore refused.

References: Martineau No. 2
Blanchard
Davidson
Minott
Mingo
In Re James (B.C.S.C.)

Glen Howard v. The Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution

This is a decision rendered by the Federal Court, Appeal Division on March 1, 1985.

FACTS

The Appellant, a federal inmate, was involved in certain incidents which resulted in 5 charges being laid against him pursuant to Section 39 of the Penitentiary Service Regulations. On January 06, 1983, the Appellant appeared before the presiding officer and pleaded guilty to two of the charges and not guilty to the remaining three. The Appellant was subsequently charged with two more offences to which he pleaded not guilty. All charges were categorized under the Commissioner's Directive 213 as "serious" or "flagrant". The hearing of February 03, 1983 was adjourned in order that the presiding officer of the Inmate Disciplinary Court could receive written submissions from both counsel for the Appellant and counsel for the Department of Justice on the issue of the Appellant's request for counsel. The presiding officer exercised his discretion and held that Section 7 of the Charter does not create a "new wave of rights" and that he was not convinced that in the circumstances of the particular case, a denial of the right to counsel would preclude the possibility of a fair hearing. The request for counsel was denied.

The Appellant then applied for an order of prohibition which was denied on the grounds that at common law the Appellant had no right to be represented by counsel at such proceedings and that Section 7 of the Charter had not conferred on him any new right to such representation. The Appellant appealed this decision.

ISSUE

Does Section 7 of the Charter afford the Appellant an undeniable right to counsel in disciplinary hearings?

HELD

The appeal was allowed.

(per Chief Justice and Mr. Justice Pratte)

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The enactment of Section 7 of the Charter has not created any absolute right to counsel in all such proceedings. It is undoubtedly of the greatest importance to a person whose life, liberty or security of the person are at stake to have an opportunity to present his case as fully and adequately as possible... and I do not think it can be affirmed that in no case can such an opportunity be afforded without also as part of it affording the right to representation by counsel at the hearing.

The Court examined the statutory provisions, regulations and directives relating to disciplinary hearings and concluded that the fact that under these provisions earned remission, once forfeited, cannot be restored makes the forfeiture of it by the disciplinary court a final and irrevocable deprivation of the right to liberty, conditional or qualified as it might be, to which the inmate would otherwise become entitled.

The Court held that Section 7 of the Charter is to be broadly construed, the standard of what is required to satisfy that section in its procedural sense is a procedure which is fundamentally just which will undoubtedly vary with the particular situation and the nature of the particular case.

Any right a person may have to the assistance of counsel arises from the requirement to afford the person an opportunity to adequately present his case.

Whether or not an inmate's request for counsel can lawfully be refused is not a matter of discretion but is a matter of right where the circumstances of the case are such that the opportunity to present the case adequately calls for representation by counsel. The denial of such a request by the presiding officer cannot be regarded as an adjudication of the right and cannot prevent a superior Court in the exercise of supervisory jurisdiction from determining the question on its own.

What Section 7 requires is that an inmate be allowed counsel when to deny his request would infringe his right to fundamental justice, the existence of the right admittedly depends on the facts. But the right, unless it exists, is not discretionary, in the sense that the presiding officer has a discretion to disallow it. His authority cannot prevent a reviewing court from looking at the facts and substituting its own view if it is persuaded by them that the case is one in which counsel should be allowed in order to afford the inmate the rights guaranteed by Section 7.

Section 7 does apply to purely administrative proceedings.

Other than, situations of unique simplicity, where there is a possible penalty of the forfeiture of earned remission there is a right to counsel. The probability that counsel will be required for an adequate hearing on charges with serious consequences is so strong as to amount effectively to a presumption in favour of counsel, a departure from which a presiding officer would have to justify.

Howarth v. National Parole Board

Judgement of the Federal Court of Appeal rendered by Mr. Justice Jackett, Thurlow and Pratte on October 19, 1973 in Ottawa.

This is an application to quash a proceeding under s. 28 of the *Federal Court Act* by which it is sought to have this Court set aside an order of the National Parole Board, which order purported to revoke a parole granted to the applicant.

Facts:

The *Parole Act* establishes the National Parole Board with jurisdiction to grant parole to persons under sentence of imprisonment under federal statutes.

The Board has discretion to grant parole or to refuse it.

It may also revoke parole of any "paroled inmate" and the parole of any "person" whose sentence has expired while in custody as a result of his parole having been suspended while he was a "paroled man".

If the decision under the *Parole Act* to revoke parole is "a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis" the Court has no jurisdiction to grant the relief sought by s. 28 proceeding and the application to quash should be dismissed, otherwise, this Court has such jurisdiction and the application to quash should be granted.

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Howarth v. National Parole Board (2)

Issue:

Is the decision of the Parole Board to revoke parole "a decision or order of an administrative nature required by law to be made on a quasi-judicial basis"?

It has been decided and it is accepted that an order revoking parole is of an administrative nature.

Nevertheless if the law requires it, an administrative decision may have to be dealt with in a quasi-judicial manner.

RE: Howarth (Supreme Court)
Bruce
Ex parte McCaud
Martineau #1, #2
Dubeau
Beaumier
Cline

Howarth v. National Parole Board

This is a judgement of the Supreme Court of Canada rendered by the Honourable Mr. Justice Pigeon, Martland, Judson and de Grandpré, on October 11, 1978 in Ottawa.

This is an appeal from the decision of the Federal Court of Appeal refusing to grant a proceeding under s. 28 of the *Federal Court Act* by which it was sought to set aside an order of The National Parole Board which purported to revoke a parole granted to applicant.

Facts:

The *Parole Act* establishes the National Parole Board with jurisdiction to grant parole to persons under sentence of imprisonment under federal statutes.

The Board has discretion to grant parole or to refuse it.

It may also revoke parole of any "paroled inmate" and the parole of any "person" whose sentence has expired while in custody as a result of his parole having been suspended while he was a "paroled man".

If the decision under the *Parole Act* to revoke parole is "a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis" the Court has no jurisdiction to grant the relief sought by s. 28 proceeding and the application to quash should be dismissed,otherwise,this Court has such jurisdiction and the application to quash should be granted

Issue:

Is the decision of the Parole Board to revoke parole "a decision or order of an administrative nature" required by law to be made on a quasi-judicial basis ?

The Court agrees to say that the Federal Court of Appeal took the right approach in deciding that s. 16 of the *Parole Act*, which authorizes a member of the Board to revoke a parole, did not require the decision to be made in a quasi-judicial manner.

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Howarth v. National Parole Board (2)

> This Court mentions that the new wording of what is now s. 16(4) of the *Parole Act*, which requires the Board to make an inquiry before revoking parole, does not imply an obligation to act quasi-judicially or judicially.
>
> Because s. 28.1 of the *Federal Court Act* is inapplicable due to the nature of the decision under consideration. The Court dismisses the appeal.

We must look at s. 16 of the *Parole Act* in order to see if such requirements exist. Section 16(1) authorizes a member of the Board to revoke parole and 16(4) requires the Board not to suspend parole before completion of an inquiry. In the opinion of the Court, s. 16(4) does not require a quasi-judicial basis because it does not exist unless there is an obligation within the law to give the inmate reasons for the action taken against him and to give him a full opportunity to be heard.

Therefore it cannot be said that a revocation decision is "required by law to be made on a judicial or quasi-judicial basis". This Court has no jurisdiction to set aside such a decision under s. 28 of the *Federal Court Act*.

This decision has been appealed to the Supreme Court of Canada.

RE: Bruce
Ex parte McCaud
Martineau #1, #2
Dubeau
Beaumier
Howarth (F.C.)
Cline

Hudson v. Her Majesty the Queen in Right of Ontario, et al.

This is a judgement of the County Court of the county of Lambton in Sarnia, Ontario, rendered by Mr. Justice Meehan, on January 26, 1983.

This is an action for damages for personal injuries as a result of an assault on one prisoner (plaintiff) by another (one of the defendants).

FACTS: On December 23, 1979, the plaintiff, an inmate in the Sarnia jail, was assaulted without provocation or warning by another inmate, the defendant Cottrelle, in an open area of the jail inhabited at that time by the plaintiff and five other prisoners, one white and four native Canadians, one of whom is the defendant. The inmate who assaulted the plaintiff is a native Canadian and the evidence discloses that the plaintiff had requested earlier to be moved because of problems with native Canadians. At the time of the assault, the individual cells were closed and the prisoners only inhabited the open area where the assault took place; there was no guard present on the floor at that time. As a result of the assault, the plaintiff suffered severe personal injuries as well as lingering after-effects of the injury.

Cottrelle's file discloses that he has committed two offences involving violence. He has pleaded guilty to fighting with another inmate and he was involved in a riot in another provincial institution. He was rated substandard, which is the lowest of grades and he was for some time kept in segregation. When he was transferred to Sarnia jail, he was classified as fit to mingle. All this information was available to the Ministry.

The plaintiff alleges there was inadequate supervision at the time of the assault, that the Ministry should have known that the defendant Cottrelle was capable of unprovoked assaults, and that the Ministry failed to adequately control Cottrelle.

ISSUES: Whether it could be reasonable foreseen that the inmate Cottrelle, would cause problems in the Sarnia jail which would be likely to result in harm to another inmate. In the face of the information in the file,

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would it have been prudent to put Cottrelle with a group of his peers and 2 whites in an open area.

HELD: It could easily have been foreseen that the inmate, Cottrelle, was likely to cause harm to another prisoner. The likelihood of that harm was increased by the placing of the various persons, given their ethnic backgrounds, in an open area with the cells closed during the day. It is also more likely that an assault would take place when there was no guard present on the floor.

Prison authorities owe a duty to an inmate to take reasonable care for his safety as a person in their custody, and when they fail to do so they may be held liable.

Judgement against Mr. Cottrelle and against the Ministry. Total damages awarded in the amount of $35,715.00.

Nick Hunchak v. National Parole Board and the Director of Mountain Institution

This is a judgement rendered by Mr. Justice McKay, of the British Columbia Supreme Court on October 26, 1981.

Facts:

Hunchak's mandatory supervision was suspended pursuant to a warrant which read simply that the designated person had "reasonable and probable grounds to believe that the inmate should be apprehended".

Hunchak brought a habeas corpus application seeking relief because there was no rationale basis for the grounds upon which his mandatory supervision certificate was suspended.

Held:

The Court held that it was bound by the decision of the B.C. Court of Appeal in the Lewis case, and on the issue of the "duty to act fairly", Hunchak himself admitted that he knew the reason for suspension of his mandatory supervision, namely to prevent a breach. To that extent, he knew the case which he must meet and his suspension was not invalid.

Although not as a part of his judgement per se, Mr. Justice McKay expressed the hope that, in the future, suspension warrants would set out more particulars on their face.

Hunchak v. the National Parole Board and
the Director of Stony Mountain Institution

Judgment of a British Columbia Court of Appeal rendered by Mr. Chief Justice Nemetz on June 28, 1982.

Facts:

This is an appeal from a Supreme Court of British Columbia decision not to grant Hunchak's application for *habeas corpus*. On August 12, 1981, Hunchak's mandatory supervision was suspended. The warrant of apprehension and suspension stated in part:

> "I, Jean B. McMurdo a person designated by the chairman pursuant to the *Parole Act*, have reasonable and probable grounds to believe that the inmate (Hunchak) should be apprehended."

The warrant did not specify upon which grounds it was based.

Issue:

Was the appellant (Hunchak) unjustifiably detained because the warrant of apprehension and suspension did not specify the grounds upon which it was based?

Held:

Section 16(1) of the *Parole Act* provides that the person designated by the Baord is entitled to suspend parole (or mandatory supervision) if he is satisfied that the arrest is necessary or desirable for any reasons stated. The specific reasons which have caused him to so decide need not be set out in the warrant.

Essam Ibrahim v. The Disciplinary Tribunal of the Montée St-François Institution, et al

This is a decision of the Federal Court, Trial Division, rendered by the Honourable Mr. Justice Yvon Pinard on the 4th day of November, 1985.

The applicant sought the following relief pursuant to section 24 of the Charter and to section 18 of the Federal Court Act:

(a) The issuance of a writ of certiorari quashing the decision of the Disciplinary Tribunal of the Montée St-François Institution;

(b) the issuance of a writ of mandamus ordering the respondent, Jean-Paul Dallaire, to deposit in the applicant's file the judgement rendered in this application;

(c) the issuance of a writ of certiorari quashing the decisions of the National Parole Board suspending and revoking the applicant's day parole; and

(d) the issuance of a writ of certiorari quashing the decision of the respondent, Pierre Goulem, to transfer the applicant to Leclerc Institution.

FACTS On March 14, 1985 the applicant, an inmate at Montée St-François Institution, was charged with the disciplinary offence of having contraband in his possession contrary to paragraph 39(i) of the Penitentiary Service Regulations. The charge arose from the discovery, by correctional officers, of valium pills in the applicant's cubicle. At the time of the charge the applicant was on day parole, which day parole was suspended on March 15, 1985 as a result of the charge. The applicant was found guilty by the Disciplinary Tribunal of Montée St-François Institution. The applicant was thereafter transferred to Leclerc Institution and on April 23, 1985 his day parole was revoked.

DECISION 1) Did the refusal of the applicant's request for a blood test, a urine test and fingerprint analysis at the time the pills were found in his cubicle and the failure of the Chairman of the Disciplinary Tribunal to comment thereon constitute a breach of paragraph 11(d) of the Charter?

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There is no obligation in law to grant such request to a fully free citizen. Therefore, there was no duty to grant the applicant's request for the tests and the analysis, and the refusal did not constitute a violation of any right or a breach of any duty. Even if it is accepted that section 11 of the Charter applies to inmate disciplinary proceedings, as the respondents did not violate any right or breach any duty, there could not have been any violation of the right to a fair hearing under paragraph 11(d).

2) Were the comments made by the applicant's parole supervisor and by a correctional officer misleading?

The comments of the applicant's parole supervisor did not mislead the applicant, but were rather a form of encouragement to him. There was insufficient evidence to establish the comments made by the correctional officer.

3) Was the applicant denied the right to retain and instruct counsel contrary to paragraph 10(b) of the Charter?

It was not necessary to determine whether or not paragraph 10(b) is applicable to this case since even in assuming that the applicant's right to be informed under paragraph 10(b) had been violated, he suffered no prejudice therefrom and there is no appropriate remedy under section 24 of the Charter.

4) Was the applicant misled by the inaccurate statuatory reference in the "Inmate Offence and Notification of Charge", thereby resulting in a breach of paragraph 11(a) of the Charter?

The applicant was not misled by the mistaken reference because the offence was clearly identified on the document. In addition the applicant received a further document setting out the charge and he was fully informed of the charge by the Chairman at the disciplinary hearing. The applicant was therefore informed of the specific offence without unreasonable delay, and accordingly paragraph 11(a) was not breached.

5) Were the applicant's language rights infringed by the use of French on certain documents and during certain portions of the disciplinary hearings?

As confirmed by his conduct at the disciplinary hearing the applicant was fluent in both English and French, and therefore his language rights were not infringed or denied.

6) Did the Chairman reverse the onus of proof at the hearing contrary to paragraph 11(d) of the Charter?

The comments made by the Chairman with regard to the onus of proof were based upon the evidence that pills had been found in the applicant's cell and that the applicant had to explain where these pills were coming from. Taken as a whole and in their proper context, the Chairman's comments were appropriate and there was therefore no justification to interfere with his findings of fact.

7) Were the applicable Commissioner's directives, divisional instructions and administrative procedures properly complied with?

The Commissioner's Directives were properly complied with and, although some divisional instructions and administrative procedures were either not fully applied or were contravened in part, the provisions were applied fairly in this case.

On the facts of this particular case the Disciplinary Tribunal acted fairly, in good faith, without bias and in a judicial temper, having also given the applicant the opportunity to adequately state his case.

The application was dismissed.

Jackson v. Joyceville Penitentiary (Disciplinary Tribunal)

This was a judgment of the Federal Court (Trial Division) rendered on February 16, 1990.

Facts

Inmate Jackson refused to provide a urine sample when requested to do so by staff at Joyceville Institution and was charged with failure to obey a lawful order. In his action, Jackson claimed that section 41.1 of the Penitentiary Service Regulations contravened sections 7 (fundamental justice), 8 (unreasonable search and seizure) and 15 (equality provisions) of the Charter of Rights and Freedoms.

Issue

Does s.41.1 of the Penitentiary Service Regulations contravene the Charter?

Decision

Section 41.1 of the Penitentiary Service Regulations, insofar as it purports to authorize a requirement that the inmate provide a urine sample to determine the presence of an intoxicant in the body of the inmate where the inmate is believed to have ingested an intoxicant, is in its present form inconsistent with sections 7 and 8 of the Charter. It is not a reasonable limitations demonstrably justified in a free and democratic society within section 1 of the Charter, and is of no force and effect.

The regulation as it presently reads provides for an unreasonable search contrary to s.8 of the Charter since it contains no standards, criteria or circumstances relating to its application for the guidance of staff or inmates. However, the technical testing process would not constitute an unreasonable manner of search if the regulation were otherwise not unreasonable. Commissioner's Directives and Standing Orders are not law and cannot be relied upon to qualify words of the regulation or to prescribe a reasonable limit under s.1 of the Charter.

With respect to s.7 of the Charter, MacKay, J. ruled that the requirement to provide a urine sample deprived the inmate of security of the person, and, since it could also result in disciplinary proceedings, also constituted an interference with liberty of the person. S.41.1 therefore contravenes s.7 of the Charter because the restrictions on rights to liberty and security of the person are not, in the absence of standards or criteria or applicable circumstances, in accordance with the

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principles of fundamental justice.

MacKay, J. accepted that unauthorized intoxicants create serious problems in penitentiaries, that societal concerns regarding these problems are substantial and that the purpose of s.41.1 was to improve the safety and security of the institution. However, he went on to decide that since the regulation lacks standards or criteria limiting the authority to search, the regulation is not a reasonable limitation prescribed by law within s.1 of the Charter.

The Court rejected the plaintiff's argument that inmates suffered discrimination under s.15 of the Charter because they were singled out amongst Canadians for urinalysis testing. Inmate status is not a prohibited ground of discrimination under s.15.

Jacobson v. Regional Transfer Board (Pacific) and Commissioner of Penitentiaries

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Strayer on April 14, 1987.

This is an application for certiorari and mandamus in relation to a decision taken by officials at Mission Institution to transfer the applicant from that institution to Kent Institution.

FACTS — The applicant was transferred from Mission Institution (medium security) to Kent Institution (maximum security) as a result of a decision taken by officials of the former institution on August 25, 1983. He was subsequently moved to Matsqui Institution (S-5) and then to Ferndale Institution (minimum security). He was still incarcerated in the latter at the time of the judgment. The applicant is serving a life sentence for second degree murder and is eligible for parole in 1989.

ISSUES — Whether the transfer decision was taken in accordance with the common law rules of fairness or the principles of fundamental justice guaranteed by s.7 of the Charter.

Whether the applicant was entitled to a hearing prior to his transfer or a kind of trial with sworn testimony in respect of the making of a transfer decision.

DECISION — The application for certiorari is dismissed. Though the decision on August 25, 1983 was not taken in accordance with common law rules of fairness or the principles of fundamental justice as guaranteed by s.7 of the Charter, any deficiency in procedures was made up subsequently both through opportunities for him to make written submissions in his grievances and through the hearing of the Outside Review Board on January 9, 1984.

The applicant was not entitled to a hearing prior to that transfer nor was he entitled to have a kind of trial with sworn testimony in respect of the making of a transfer decision. The decision is of a routine administrative nature not requiring a judicial type hearing.

The application for mandamus is dismissed. It does not specify any particular act which the Court should require to be performed.

The application is dismissed.

Gregory Jamieson v. R. LeBlanc and G. Downing

This is a decision of the Federal Court rendered by Mr. Justice Strayer on March 11, 1986. The applicant applied for a writ of certiorari quashing the decision to transfer him.

FACTS — Jamieson was transferred from Frontenac Institution to Collins Bay. Following his arrival at Collins Bay he was given a notice of transfer which stated that he was being transferred because of a suspected involvement in drugs. He was invited to respond within 48 hours which he did. Jamieson then wrote a number of letters to Mr. Downing, Warden of Frontenac Institution and Mr. Noel his Classification Officer at Frontenac asking for reasons for his transfer and denying involvement in drugs. He only received one reply to these letters. The reply stated that he was being transferred because he had been belligerent and verbally abusive to certain staff members and because of suspicion of drug use.

ISSUE — Was Jamieson given a full opportunity to respond before a decision was made concerning his transfer?

HELD — Certiorari issued to quash the decision of the Commissioner to transfer Jamieson to Collins Bay.

REASONS — The allegation that Jamieson was being transferred to Collins Bay because he was belligerent and verbally abusive to certain staff members was not presented to Mr. Jamieson in his notice of transfer. Mr. Jamieson was only told that he was being transferred because of suspicion of involvement with drugs. Consequently, Mr. Jamieson did not have the opportunity to respond to the first allegation. The duty of fairness applies to transfers of prisoners within the prison system. However, transfers do not require a formal hearing prior to a transfer and section 7 of the Charter of Rights and Freedoms only requires the common law duty of fairness. (Chester; Hay).

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There is no evidence to indicate that Jamieson was adequately informed as the reasons for his transfer so as to enable him to respond to them. There is no evidence that Jamieson's letter of rebuttal was ever taken into account by the final decision-maker. The procedure followed in this case is not even in accordance with the Commissioner's Directive which, although not law, would normally constitute procedural fairness. In the absence of some evidence as to why this could not be done, the inmate should have been given the specific reasons for the intended transfer. It should be clear that his response thereto has been considered by the relevant decision-maker before a final decision was taken concerning the transfer, and he should have been advised as to what that decision was.

One should not expect formal and meticulous procedures to be followed in the taking of what must be fairly routine administrative decisions concerning transfers, but the court fails in its duty if it does not require some evidence as to basic requirements of fairness having been observed.

Gerald Joseph Johns v. The Commissioner of penitentiaries

Judgement of the Federal Court, Trial Division, rendered by the Honourable Mr. Justice Cattanach, on April 4th, 1974 in Ottawa.

The plaintiff by his Statement of Claim seeks a declaration that he is being illegally and unlawfully confined in Prince Albert Penitentiary and that the warrants by which he is held there are defective.

Plaintiff pleaded not guilty of the offence charged but guilty of possession of stolen property having a value of over $50.00 contrary to s. 313(a) of the *Criminal Code*. The preceding magistrate accepted the plaintiff's plea of guilty on the other offence in accordance with s. 334(6) of the *Criminal Code*.

It is argued on behalf of the inmate that the first warrant of committal was defective and that the second one issued to correct the defective one did not bear an endorsement requiring the keeper of the prison to substitute it for the first warrant.

Issues:

> Is it essential that a warrant of committal issued to replace or correct a first one, bear an endorsement on its face that it is in substitution of the first warrant ?
>
> > The Court does not think that such endorsement is essential as long as it is made clear that the keeper of the penitentiary knows by virtue of which warrant he is authorized to hold a person in his custody.
> >
> > In this case it is agreed that the keeper of the penitentiary was under no misapprehension as to which warrant the plaintiff was being detained in custody.

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> Therefore the failure to endorse the second warrant to the effect that it is in substitution for the first one is not fatal to the validity of the second warrant.

Therefore the plaintiff is not entitled to any of the relief sought in the Statement of Claim.

Jolivet and Barker v. The Queen and the Solicitor General of Canada

This was a judgment of the Supreme Court of British Columbia rendered by the Honourable Mr. Justice Taylor, on August 17, 1983.

The petitioners sought a declaration that subsection 14(4)(e) of the Elections Act, R.S.C. 1970, c. 14 (1st Supp.), which disqualifies prisoners from voting in federal elections, is of no force and effect by virtue of section 52 of the Constitution Act, 1982, because it is in conflict with section 3 of the Charter which guarantees the right to vote to all Canadians.

Facts: Subsection 14(4)(e) of the Canada Elections Act provides that "every person undergoing punishment as an inmate in any penal institution for the commission of any offence" shall be disqualified from voting. The petitioners, inmates at Kent Institution, claim that the limitation on their right to vote in subsection 14(4)(e) cannot be demonstrably justified in a free and democratic society as is required by section 1 of the Charter.

Issue: Can the limitation imposed by subsection 14(4)(e) of the Canada Elections Act on the constitutional right of Canadian citizens to vote in the election of members of the House of Commons be demonstrably justified in a free and democratic society ?

Held:

(1) Disenfranchisement of prisoners cannot be justified under section 1 of the Charter on the grounds of "unfitness" to vote, or as a penalty for breach of the ordinary criminal law.

(2) The words "right to vote" in section 3 of the Charter mean more than the right to cast a ballot. It means the right to make an informed electoral choice reached through freedom of belief, conscience, opinion, expression, association and assembly. In the course of his judgment the Honourable Mr. Justice Taylor stated as follows:

> "It seems to me that the restriction imposed by imprisonment on freedom of the person, the close control which must be maintained by the state over association, assembly and discussion there, and inevitable interference in free inflow and circulation of information and ideas, all of which are necessary to preservation of prison order and discipline, render it impossible for prisoners to make the free and democratic electoral choice

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contemplated by the constitution. The casting of a ballot under such conditions could not, in the context of the Charter, be described as an exercise of the "right to vote"."(page 7).

(3) The limitation on the constitutional right to vote imposed on prisoners by the Canada Elections Act is justifiable in a free and democratic society and is therefore authorized by section 1 of the Charter.

Order

Petition dismissed.

William Jones v. Her Majesty

This is a decision of the Federal Court of Canada, Trial Division rendered by the Honourable Mr. Justice Strayer on September 21, 1990.

FACTS:

An inmate with a 6 year sentence was granted parole which was subsequently suspended. Following suspension, the inmate received two additional sentences. Thereafter, the inmate's parole was revoked.

ISSUE:

Did the revocation of the inmate's parole suspend the operation of S.20(1.1) and (1.2) of the Parole Act resulting in the merger of the three sentences pursuant to S.20(1) of the Act?

DECISION:

The Court rejected this interpretation finding that S.20(1) of the Parole Act is subject to 20(1.1) and (1.2) and further (1.3) and (1.4) are supplemental to and define (1.1) and (1.2). As a result, pursuant to (1.4), at the time of revocation, the "total" of the unexpired portion of the original sentence and the unexpired portion of later sentences must be served. The Court also relied upon Subsection (1.6) which defines "later sentence" as a sentence merged pursuant to (1.2).

Stephen Kelly v. Attorney General of Canada

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Denault on July 24, 1987.

This is an application for certiorari and mandamus in relation to a decision to transfer the applicant from Warkworth Institution to Kingston Penitentiary.

FACTS

On July 10, 1986, in two separate incidents, the applicant assaulted two other inmates. While being subdued during the second altercation, the applicant struck a Correctional Service officer. The applicant was found guilty of all three disciplinary charges laid against him and was sentenced to 21 days punitive dissociation and a loss of 30 days earned remission effective July 22, 1986.

On July 31, 1986, the applicant was informed by the Warden of Warkworth Institution by way of a proposed involuntary transfer notice that his transfer was being recommended to either Collins Bay or Kingston Penitentiary. The reasons underlying the recommendation were his involvement in the fights alluded to earlier. The notice specified that the applicant had 48 hours to submit a written rebuttal to the proposed involuntary transfer.
By way of letter dated August 1 and 2, 1986, the applicant opposed the proposed involuntary transfer for two reasons:

1) that a transfer to Collins Bay Institution would endanger his life;

2) that a transfer to Kingston Penitentiary would render unable him to complete his apprenticeship as a general machinist.

On August 11, 1986, the applicant was informed by way of a rebutted involuntary transfer notice that his arguments were being reviewed by the institutional multi-disciplinary team.

On August 18, 1986, there was issued an addendum to the progress summary report dated July 29, 1986 which showed that the arguments of both the inmates and his family were taken into consideration in reaching the decision

relative to the applicant's transfer. It is to be noted that the inmate's family members had requested from the Correctional Service of Canada (C.S.C.) that, if it were necessary to move the applicant, an institution be chosen that would meet his protection and training experience.

The applicant successfully challenged the procedure by which he had been convicted of the three disciplinary offences mentioned supra. The said offences were reheard on November 4, 1986. The applicant was found guilty on two of three charges, including the charge of striking the Correctional Service officer.

On November 5, 1986, another proposed involuntary transfer notice was sent to the applicant informing him that a recommendation had been made by the Warden of Warkworth for his transfer to Kingston Penitentiary. Again, the applicant submitted a written rebuttal which was duly taken into consideration.

On November 28, 1986, the Regional Transfer Board approved the recommendation for transfer to Kingston Penitentiary. By letter, dated December 1, 1986, the applicant was informed of the decision and transfer on or about that same day.

ISSUE

Whether there was a breach of the duty to act fairly.

DECISION

After careful review of all the evidence, the Court was unable to conclude that the institutional authorities failed to fulfill their duty to act fairly in ordering the transfer of the applicant. Not only was the applicant given adequate notice of what was being alleged against him, but on three occasions he was offered the opportunity to answer those allegations in writing. On each of these occasions he availed himself of his right to do so. There is no doubt that the officials did take the inmate's rebuttal into consideration before coming to a final decision.

The application was dismissed.

Donald Kelly v. the Disciplinary Board of Joyceville Institution in the Person of Roy Conacher

This is an application for certiorari to quash a conviction of the applicant under paragraph 39(1) of the Penitentiary Service Regulations.

This is a judgment of the Federal Court, Trial Division, rendered by Mr. Justice Muldoon on May 8, 1987.

FACTS — The applicant was convicted under paragraph 39(1) of the Regulations for having contraband in his possession: a 20 centimetre long knife and a 16 centimetre hacksaw blade were concealed in a photo album in his cell. As a result he was sentenced to 10 days dissociation. The conviction is attacked on the grounds that the applicant was denied the right to counsel which is contrary to the principles of fundamental justice and the duty to act fairly. Further the applicant maintains that the denial of the right to counsel in circumstances where other inmates who, unlike the applicant, are not serving life sentences are entitled to counsel, is unequal treatment and hence, contrary to the equality rights provided by the Charter.

ISSUE — Whether the respondent's decision not to allow the applicant to be represented by legal counsel is contrary to sections 7 and 15 of the Charter.

DECISION — From the present circumstances, the applicant does not have the absolute right to counsel. Unlike the situation in the Howard case, the offence for which the applicant was charged is not the most serious, the charge is not notoriously vague or difficult for anyone to defend and his remission is not at irreversible risk. These elements were all present in the Howard case and justified the need for counsel. Here, the applicant's offence is designated as intermediate. He faced no irreversible loss of remission. The offence charged is of the essence of precision of simplicity. Further, the applicant has had some 50 previous appearances before Disciplinary Tribunals. Hence, the subject proceedings could hardly have intimidated or disadvantaged the defendant to such an extreme. Moreover the facts demonstrate that the applicant had ample time to prepare his case. The document entitled "Inmate

Offence Report and Notification of Charge" was delivered to the inmate on July 21, 1986. Mr. Conacher provided his written reasons for denying the applicant's request to be represented by counsel on September 17, 1986. The hearing of the charge was held on September 26, 1986 when the applicant was tried and convicted. He had ample time to obtain advice from the Queen's Correctional Law Project on how to present his case.

The applicant's argument on the allegation of unequal treatment contrary to the Charter was brief and wan. There was nothing to it.

The Court can find no unfairness whatever nor any denial of the guarantees of section 7 or section 15 of the Charter.

The application is dismissed.

Klashinsky v. the Queen

Judgement of the Supreme Court of British Columbia, rendered by the Honourable Mr. Justice Lander, on May 14, 1985.

FACTS

On January 22, 1971, the Petitioner was sentenced to a term of 9 years imprisonment.

On March 14, 1977, he was released, under protest, on mandatory supervision with a warrant expiry date of January 21, 1980.

On October 15, 1977, an amendment to the Parole Act came into force, providing that:

a) A prisoner is allowed to remain in custody, rather than be released on mandatory supervision, if he so elects.

b) A prisoner whose mandatory supervision is revoked is given credit in the calculation of the remanet of his sentence for the time spent at large while on mandatory supervision.

On March 26, 1978, the Petitioner's mandatory supervision was suspended, but on April 3, 1978, that suspension was cancelled, pursuant to section 16 of the Parole Act. The Petitioner was then released on the same certificate, indicating still that his warrant expiry date was January 21, 1980.

On June 20, 1978, the Petitioner's mandatory supervision was suspended again; it was revoked on October 4, 1978, bringing into operation section 20 of the Parole Act in the calculation of the remanet of his sentence.

In calculating the remanet of the Petitioner's sentence, the prison authorities credited him with the time served at large on mandatory supervision after October 15, 1977, but not with the 213 days served in that same way before October 15, 1977.

The Petitioner was subsequently sentenced to two terms of imprisonment, in 1979 and in 1983. He is now to be released on mandatory supervision on September 29, 1985. If he were given credit for the time spent at large on mandatory supervision between March 14, 1977 and October 15, 1979, he would have been released on mandatory supervision on February 27, 1985.

ISSUE

1) Whether the Charter of Rights and Freedoms applies to this case, since the facts giving rise to the current incarceration occurred before the Constitution Act, 1982 was proclaimed.

2) If the Charter applies to this case, whether the rights and freedoms protected by it were denied to the Petitioner.

DECISION

It is now clear that both the substantive and procedural provisions of the Charter do not apply retrospectively. Nevertheless, the applicant may challenge the terms under which his incarceration is currently sustained, even if such incarceration was ordered or began prior to the Charter coming into force, since he is not challenging the validity of the application of the law prior to the Charter, but rather the criteria which justifies his continued detention after the Charter has come into force.

Furthermore, section 14 of the Parole Act, amalgamates all sentences imposed consecutively upon a prisoner's existing sentence, for the purposes of the Parole Act; as a result, it cannot be said that the time for which the credit was lost had already been served when the Charter came into effect.

Having decided that the Charter may apply to this case, the next issue to be determined is whether the constitutional rights of the Petitioner have been infringed. The criteria and legislation employed in 1985 to continue his detention take into account the now-repealed section 20 of the Parole Act, which had the effect of forfeiting credit for the 213 days beyond the date of expiry of the combined warrants of committal made by the judiciary. The Petitioner alleges that his present detention constitutes a violation of constitutionally protected rights under sections 7, 9 and 11(h) of the Charter.

There is no merit in the procedural aspect of the Petitioner's argument concerning section 7: to apply the Charter to the process by which his parole or mandatory supervision was revoked in 1978 would be to apply the Charter retrospectively. As for the substantive aspect of section 7, it is no broad enough to incorporate protection of freedoms and rights protected by other specific provisions of the Charter.

Section 11(h) which provides protection against double jeopardy has no application here either. The accused was indeed subject to two punishments, but they are in relation with two separate offences, namely the breach of parole and the offence of trafficking in narcotics.

Finally, the section 9 argument involving arbitrary detention is not acceptable because there is no evidence of any arbitrary exercise of discretion in relation to the clearly defined standards which were referred to in determining the length of the Petitioner's remaining sentence. As for the legislation itself, the jurisprudence defines an arbitrary legislation as having no rational basis, and being capricious, unreasonable or unjustified. Section 20 of the Parole Act has a rational basis, and therefore cannot be considered as being arbitrary, and in this respect, the Petitioner's rights under section 9 have not been denied.

The application was dismissed.

KNOCKAERT v. THE COMMISSIONER OF CORRECTIONS ET AL.

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Reed, on March 24, 1986.

The applicant seeks a writ of certiorari quashing a decision not to credit him with earned remission for the month of October, 1984.

FACTS — On November 1, 1984, the applicant was charged and convicted of the disciplinary offence of having contraband in his possession on October 17, 1984; a penalty of 30 days of loss of earned remission was imposed by the Disciplinary Court. On December 21, 1984, the applicant received notice from the Earned Remission Board that he had not been credited with earned remission for the month of October, because of his conviction by the Disciplinary Court.

ISSUE — Whether the non-crediting of earned remission with respect to the month of October is a second punishment for an offence for which the applicant had already been punished, thereby being contrary to subsection 11(h) of the Canadian Charter of Rights and Freedoms.

DECISION — Argument was made on both sides as to whether the trial, conviction and imposition of loss of earned remission by the Disciplinary Court is a proceeding coming within the terms of section 11 of the Charter. Even if the particular offence of possession of contraband constitutes an offence to which section 11 applies, the crucial issue is whether the subsequent action of the Earned Remission Board can be said to have resulted in the applicant being tried and punished for the offence a second time.

Eventhough the two proceedings in this case seem to be closely linked, the purposes for which the conviction for the offence is being used in each one of them are different: the Disciplinary Court concerns itself with punishment for the commission of an offence, (the punishment being the loss of earned remission which has already been credited), while the Earned Remission Board concerns itself with the question as to whether remission has been earned for the instant month.

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It is not sufficient, for the purpose of subsection 11(h) to demonstrate merely that the conviction for an offence has resulted in a second disadvantageous consequence for the person who has already been convicted: the second punishment must necessarily have been imposed for the commission of the offence. The Earned Remission Board does not investigate in order to give punishment for the commission of the disciplinary offence, but rather to consider all aspects of the inmate's conduct during the month in question to determine whether or not such inmate merits being credited with earned remission.

The difference of purpose of the two decisions is sufficient to require the conclusion that the Board's decision does not constitute an infrigement of subsection 11(h) of the Charter.

The application was dismissed.

(This decision is being appealed).

Knockaert v. The Commissioner of Corrections et al.

Judgment of the Federal Court of Appeal rendered on November 21, 1986.

This is an appeal of a decision of the Federal Court of Canada, Trial Division, dismissing the applicant's action, in which he sought a writ of certiorari quashing the decision not to credit him with earned remission for the month of October, 1984.

FACTS : The appellant was charged and convicted for the disciplinary offence of having contraband in his possession and was imposed a penalty of forfeiture of 30 days of earned remission. He later received notice from the Earned Remission Board that he had not been credited with earned remission for the month during which he committed the offence in question.

ISSUE : Whether the appellant was subjected to double punishment in contravention of paragraph 11(h) of the Canadian Charter of Rights and Freedoms.

DECISION:

a) M. Justice Hugessen (M. Justice Lacombe concurring);

This appeal should be decided on the very narrow basis that the administrative decision to refuse to award earned remission to an inmate because of his misbehaviour does not constitute punishment for that misbehaviour.

The statutory scheme of earned remission as set out in subsection 24(1) of the Penitentiary Act and as defined in the Commissioner's Directives clearly envisages a monthly assessment of each inmate's performance taking into account whether the inmate has conformed to institutional and other rules during that month. While breach of rules may bring punishment, compliance with them along with consistent application of effort to the program may also bring reward; though the two may be opposite sides of the same coin, they are nonetheless distinct.

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b) M. Justice Marceau (Concurring in the result);

> The arguments in support of the Trial Judge's decision that the failure to earn remission did not constitute punishment are not convincing. However, this appeal cannot succeed because paragraph 11(h) of the Charter has no application to disciplinary matters. There are overwhelming indications that the word "offence" was therein used in the restricted sense of a criminal or quasi-criminal offence. Such intention transpires from the words used, the marginal notes accompanying the provision and mostly the other rights guaranteed in that section, which have absolutely no meaning outside a criminal or quasi-criminal context. Furthermore, the practical difficulties which would arise if disciplinary proceedings were considered has being included in the sphere of application of section 11 do not allow an extension of the scope of that provision beyond what was intended by the framers of the Charter.

The application was dismissed.

Douglas Wayne KORROL v. Deputy Attorney-General of Canada and the Solicitor General of Canada. Fec. Ct. T.D. (1984)

FACTS — The plaintiff, Korrol, a Canadian citizen, is an inmate at Collins Bay Institution who was imprisoned for 4 serious offences in Florida, in 1977, and, pursuant to the Treaty Between Canada and the U.S. on the Execution of Penal Sentences was transferred to Canada to serve the remainder of his sentence in March 1980.

ACTION — The plaintiff claims that his consent to transfer was not an informed consent and seeks a declaration that his transfer to Canada was not accomplished in accordance with the above-mentioned treaty. The basis of his claim is that at the time when he signed his "verification of consent to transfer to Canada" form, he was never informed that the law regarding the computation of sentence in Canada differed from that of the State of Florida, and that as a result, under Canadian law, his potential release date arising as a result of earned remission would be approximately 2 years later than it would have been in Florida. The plaintiff claims that he would not have consented to the transfer had he been made aware of the Canadian law in this area.

ISSUE — Is there a legal requirement that the prisoner consent to the transfer?

HELD — Plaintiff's action dismissed.

REASONS

(1) In Canadian law, it is the Act and not the Treaty which governs. Our constitution, as distinct from that of the U.S.A. does not incorporate treaties into our domestic law; on a purely semantic appreciation of the legislation, one concludes that it does not require the consent of the transferee. They need only to request their respective transfers. (s.6(1))

(2) The cases relied on by the plaintiff all relate to uninformed consent to surgical operations or medical treatment. These cases are not relevant as they all deal with events that bear real risks. In this case, there were no risks. The law of Florida is known. The law of Canada is known. The plaintiff, being of normal understanding, had read, and was told, that the sentence which he was then serving would be carried out according to the laws of Canada, and that his sentence might be changed in conformity with Canadian law.

Tommy Young Lackey v. Donald Yeomans, et al

This is a judgement rendered by the Honourable Mr. Justice Addy of the Federal Court of Canada, Trial Division, on January 25, 1982 in Vancouver.

Facts:

A decision was taken to transfer the applicant Lackey from Kent Institution to Prince Albert Institution. The inmate alleged that he would likely do himself harm if he were transferred.

Relief sought:

- An interim or interlocutory injunction or relief in the nature thereof restraining the Warden of Kent Institution from implementing his decision to transfer the Plaintiff/Applicant from Kent to Prince Albert Institution pending the ruling of the Court on the merits of the Plaintiff's action.
- A similar relief having effect against the members of the Regional Transfer Board of the Pacific Region, Correctional Service of Canada.

Order:

There is not the slightest evidence that the Warden is not fully informed of the matter, that he is biased or that he has or is acting unfairly or is in any way prejudiced in his decision to transfer the applicant. The Court must not substitute its judgement for that of the person charged by statute to make the decision unless there is convincing evidence that the decision is being taken unfairly or without proper investigation of the matter. The motion was accordingly dismissed.

Robert Lafrenière v. The Officer Presiding

at the Ste-Anne-des-Plaines Institution Disciplinary Court

This is an application for certiorari to quash a conviction for a disciplinary offence awarded by the Disciplinary Court at the Ste-Anne-des-Plaines Institution.

Facts

During a search of the applicant's cell, the guards found a package of cigarettes containing "a piece of a brown substance resembling hashish". The applicant was charged and found guilty of possession of contraband by the Disciplinary Court. The applicant has applied for a writ of certiorari to overturn the Disciplinary Court's decision. He alleged a total lack of evidence that the brown substance was hashish and a lack of evidence of possession. He also claimed that he was not given the benefit of reasonable doubt, and that he was not given the opportunity to have his witnesses testify.

Question

Was the applicant treated fairly? Was there sufficient evidence before the Disciplinary Court to convict him?

Decision

The judge before whom the writ of certiorari is requested must not take the place of the judge responsible for hearing the complaint nor must he act as though he were sitting in appeal of this decision. He must instead decide whether the principles of natural justice have been respected or whether the person requesting redress was treated fairly.

In the present case, a reading of the hearing's transcript has convinced the Court that at no time was the nature of the brown substance resembling hashish established. It is important, in the case of such a charge, that the nature of the substance with respect to which the prisoner is being accused of illegal possession, be proven. It is clear from the sentence imposed, namely twenty days of administrative segregation, that those involved took action as though it had been, and the applicant was sentenced accordingly.

The application was granted, and the decision of the Disciplinary Court quashed.

Ex parte Langlois

Judgement of the British Columbia Supreme Court rendered by Mr. Justice Andrews on August 30, 1974 in Vancouver.

Accused applied for a writ of Habeas Corpus.

Facts:

> Accused was sentenced to six months consecutive to present term for escape and to two months consecutive to escape charge for fraud on same date. *Criminal Code* requires escape sentence to be served before original sentence and fraud sentence to be served concurrently with original sentence after sentence for escape is served.

Issue:

> Is the two-month term of imprisonment to be treated as running concurrently with, or consecutively to, the term of imprisonment served by the applicant in regard of the breaking and entering conviction ?
>
> > Regarding the six-month sentence, it would have to be served before the remaining of the sentence that accused was serving at the time of conviction for escape according to s. 137(1) of the *Criminal Code*.

Concerning the two-month sentence for fraud, there are two reasonable interpretations that can be given to Provincial Court Judge's intention. Neither of them can be said to be more unreasonable than the other, leading to totally different conclusions, it is truth in law that the Court should accept that which is more favourable to the applicant in custody.

Therefore the accused must serve the two-month sentence concurrently with the portion of the original sentence that remained unexpired.

Up-dating - S. 137 of the *Criminal Code* has been replaced by a new section on October 15, 1977.

RE: Sowa

Robert Larivière v. Disciplinary Bd. of Millhaven & D. Hardtman

This is a judgement of Collier J. of the Federal Ct. Trial Division rendered on October 14, 1986 concerning a motion for certiorari to quash a decision of the Disciplinary Board dated October 2, 1986.

FACTS — The applicant was charged with having contraband in his possession, namely "approximately two gallons of home brew". At the hearing before the respondent, the applicant was advised that the standard of proof required was "beyond a reasonable doubt". A correctional officer testified that during a routine cell search he had found two gallons of liquid in the appellant's cell. The officer expressed the view that this was home brew. The appellant and his witnesses testified that the liquid was apricot juice. No record was kept of the proceedings since the tape recorder failed to function properly.

ISSUE — Did the Chairperson misapply the standard of proof which he explicitly adopted? Did the respondent breach the duty to act fairly by failing to keep a record of the proceedings of the tribunal?

HELD — Motion dismissed.

REASONS — It is not necessary that there be true expert evidence before the tribunal to show that the liquid was "home brew" and therefore contraband. The Chairperson was entitled to consider the evidence and opinion of the correctional officer and prefer it to that of the applicant. Moreover it is not essential that the Chairperson should give reasons, or indicate, why he preferred and accepted the correctional officer's evidence. A disciplinary tribunal is not a court in the criminal law sense. It is not bound by all the ordinary rules of evidence. The materials indicate that there was evidence on which the Chairperson could come to a finding, beyond a reasonable doubt, that the applicant was in possession of contraband, particularized as home brew.

Although the Commissioner's Directive requires the recording of disciplinary hearings, the Martineau decisions make it clear that the directives do not have the force of law. The mere failure of a machine to record proceedings cannot give rise to a breach of the duty to act fairly. The lack of a transcript did not, in any way, prejudice the

applicant at the actual hearing. The summary of the proceedings put before this court comes from the mouths of the applicant and his representative. There is not the slightest indication of any prejudice or breach of fairness because the proceedings were not recorded verbatim.

LaSalle v. Disciplinary Tribunals of Leclerc Institution and Rousseau

This was a decision of the Federal Court of Canada - Trial Division, rendered by Walsh, J. on November 30, 1983.

The petitioner sought: a writ of certiorari or similar order quashing the decisions of the disciplinary tribunal of Leclerc Institution on March 8, 15, 22, 1983; a writ of mandamus ordering the respondent Rousseau to withdraw from the petitioner's record any mention of the disciplinary proceedings; and an order granting reparations pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms*.

FACTS

The petitioner was incarcerated in Leclerc medium security Institution, serving a three year term. On March 8, 1983, the petitioner appeared before the disciplinary tribunal and pleaded guilty to the charges of having been found in an abnormal state and having assaulted an officer, which arose from an incident which took place the previous night. As a result of the plea, the petitioner received five days' detention in solitary confinement.

On March 15, 1983, the petitioner appeared before the disciplinary tribunal to answer to a further charge of having conducted himself in a menacing matter, which also arose out of events which occurred on March 7, 1983. At this hearing, the petitioner's request to be assisted by his lawyer was denied. The petitioner was found guilty and a sentence of three days in solitary confinement was imposed. On March 22, 1983, the petitioner again appeared before the disciplinary tribunal. He was charged with failing to obey a lawful order, which also referred to the events which occurred on March 7, 1983. The petitioner was found guilty and was given a warning.

At the hearing on March 22, 1983, the Associate Director of Socialization directed that the petitioner be held in administrative detention pending his transfer to a maximum security institution. The petitioner sought a hearing before the transfer took place, but his request was denied and on March 29, 1983, he was transferred to Archambault Institution.

ISSUES

(Although the petitioner challenged the actions taken on the basis of the *Charter*, Walsh, J. declined to invoke the *Charter* to deal with the case.)

Did the respondents, in the decisions to discipline the petitioner and to transfer him, comply with the duty to act fairly and in accordance with the principles of natural justice?

HELD

1. Disciplinary Proceedings on March 8, 1983

Although the notice provisions in Commissioner's Directive 600-7-03, paragraphs 12(c)(1) and (2) may not have been complied with, the petitioner pleaded guilty to the two initial charges laid against him of disobeying a regulation by being intoxicated and assaulting a prison officer, and there was therefore no reasonable doubt as to his guilt nor justification for quashing these charges.

2. Disciplinary Proceedings on March 15 and March 22, 1983

(a) There was no valid or reasonable explanation as to why the charges were not laid at the same time as the initial charges, and there may not have been any justification for laying an excessive number of charges arising out of the same incident.

(b) The legal issues which the petitioner wished to raise were sufficiently serious that the presiding judge should have at least considered the petitioner's request to be represented by legal counsel, or at least adjourned the hearing so as to permit written legal submissions to be made by the petitioner's lawyer.

(c) It was unfair to the petitioner that the guards laying the charges against him had access to the presiding judge in the absence of the petitioner.

For all of the above reasons, the decisions of March 15 and March 22, 1983 were quashed.

3. Decision to Transfer Petitioner to a Maximum Security Institution

The decision to transfer the petitioner was taken unfairly because he was never informed of the reasons for the transfer; he was never given any document with respect to the transfer decision; and his letter requesting a hearing was ignored and therefore the transfer decision was not reconsidered nor was the petitioner given any chance to make representations prior to the decision being made. In addition, the reasons given for the transfer, which were subsequently communicated to the petitioner's lawyer, appear to be based in part on the single incident of drunk and disorderly conduct, which would hardly make the petitioner a danger to the security of the institution.

4. Subsection 24(1) of the Charter

The Court could not in these proceedings award damages, under

subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, to the petitioner.

DECISION

The two decisions of the disciplinary tribunal rendered on March 8, 1983 were not interfered with. The decisions rendered on March 15 and March 22, 1983, as well as the transfer decision made on March 23, 1983 were quashed. These decisions were ordered to be struck from the petitioner's record. An order was made to retransfer the petitioner back to Leclerc Institution, unless the petitioner desired to remain at Archambault Institution.

Bryan Rolston LATHAM and the Solicitor General of Canada et al

An application for habeas corpus with certiorari in aid to quash the decision of the National Parole Board revoking the applicant's day parole.

This is a judgment of the Federal Court, Trial Division, rendered by Mr. Justice Strayer, on March 28, 1984.

FACTS: Applicant serving sentence of imprisonment for rape was subsequently convicted of another rape and assault while on M.S. in 1974. He was released on day parole in August 17, 1982 and in September, 1982 the police investigated complaints by his twelve year old stepdaughter that he told her he felt like raping her. Applicant voluntarily returned to penitentiary at urging of parole officer and day parole was suspended and revoked after a post-suspension hearing.

ISSUE #1: Can the Federal Court, Trial Division issue habeas corpus?

HELD: No. It is well settled that the Federal Court, apart from certain minor exceptions, cannot issue habeas corpus. However, the Federal Court can deal with the merits of the application by way of certiorari since once the NPB's order is quashed there will be no authority for detaining the applicant since the suspension of his day parole will no longer be effective.

ISSUE #2: Did the Board lack jurisdiction when it revoked the applicant's day parole after he had already surrendered himself?

HELD: No. While it is possible to contend that parole cannot be revoked if it is not yet in effect or no longer in effect, the parole of the applicant here was still in effect since the voluntary surrender by Latham could not have the effect of terminating parole. Full parole or day parole can only be revoked by the Board pursuant to Section 6 of the Parole Act.

ISSUE #3: Were the common-law rules of fairness and Section 7 of the Charter breached in this case because the applicant was not adequately informed of the grounds upon which the Board was considering revocation of his day parole?

HELD: Yes. The evidence establishes that Latham was not properly informed as to the nature of the allegations under consideration by the Board. While the applicant was aware of the nature of the allegations that had been made against him by his stepdaughter, he was never made aware of the precise grounds for the revocation of his parole. While the Violation Report gave us the reason for suspension, "to prevent a breach of a term of condition of parole", his parole certificate contained no material conditions. As well, little or nothing was communicated to the applicant at the parole suspension hearing until after a decision was made. While parole is not a right but a privilege, and therefore its revocation does not requi the judicial-type process more commonly associated with the concept of natural justice, it does require at least an observance of fairness. The failure here to adequately notify the applicant of the reasons for which revocation was being considered constituted a major denial of fairness.

ISSUE #4: If the answer to issue #3 is "yes", was the Board justified in withholding information from the inmate on the grounds that it was confidential and consequently exempt from disclosure as provided fo in sub-section 17(3) of the Parole Regulations?

HELD: No. While sub-section 17(3) would provide a legally effective limitation on any common law fairness requirement of disclosure, it is not effective in limiting the right which a parolee has under Section 7 of the Charter. The term "fundamental justice" within the context of parole revocation means that fairness is required. Fairness, in turn, requires at least an outline being given to the person affected of the allegations being considered by a tribunal in deciding whether to deny that person his liberty. A law which purposes to deny even this is not a reasonable limitation within the meaning of Section 1 of the Charter of the rights guaranteed in Section 7 thereof.

ISSUE #5: Were the common-law rules of fainess and Section 7 of the Charter breached because the applicant was denied the opportunity to be present during much of the hearing.

HELD: Yes. SInce the applicant was available and waiting outside, there can be no justification for excluding him from the hearing except that of confidentiality. This exclusion amounted to a denial of fairness.

ISSUE #6: Were the common-law rules of fairness and Section 7 of the Charter breached because the Board failed to notify the applicant that he was entitled to counsel.

HELD: No. The evidence does not disclose that the applicant was in any way denied counsel by the Board. The applicant tried to get a lawyer to represent him but his efforts failed. The applicant also apprently consented to the hearing being held earlier than originally planned.

Section 10(b) of the Charter which provides that "everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right" has no application in the present context and cannot be invoked by the applicant since it covers only the situation of initial arrest or detention. The guarantee in Section 7 of the Charter however requires that a parolee should have eve reasonable opportunity to be represented by counsel at a revocation hearing.

ISSUE #7: Is Section 20 of the Parole Act, which provides for the automatic loss of statutory and earned remission upon revocation of parole for whatever reason, contrary to Section 7 of the Charter.

HELD: No. Section 7 of the Charter was intended to quarantee only procedural justice or fairness and not to impose a substantive test of the fairness of laws. Therefore, Section 7 cannot be used by the Court to review a statutory enactment such as Section 20 of the Parole Act to determine whether it is "draconian" and thus contrary to fundamental justice.

CONCLUSION: The decision of the NPB of October 6, 1982, revoking the applicant's day parole and any warrants based thereon were quashed and the applicant was awarded costs.

NOTE: This decision antedates Madame Justice Reed's judgment in Cadieux vs. The NPB et al rendered in the Federal Court, Trial Division on May 8, 1984 which considered the issue of when the Board can refuse to disclose confidential information to an inmate.

Maurice Lauzon v. The Warden of Millhaven Institution, Correctional Service of Canada.

Judgement of the Supreme Court of Ontario rendered by the Honourable Mr. Justice O'Leary on February 14, 1980.

Inmate applied for a writ of Habeas Corpus ad subjiciendum with certiorari in aid which was treated, on the consent of the parties, as an application for the discharge of the prisoner as if the writ had been issued and a return made.

Facts:

Applicant claims to be entitled to be released from close custody on mandatory supervision.

The sentence administrator of Millhaven Institution has calculated that the prisoner will not be entitled to be released from close custody on mandatory supervision until October 17, 1981.

On February 7, 1977 the prisoner was convicted of offences and was given these sentences:

1 - being unlawfully at large between Oct. 19, 1975 and Oct. 24, 1975: 4 months in Kingston Penitentiary;

2 - escaping lawful custody on May 11, 1976: 4 months in Kingston Penitentiary;

3 - forcible seizure: two years in Kingston Penitentiary consecutive to sentence now being served.

Issue:

Did the "escape" sentences which the prisoner received for breaking out of prison on August 3, 1970, for being unlawfully at large between October 19, 1975 and October 24, 1975; and for escaping lawful custody on May 11, 1976 fall within the provisions of s. 14 of the *Parole Act* ?

The effect of s. 137(1) of the *Criminal Code* as it read before October 15, 1977, is that a prisoner who was sentenced for an "escape" has to serve the sentence he was given for the escape first, and he would serve, after, the portion of his unexpired sentence.

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> In this case s. 14 of the *Parole Act* has no effect, in other words the sentences imposed for the escape do not constitute one sentence.
>
> "Therefore when the two-year sentence was imposed on February 7, 1977 the sentence "now being served" was the 4-month sentence for the offence of being unlawfully at large imposed earlier that day. Accordingly that two-year sentence had to be served consecutively to the four-month sentence but concurrently with the portion of the term of imprisonment that he was serving ... at the time of his escape, that he had not then served.

Order:

> Prisoner is therefore entitled to be released from close custody on mandatory supervison.

This case has been appealed and the appeal was allowed.

RE: A.G. Canada v. Lauzon

The Attorney General of Canada v. Maurice William Lauzon known as John Hilderbrand

Judgement of the Supreme Court of Ontario, Appeal Court, rendered by Honourable Mr. Justice Arneys, Jessup and Brooke on February, 1981 in

Inmate Lauzon applied for a writ of habeas corpus submitting that on a proper calculation of his sentence he was entitled to be released. Habeas Corpus was granted. The Attorney General of Canada is appealing that decision.

Facts:

On June 20, 1969 Lauzon was sentenced to a total of 9 years in federal penitentiary.

On August 3, 1970: he escaped and was apprehended the next day. While at large he committed two offences.

On August 19, 1970: he was, for escape, sentenced one year consecutive to sentence now being served. Eighteen months consecutive to sentence now being served and consecutive to sentence of this date.

One year concurrent to sentence now being served and concurrent to sentence of this date.

On February 7, 1977: sentenced four months in a penitentiary for being unlawfully at large; sentence four months in a penitentiary for escape, two years in a penitentiary consecutive to sentence now being served.

Issue:

When two or more sentences are imposed on the same day, are they deemed to have been imposed simultaneously or one after the other ?

The trial judge held that the 18-month sentence imposed on August 19, 1970 was to be served consecutively to sentence imposed on that date for escape but concurrently with portion of his sentence that he had not served yet and that the 2-year sentence imposed on February 7, 1977 was

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> to be served consecutively to sentence imposed on that date but concurrently with that portion of his term not served yet and held that respondent was entitled to be released.

The Court of Appeal held that the trial judge intended to sentence the accused on August 19, 1970 as follows:

> One year for prison break, the remaining of his nine-year sentence and then the 18 months for forcible seizure.

Sentences imposed on the same day are deemed to have been imposed simultaneously and not one after the other. Therefore a sentence imposed to be served consecutively to term now being served cannot be said to be served consecutively to sentence handed down earlier the same day; unless the judge specified it was to be served in that manner.

RE: Lauzon (Trial division)

Regina v. Edward Victor Law (No. 1)
Regina v. Edward Victor Law (No. 2)

Regina v. Edward Victor Law (No. 1)

This is a judgement of the Ontario Court of Appeal rendered by Blair, J.A., on November 6, 1981.

This is an appeal by the Crown from an order of Galligan, J. in the Supreme Court of Ontario granting an application for habeas corpus and directing the penitentiary authorities to release the respondent.

Facts:

The inmate was on bail pending an appeal from a two year sentence, when he committed further offences for which he was sentenced to an additional seven months. The inmate subsequently abandoned his original appeal. Prison officials were not informed of the abandonment by the court clerks at the Ontario Court of Appeal. He was subsequently released, on parole, from the provincial institution. Ten months after his release, it was discovered that the inmate had not yet served his two-year sentence. He was subsequently re-arrested.

Issue:

Is time spent at large due to an administrative error on the part of the prison authorities credited against the inmate's sentence?

Held:

The appeal is allowed. This situation is governed by section 649(3) of the *Criminal Code*. Subsection 649(3) states, among other things, that a term of imprisonment "resumes" when a convicted person is taken into custody "under the sentence". The mere fact that a mistake was made in the administration of the sentence does not generally justify premature release. The Stanton case (1979(, 49 C.C.C. (2d) 177 (where an inmate had been credited with time spent at large as a result of an administrative error was distinguished on two grounds:

1) In Stanton, the inmate believed he had been granted parole, while in the present case the inmate was aware of the fact that he had not yet served a sentence that he ought to have, and

2) In any event, the correctness of the Stanton decision may be doubted since the case of Re Macdonald (1981), 59 C.C.C. (2d) 202, in which Arnup, J.A. specifically reversed the basis on which the Stanton decision had been made.

Regina v. Edward Victor Law (No. 2)

This is a judgement of the Supreme Court of Ontario, rendered by Eberle, J. on December 3, 1981.

Facts:

Subsequent to the decision in R. v. Law (No. 1) (above), Mr. Law was re-arrested.

Issue:

Is the time spent at large due to the valid release order issued by Galligan, J. of the Supreme Court of Ontario, to be credited against the sentence of the inmate, where that release order is overturned by the Ontario Court of Appeal?

Held:

No. The MacDonald case firmly rejected the proposition that a sentence runs notwithstanding the conduct of the inmate after it was imposed. The case of R. v. Dozois (1981), 61 C.C.C. (2d), 171, established that the statutes set out, exhaustively, all instances in which an offender is deemed to be serving a sentence though not in custody. None of these statutory extensions assist Mr. Law. Law's situation is no different from that of any person whose acquittal by a lower court is overturned on appeal. In the interim the person is not in custody but when the acquittal is reversed, they must then go into custody. The common law rule is that a sentence is to be served in custody. In the absence of a statutory extension that applies to this case, the common law rule applies.

Charles Lawrence LeBar v. Her Majesty the Queen

Judgment of the Federal Court, Trial Division, rendered by the Honourable M. Justice Muldoon on January 12, 1987.

This is an action for damages in which the plaintiff sues to recover compensation and exemplary damages for having been unlawfully imprisoned.

FACTS : During the summer of 1982, the plaintiff was serving a term of imprisonment of 14 years for having committed armed robbery and a subsequent term to which he had been sentenced for escape pursuant to section 137 of the Criminal Code. His expected release date had been calculated as being October 22, 1982.

On July 19, 1982, the Appeal Division of the Federal Court of Canada rendered its decision in the MacIntyre case; according to the sentence calculation principles established by that decision, the plaintiff's recalculated date for release was August 10. However, he was only released on September 22, 1982, the day after the decision was made not to appeal the MacIntyre decision to the Supreme Court of Canada.

ISSUE : Whether the Correctional Service of Canada is liable for not having released the plaintiff, pursuant to the principles set out in the MacIntyre decision, immediately after the said decision was rendered.

DECISION: It is not contended that the method of computation prescribed by the MacIntyre case applied to the plaintiff's circumstances. The defendant rather contends that the declaratory relief granted in that case was not coercive against the Crown.

According to the case law, the conditions of application of the doctrine of issue estoppel are that the same question has been decided, that the judicial decision which is said to create the

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estoppel be final and that the parties to such decision be the same as those to the proceedings in which the estoppel is raised. Even though there is no exact mutuality of parties in this case, the plaintiff now being LeBar instead of MacIntyre, the same question or issue in the two cases is the judicial interpretation of the interaction of the same provisions of the Penitentiary Act, the Parole Act, and the Criminal Code. The lack of mutuality of parties affords no comfort to the defendant. The action at bar sounds in tort, which is a matter of private domestic law, but requires the interpretation of public law statutes as was performed by the Appeal Division in the MacIntyre case. If the defendant declined to abide by the law as proclaimed by that unappealed decision, the consequences of neglecting to comply with the law must be visited. Pondering the possibility of seeking leave to appeal to the Supreme Court of Canada does not excuse the unlawful imprisonment. Accordingly, the defendant is liable to the plaintiff for having kept him unlawfully detained during the 43 days period between August 10 and September 22, 1982.

As for the quantum of damages, the plaintiff is entitled to $430 in general damages, on a $10 per diem basis. Furthermore, he is entitled to $10,000 of exemplary damages, considering that the unlawful imprisonment constituted oppressive, arbitrary and fundamentally unconstitutional conduct on the part of the Crown's servants. Even though malice was not proven in this case, the oppressive and wilful or wanton disregard of the plaintiff's right to be released was amply abusive to support the award of exemplary damages.

Judgment was rendered in favor of the plaintiff.

This judgment is presently under appeal.

Her Majesty the Queen and Charles Lawrence Lebar

Judgment of the Federal Court of Appeal, rendered by Mr. Justice MacGuigan on October 27, 1988.

This is an appeal and cross-appeal from the judgement of Muldoon J. rendered on January 12, 1987 wherein he declared that the respondent was entitled to have been released from prison on August 10, 1982, and not September 21, 1982, when he was in fact released.

Facts:

- During the summer of 1982, the plaintiff was serving a term of imprisonment of fourteen years for having committed armed robbery and a subsequent term to which he had been sentenced for escape pursuant to section 137 of the Criminal Code. His expected release date had been calculated as being October 22, 1982.

- On July 19, 1982, the Appeal Division of the Federal Court of Canada rendered its decision in the McIntyre case. According to the sentence calculation principles established by that decision, the plaintiff's recalculated date for release was August 10. However, he was only released on September 22, 1982, the day after the decision was made not to appeal the McIntyre decision to the Supreme Court of Canada.

- In his decision rendered on January 12, 1987, Mr. Justice Muldoon awarded general damages in the amount of $430.00 and exemplary damages in the amount of $10,000.00.

Issues:

1. Whether exemplary damages should have been awarded since the McIntyre decision was merely declaratory and whether a declaration renders a matter res judicata where there is not an exact mutuality of parties.

2. Whether an award of exemplary damages were warranted in the circumstances of this case where the defendant acted in good faith.

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3. Whether general damages should be increased from $10.00 a day to $500.00 a day and exemplary damages from $10,000.00 to $50,000.00.

Decision:

With respect to the first issue the Court stated that a declaration is a peculiarly apt instrument in dealing with bodies invested with public responsibilities because it can be assumed that they will, without coercion, comply with the law as stated by the Courts. In the opinion of Mr. Justice MacGuigan, the necessity for the Government and its officials to obey the law is the fundamental aspect of the principle of the rule of law, which is now enshrined in our constitution by the preamble to the Canadian Charter of Rights and Freedoms. The rule of law must in all events mean that the law is supreme and that officials of the Government have no option to disobey it.

To treat the McIntyre case as affecting only the rights of the inmate in that case is to ignore reality. The wording of the Court's holding in that case, answered in an universal proposition a general question as to the meaning of section 24.2 of the Penitentiary Act. Government officials could not have been in any doubt as to the generality of the Court's pronouncement in that case.

The proper course of action for the appellant would have been to seek to have the judgment in McIntyre post-dated pursuant to Rule 338(2) or to seek leave to appeal to the Supreme Court along with a stay of the McIntyre judgment. It is not enough for the Government to remain outwordly mute and disobedient in the face of a declaratory judgement, because such an apparent failure to obey the law is a ready occasion of scandal for the public. If it has some reason for uncertainty, it owes it to the principle of the rule of law to reveal its position publicly, through a legal challenge to its apparent duty as declared by the Courts. Mr. Justice MacGuigan therefore rejected the appellant's contention that it had no obligation to follow the declaratory judgment in McIntyre.

As for the award of exemplary damages, Mr. Justice MacGuigan agreed with the Trial Judge in finding that the conduct of the Government was unlawful and deliberate. He stated that in his view malice was not necessary for the existence of oppressive, arbitrary or unconstitutional action by the servants of the government which founded the award of exemplary damages in this case.

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Regarding the issue of an increase in damages, Mr. Justice MacGuigan concluded that the respondent had not succeeded in establishing any reviewable error in the Trial Judge's award of general damages and exemplary damages.

Both the appeal and the cross-appeal were dismissed.

Leschenko v. Attorney General of Canada, et al

This is the summary of a judgment of the Federal Court of Appeal rendered by Mr. Justice Pratte, Ryan and Kerr on September 23, 1982.

This is an appeal and a cross-appeal which raise two entirely different issuesand for this reason will be considered separately.

A. The Appeal

Facts:

1. On December 20, 1975, Leschenko escaped from a Canadian penitentiary where he had an unserved balance of imprisonment of approximately 20 years.

2. He was arrested and convicted by an American Court to 15 years of imprisonment for crimes committed in the United States. He served 3 years of this sentence before being returned to Canada pursuant to the *Transfer of Offenders Act*.

Question:

Is Leschenko entitled to credit against the time to be served under the sentence imposed in Canada for the time spent in custody in the U.S.?

Decision:

No. Neither the argument made under s. 137(1) of the *Criminal Code*, nor that made under sections 4 and 11 of the *Transfer of Offenders Act* succeeded.

B. The Cross Appeal

Facts:

On August 29, 1974, Leschenko was found guilty of the offence of attempt to escape from lawful custody.

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Leschenko v. Attorney General of Canada, et al (2)

Question:

Is s. 137(1) of the *Criminal Code* or s. 22(4) of the *Penitentiary Act* applicable in computing Leschenko's sentence?

Decision:

A mere reading of those two provisions clearly shows that subsection 137(1) applied when a person who had escaped while undergoing imprisonment had been sentenced for that escape; it clearly did not apply to the appellant (Leschenko) who had merely attempted to escape and had been convicted and sentenced for that offence. The consequences of the appellant's conviction and sentence were therefore governed by subsection 22(4) of the *Penitentiary Act*.

R. v. Richard Lévesque and John Clifford Reynolds

Judgement of the Supreme Court of British Columbia rendered by Mr. Justice Berger on August 27, 1980 in Vancouver, B.C.

This is an application by the Attorney General of Canada for certiorari to set aside an order of HIs Honour Judge Davies, of the County Court of Westminster, directing that the accused Richard Lévesque be kept in a federal penal institution within the province of British Columbia within reasonable driving distance of Vancouver until completion of his trial on a charge of attempted murder.

Facts:

On March 15, 1976: conviction of conspiring to traffic of narcotics, and sentenced to 12 years imprisonment in a penitentiary.

On November 21, 1979: accused was transferred from Kent Institution in British Columbia to Laval Institution in Québec.

On May 5, 1980: trial commenced in Westminster County on a charge of murder. Trial was adjourned until September 29.

On May 9, Judge Davies made the order under attack now.

Issues:

Does the trial judge have jurisdiction to give such an order under s. 460 of the *Criminal Code* ?

Where the appearance of a prisoner at his trial is required, the judge may give directions pursuant to s. 460(5) of the *Criminal Code* as to transfer the accused to a penitentiary located in the district where he is to stand trial.

Section 13 of the *Penitentiary Act* gives jurisdiction to the Commissioner of Penitentiaries on respondent as a prisoner and s. 460 of the *Criminal Code* gives jurisdiction to trial judge on respondent as an accused.

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Obiter:

The power to make orders under s. 460 of the *Criminal Code* should, in future, only be exercised after notice to the Commissioner of penitentiaries.

Order:

Judge Davies had the power to make the order he did. The application is dismissed.

LEVESQUE v. THE ATTORNEY GENERAL OF CANADA ET AL

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Rouleau on November 26, 1985.

At issue is a request for a declaratory judgment that the applicant is entitled to vote in general elections in the Province of Quebec.

FACTS: In March 1981, prior to the general elections, the applicant and two other inmates attempted to obtain an interlocutory injunction ordering the Solicitor General not to prevent them from exercising their right to vote; this application was dismissed by the Federal Court.

The applicants then wrote to the United Nations' Human Rights Committee and brought their complaint to it; the Committee decided that their letter was inadmissible on the ground that the applicants had not exhausted the internal remedies available to them and that they could attempt to obtain a declaratory judgment from the Federal Court.

The applicant subsequently initiated these proceedings, making essentially the same claims as he did when submitting the application for an injunction in 1981, plus one relating to Section 3 of the Canadian Charter of Rights and Freedoms, which guarantees every citizen of Canada the right to vote.

ISSUES:
- Has Section 3 of the Charter been violated by the defendants?
- If it has not, what is the legal scope of Canada's international obligations?

DECISION For a start, it appears clear that the applicant has indeed been deprived of the right guaranteed to him under Section 3 of the Charter. It remains to be seen whether the restriction imposed on this right is in compliance with Section 1 of the Charter, specifically, whether it is reasonable and justified within a free, democratic society. The argument that the right to vote cannot be granted to inmates on account of administrative or security reasons cannot

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be used here to prevent the exercise of a constitutional right. It is also impossible to maintain that the loss of certain rights, including the right to vote, is necessarily a consequence of incarceration. The right to vote is the cornerstone of any self-respecting democracy and could hardly be restricted, except in the very specific context of Section 1 of the Charter.

In light of this conclusion on the internal matter of the Constitution, it is unnecessary to broach the issue of Canada's international obligations in this regard.

The application for a declaratory judgment was allowed. (To render this decision executory, the Judge ordered the issuance of a writ of mandamus enjoining the appropriate authorities to act accordingly, based on the implicit duty of the federal administration under the declaratory text of Section 3 of the Charter. He also justified the issuance of the writ against a Minister of the Crown acting as the Crown's representative, contrary to the traditional Common Law position, basing his reasoning on Sections 32 and 52 of the Charter).

Wendell Sinclair Lewis v. The Queen

Judgement of the Supreme Court of British Columbia rendered by Mr. Justice Bouck on May 6,1975 at New Westminster, B.C.

The applicant is asking that a writ of Habeas Corpus ad subjiciendum with certiorari in aid be issued to quash a warrant of arrest taken out by a person designated by the Chairman of the National Parole Board pursuant to s. 16 of the *Parole Act*.

Facts:

In March 1975, the applicant was released on mandatory supervision. He did not report to the Parole Office when required to do so.

On April 9, 1975, a warrant of apprehension was issued. Applicant was subsequently arrested and returned to prison. The affidavit material shows that the mandatory supervision was suspended by reason of his failure to report to the National Parole Board Office.

Issue:

Should the warrant of apprehension contain on its face the reasons for its publication ?

S. 16(1) of the *Parole Act* sets out three reasons wby a person designated by the Chairman of the National Parole Board would sign a warrant of apprehension. He can only do it if he is satisfied that at least one of the three reasons applies to the case. This person only has to satisfy himself contrary to a warrant issued by a Justice of the Peace as at common law.

Under these circumstances, the court is of the view that the warrant ought to contain the reason for its issuance on its face. Otherwise, there is no way to know if the person designated by the Chairman of the National Parole Board considered the items in s. 16(1) of the *Parole Act*.

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Wendell Sinclair Lewis v. The Queen (2)

Order:

The warrant of apprehension, dated April 9, 1975 is quashed and the writ of habeas corpus is issued releasing the applicant.

This judgement has been appealed to the British Columbia Court of Appeal and the appeal has been allowed.

RE: Her Majesty the Queen v. Wendell Sinclair

Her Majesty the Queen v. Wendell Sinclair Lewis

Judgement of the British Columbia Court of Appeal rendered by the Honourable Justice of British Columbia, Mr. Justice Bulland, Mr. Justice Branca on December 16, 1975, in Vancouver.

This is an appeal by the Crown from a judgement of the Supreme Court of British Columbia on an application for habeas corpus with certiorari in aid ordering the release of Wendell from custody in B.C. penitentiary. Mr. Justice Bouck quashed the warrant and order him released from the B.C. penitentiary.

Facts:

On March 1975, the applicant was released on mandatory supervision. He did not report to the Parole Office when required to do so.

On April 9, 1975, a warrant of apprehension was issued. Applicant was subsequently arrested and returned to prison. The affidavit material shows that the mandatory supervision was suspended by reason of his failure to report to the National Parole Board Office.

Issue:

Should the warrant of arrest contain on its face the reason for its publication ?

> "There was no invalidity in the warrant of arrest. The warrant stated the reason for the arrest of the appellant was that his parole had been suspended. In suspending the parole, the Board is exercising an administrative function and is entitled to make that decision in its absolute discretion. It is not required to state its reasons for suspending parole."

Order:

The appeal is allowed and the order granting a writ of habeas corpus is set aside.

RE: Wendell Sinclair Lewis v. The Queen

Lylick v. A.G. of Canada et al. (Fed. Court T.D.) (1984)

Action: Lylick sought a declaration to the effect that he was unlawfully held in custody at the Drumheller Institution as of and from August 28, 1982.

Facts:

1. December 8, 1981 - Lylick sentenced to 12 months imprisonment.
2. February 25, 1982 - Lylick sentenced to 15 months imprisonment to be served consecutive to the sentence being served.
3. April 3, 1982 - Lylick admitted to Drumheller Institution.
4. April 6, 1982 - Lylick was transferred to a Provincial Correctional Institution.
5. June 3, 1982 - Lylick sentenced to 6 months imprisonment consecutive to the sentence being served.
6. August 28, 1982 - Lylick admitted to Drumheller Institution.
7. October 12, 1982 - Sentence referred to in paragraph 5 was varied on appeal three months (rather than 6) consecutive to the sentence being served.
8. August 13, 1983 - Lylick released on mandatory supervision.
9. September 2, 1983 - Mandatory supervision suspended and Lylick returned to custody in Drumheller Institution.
10. September 23, 1983 - Lylick's mandatory supervision revoked.

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Lylick claims that the phrase "and the aggregate of the unexpired portions of those terms at that time amounts to two years or more..." as found in section 659(5) of the Criminal Code requires that in determining the unexpired portion of the term of imprisonment, one should at that time credit the prisoner with the earned remission which he has accumulated as well as the maximum earned remission which could be calculated in regard to the term of imprisonment to which the prisoner is at that time sentenced.

Held: Plaintiff's action was dismissed.

Reasons:

1. Section 14 of the Parole Act is applicable to section 695(5) with the result that in construing the words of subsection 659(5), "the aggregate of the unexpired portions of those terms at that time", only the days served in prison are to be deducted at the time at which the subsequent term of imprisonment is imposed, not any earned remission.

2. Earned remission is distinct from statutory remission and is not to be credited or deducted at the commencement of the term.

3. In addition to serving his term between December 8, 1981 and February 25, 1982, the plaintiff also earned 39 days of remission, but it is not to be taken into account for the purposes of subsection 659(5).

N.B.: For a decision to the contrary effect, see Re Shiminousky v. Robinson (p. 93 of the Correctional Case Law Manual).

MacAllister v. Goulem

This is a summary of a decision of the Superior Court of Quebec (Criminal side) rendered by the Honourable Mr. Justice Landry on March 26, 1984.

The applicant, relying on the relevant provisions of the Parole Act applied for a writ of habeas corpus with certiorari in aid ordering his release.

FACTS — The applicant had breached the conditions of his parole by going to Bermuda on a family holiday without the consent of the National Parole Board. On February 29, 1984 the applicant's parole was suspended and a warrant of apprehension issued by a designated person under s. 16(1) of the Parole Act. On March 5, 1984 the applicant was apprehended. On March 19, 1984 a second designated person under s. 16(1) of the Act cancelled the suspension pursuant to s.16(3) of the Parole Act. Later that same day, a third designated person disagreeing with the decision to cancel the applicant's suspension, suspended the applicant's parole. This third designated person had no new facts before him and acted on the sole basis that he disagreed with the earlier decision.

ISSUE — Are paroled inmates subject to successive suspensions of their parole by designated persons under s. 16(1) of the Parole Act for the same breach of the terms and conditions of parole?

HELD — That a designated person under s. 16(1) of the Parole Act is limited in his ability to suspend parole pursuant to that section. Section 16 allows a designated person to suspend parole for a limited period of time. This power is not a discretionary one. It can only be exercised where there has been a breach of the terms and conditions of parole. Where parole is suspended the designated person has 14 days to conduct an inquiry and decide whether the case warrants the Board's attention. Where a suspension is cancelled, as in this case, it can be assumed that the breach of parole which gave rise to the decision did not warrant revocation. It is not open to a designated person under section 16(1), to review the decision of a duly authorized colleague and order a suspension on the same grounds as gave rise to the first decision. Any other conclusion would mean that the door would be left open to successive 14 day suspensions on identical grounds.

DECISION — Habeas corpus should issue. The warrant of apprehension and suspension of parole issued by the third designated person pursuant to s. 16(1) of the Parole Act be declared void.

Application granted.

Robert MacDonald (Robert Daniel McDonald)

This is a judgement of the Supreme Court of Ontario rendered by Mr. Justice Galligan on November 10, 1980.

This is an application for a writ of habeas corpus upon the ground that the applicant is not the person named in the warrant of commitment under which he is being held.

Facts:

On October 21, 1968, applicant was sentenced to eight years in penitentiary, and to a term of three years consecutive.

In July 1971,he was granted a temporary absence permit. He did not return and in July 1980 was apprehended in Australia and extradited to Canada.

On September 19, 1980, he was found not guilty of being unlawfully at large under s. 137 of the *Criminal Code* as the Crown failed to prove that the applicant was one and the same person as the Robert McDonald named in the warrant of commitment.

Issues:

Is the decision of the Provincial Court, that found Robert MacDonald not guilty, res judicata regarding this case ?

> "The mere fact that the provincial court judge was not satisfied that the Crown had proven that the applicant i.e., the accused before that Court, was the same person as the Robert McDonald named in the warrants of committal, is in no sense res judicata of the fact that this applicant is not the same person as the Robert McDonald named in those warrants of committal".

Is a prisoner, while at large, considered to be serving his sentence?

> If the applicant was considered to be serving his sentence while at large,

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s. 137 of the *Criminal Code* would be of no effect since it has been over eleven years since he was sentenced to a term of eight years. There is strong authority in Ontario that provides for the contrary.

> "It could not be said that a prisoner unlawfully at large, could be considered as serving his sentence while he was absent from custody."

The application is dismissed.

> "While there is no onus resting upon the accused in the criminal proceedings, the same cannot be said of an applicant for the extraordinary remedy of Habeas Corpus. It is my opinion that there is an onus upon a person seeking Habeas Corpus upon the ground that he is not the person named in the warrant of committal under which he is being held to lead or produce some evidence of that fact".

REFERENCES: Hills
Norman McCaud (June 9, 1975) and (Sept. 26, 1975)

Jack Clinton Macgrath v. Her Majesty the Queen

Judgement of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Collier, on November 8, 1977 in Ottawa.

Inmate filed a statement of claim asking relief on five matters:

1- On June 21, 1976:plaintiff was convicted and punished. He submits that the Board did not comply with the procedure laid down for such hearings.

2- On the same day, he was transferred from one penitentiary to another, and says he was not given a hearing nor was he informed of the reasons of the transfer.

3- The plaintiff says he was improperly and unlawfully deprived of some of his possessions. In addition, punitives damages are sought.

4- His transfer and confinement to B.C. Penitentiary was "cruel and unusual punishment".

5- Plaintiff claims that bank interest, on personal monies was unlawfully and without his consent credited to the Inmate Welfare Fund.

Issues:

a) Can the Trial Division, by virtue of s. 18 of the *Federal Court Act*, entertain a claim for the setting aside of an administrative decision made by a federal board when the decision was not required to be made on judicial or quasi-judicial basis?

In the Court's opinion, when the federal board is authorized by law to impose a serious punishment, it has a duty to act fairly in its decision to impose the punishment. The board, in this case, did not act fairly because no oral evidence was presented to prove the charge and the inmate was not given the opportunity to cross-examine the witnesses.

The declaratory relief is granted on this point because it will erase this conviction from the inmate's record.

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b) Does the inmate have the right to be heard, and to be given reasons upon his transfer to another penitentiary?

There is nothing in the legislation that suggests the right of the plaintiff to be heard or to be given reasons of a transfer. Even if directives provide for such procedure, they only create guidelines and criteria for classification boards, and for other administrative staff.

Even if some rights had been infringed, the granting of the declaration sought would not be useful or practical.

Therefore, under this particular head, the claim is dismissed.

c) With respect of the deprivation, or loss, of certain personal possessions did the institutional head take reasonable care to ensure that the effects of the inmate be protected from loss or damage ?

The plaintiff must satisfy the court, by a preponderance of evidence, he was unlawfully deprived of his effects. He did not do so.

His claims, in respect of this head, are dismissed.

d) Was the transfer of the plaintiff to British Columbia Penitentiary a "cruel and unusual punishment" ?

The transfer of the plaintiff was not a punishment, he was transferred to serve a punishment and ordered to remain there as a result of an administrative decision based on his previous conduct.

This claim of relief will be dismissed.

e) Is consent of the inmate necessary for the transfer of interest or his personal monies from the Inmate Trust Fund to the Inmate Welfare Fund ?

There is no authority, permitting the transfer to the Inmate Welfare Fund of interest earned by an inmate's personal monies. According to *Penitentiary Service Regulation* 2.22, it is clear that inmate's personal monies are to be deposited in a trust account. Therefore his consent was necessary.

The Claim, under this head, must be granted.

References: Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board, (1977) 74 D.L.R. (3d) 1.

Re: Anaskan and the Queen, (1977) 15 O.R. (2d) 517.
Howarth (F.C.) (S.C.)
Ex parte McCaud
Martineau Butters #1, #2
Bruce
Dubeau
Cline
Campaugh

Robert MacIntyre v. Her Majesty the Queen

This is the summary of a judgement of the Federal Court of Canada, Trial Division, delivered by the Honourable Mr. Justice Cattanach on November 15, 1981.

The applicant seeked a declaration that he was entitled to release from penitentiary in accordance with his calculation of the sentence imposed on him, calculation he contended was correct in law.

Facts:

- The plaintiff was sentenced on July 6, 1971 to four years imprisonment.
- The plaintiff was paroled on November 6, 1972. He was recommitted on a suspension warrant March 5, 1973.
- The plaintiff's parole was forfeited on June 14, 1973.
- The plaintiff was sentenced on June 14, 1973 to a number of terms which totalled two years consecutive to the unexpired portion of any term for which parole was granted.
- The plaintiff was unlawfully at large for 31 days in January and February, 1976. The plaintiff, on April 13, 1976 was sentenced to a total term of nine years consecutive to any sentence then being served.
- The plaintiff was on September 14, 1976 sentenced to four months in Kingston Penitentiary as a result of a conviction for being unlawfully at large pursuant to section 133(1) of the *Criminal Code*.

Issue:

Does the term in section 24.2 of the *Penitentiary Act*, namely "the sentence he was then serving", mean a "sentence consisting of a term of imprisonment commencing on the earliest day on which any of those sentences of imprisonment (to which he was subject) commenced and ending on the expiration of the last to expire of such terms of imprisonment", pursuant to section 14(1) of the *Parole Act*?

Held:

Section 14 of the *Parole Act* is both sweeping in its language and effect. It is general in its terms. It is a cardinal rule of legal interpretation that general provisions in the same statute or other statutes are not to control or repeal special provisions in the same statute or other statutes. The special provisions are to be read as excepted out of the general.

Such special legislation exists in section 137 of the *Criminal Code*. That section of the Code, as it existed at the time the inmate was sentenced for escape, must be construed as imposing a new sentence which commenced when the sentence for escape was imposed. For the foregoing reasons, the answer to the question in issue is no.

Please note that Mr. Justice Cattanach's decision is presently under appeal.

MacINTYRE V. THE QUEEN

Judgment of the Federal Court of Appeal rendered by Mr. Justice Thurlow, Kelly and Cowan on July 19th, 1982.

This is an appeal from a judgment of the Federal Court, Trial Division on a Special Case formulated for the opinion of the Court, pursuant to Rule 475.

Facts:

1. The Plaintiff was sentenced on July 6th, 1971, to four years imprisonment.

2. The Plaintiff was paroled on November 6th, 1972 but his parole was forfeited by conviction for a number of offences on June 14th, 1973.

3. The Plaintiff was unlawfully at large for 31 days in January and February, 1976. The Plaintiff, on April 13th, 1976, was sentenced to a total term of nine years consecutive to any sentence then being served.

4. The Plaintiff was, on September 14th, 1976, sentenced to four months in Kingston Penitentiary as a result of a conviction for unlawfully at large pursuant to section 133 1(b) of the Criminal Code.

5. At the time of the sentencing, section 137 of the Criminal Code provided:

> "137. (1) Except where otherwise provided by the Parole Act, a person who escapes while undergoing imprisonment shall, after undergoing any punishment to which he is sentenced for that escape, serve the portion of the term of imprisonment that he was serving, including statutory remission but not including earned remission, at the time of his escape that he had not then served minus any time that he spent in custody between the date on which he was apprehended after his escape and the date on which he was sentenced for that escape."

Issue:

Does the term in section 24.2 of the Penitentiary Act, namely "The sentence he was then serving," mean a "Sentence consisting of a term of imprisonment commencing on the earliest day on which any of those sentences of imprisonment (to which he was subject) commenced and ending on the expiration of the last to expire of such terms of imprisonment, pursuant to section 14.1 (sic) of the Parole Act?"

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Cowan, J

With all the respect for the opinion of the Saskatchewan Court of Appeal in the Sowa case, I cannot agree that section 137 of the Criminal Code must be construed as imposing a new sentence - one which commenced when the sentence for escape was imposed. In my opinion, the only effect of subsection 137(1) was the order in which the escape sentence and remanet should be served.

Section 137 merely provided that after sentencing for the escape, the appellant was required to serve the term of imprisonment of four months to which he was sentenced for that escape before commencing to serve the balance remaining of the term of imprisonment consisting of six years, commencing July 6th, 1971, which he was serving at the time of his escape. The nine year term of imprisonment to which he was sentenced on April 13th, 1976, was expressed to be consecutive to the four year and the two year terms and, when his service under the combined four year and two year terms was suspended for four months, the nine year term would continue to be consecutive to the combined four year and two year terms.

For the purpose of the Parole Act and subsection 24(2) of the Penitentiary Act, section 14 of the Parole Act operated so that all the terms of imprisonment were deemed to constitute one sentence, consisting of a term of imprisonment commencing on the earliest day on which any of those sentences of imprisonment commenced, i.e. July 6th, 1971, and ending on the expiration of the last to expire of such terms of imprisonment, i.e. at the expiration of 15 years and four months.

Appeal allowed

It should be noted that we are considering appealing this decision to the Supreme Court of Canada. It should also be noted that the subsection 137(1) referred to in this decision was repealed and substituted by the Criminal Law Amendment Act 1977, 1976-77 S.C., c. 53 which came in force on and from August 5th, 1977.

MacLean v. The Queen

This is a decision of the Supreme Court of Canada delivered on behalf of the Court by the Honourable Mr. Justice Hall on May 1, 1972.

FACTS

The appellant, an inmate at Stony Mountain Institution, suffered severe injuries while working at the penitentiary farm. At the time of the accident the appellant was unloading bales of straw from a conveyor belt, while standing on a platform in a dairy barn. The appellant was struck by a bale of straw from the conveyor belt and was thrown or slipped from the platform to the floor below. As a result of the fall the appellant suffered, inter alia, a spinal injury, which left him physically and mentally disabled.

At trial, the Exchequer Court, per Gibson, J, dismissed the appellant's petition of right, claiming damages for the injuries sustained, on the basis that the sole and only cause of the accident was the failure of the appellant to take care for his own safety.

ISSUE

Was the Crown liable for the injuries sustained by the appellant?

DECISION

Applying Timm v. Q (1965) 1 Ex. C.R. 174 and Ellis v. Home Office (1953) 2 All E.R. 149.

The field man, employed by the Penitentiary Service, who was supervising the appellant, was negligent in assigning the appellant to do work in an area of potential danger. There was a foreseeable risk of harm to the appellant, and the field man was personally liable for exposing the appellant to that risk. As the field man was acting in the course of his employment, the Crown was liable for his negligence pursuant to ss.3(1)(a) and ss.4(2) of the Crown Liability Act.

The appeal was therefore allowed and the appellant was awarded the sum of $75,000 for damages.

MALTBY ET AL. v. A. G. SASKATCHEWAN ET AL.

Saskatchewan Queen's Bench - Sirois, J. - November 1, 1982

CHARTER OF RIGHTS - ss. 1, 2(a), 2(b), 2(d), 3, 7, 8, 9 and 12

RIGHT TO LIBERTY - PRISONS AND REFORMATORIES - DETENTION PENDING TRIAL - REASONABLE LIMITS - WHETHER MANNER OF DETENTION PENDING TRIAL OF ACCUSED IS A REASONABLE LIMIT ON RIGHT TO LIBERTY

RIGHT TO VOTE - PRISONERS - PROVINCIAL STATUTE FAILING TO PROVIDE MECHANISM FOR REMAND PRISONERS TO EXERCISE FRANCHISE - PROVINCIAL STATUTE NOT PURPORTING TO DISENFRANCHISE REMAND PRISONERS - WHETHER FAILURE TO PROVIDE MEANS FOR EXERCISE OF FRANCHISE RESULTS IN VIOLATION OF CHARTER RIGHT

RIGHT NOT TO BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT OR TREATMENT - PRISONS AND REFORMATORIES - CONDITIONS OF DETENTION - PRISONERS HELD ON REMAND PENDING TRIAL - WHETHER CERTAIN RESTRICTIONS PLACED UPON REMAND PRISONERS ARE REASONABLE

SEARCH AND SEIZURE - SEARCH OF THE PERSON - PRISONS AND REFORMATORIES - STRIP SEARCH OF REMAND INMATES - WHETHER STRIP SEARCH UNREASONABLE

FREEDOM OF ASSOCIATION - FREEDOM OF EXPRESSION - PRISONS AND REFORMATORIES - RESTRICTIONS PLACED UPON VISITATION RIGHTS OF REMAND PRISONERS - WHETHER RESTRICTIONS VIOLATE CHARTER RIGHTS

FREEDOM OF EXPRESSION - PRISONS AND REFORMATORIES - RESTRICTIONS PLACED UPON ACCESS OF REMAND PRISONERS TO EXTERNAL PERSONS AND AGENCIES - WHETHER RESTRICTIONS ON ACCESS INFRINGE FREEDOM OF EXPRESSION

FREEDOM OF RELIGION - PRISONS AND REFORMATORIES - RESTRICTIONS PLACED UPON ABILITY OF REMAND PRISONERS TO WORSHIP - WHETHER RESTRICTIONS INFRINGE FREEDOM OF RELIGION

The four applicants were remand inmates at the Provincial Correctional Centre in Saskatoon who had been charged with criminal offences and who had been ordered detained in custody pending trial. They applied to the Court of Queen's Bench under s.24(1) of the Charter for an order stating that their constitutional rights had been violated by the manner in which they had been treated while in detention.

In particular, it was alleged that:

(a) the general manner in which they had been detained constituted an unwarranted restriction on their rights to liberty as guaranteed by s.7 of the Charter;

(b) the practice of not permitting them to vote in elections contravened the right to vote guaranteed in s.3 of the Charter;

(c) the restrictions placed upon them in terms of the time, amount, type and area of recreational, social, educational and work programmes available to them, and the resulting daily routine which they were required to undergo resulted in their detention condition being of cruel and unusual treatment or punishment, contrary to s.12 of the Charter;

(d) the practices of the respondents with regard to the use of handcuffs and leg shackles was practised in such a manner as to violate the applicants' rights under s.12;

(e) the practices of the respondents with regard to strip searches of inmates violated the applicants' rights to be secure against unreasonable search and seizure as guaranteed by s.8 of the Charter and the rights to security of the person as guaranteed by s.7;

(f) the practices of the respondents with regard to placing restrictions upon the location, amount, time and type of visits to the applicants as well as restrictions placed on the persons who might be permitted to visit the applicants violated their rights to freedom of expression and freedom of association as guaranteed by ss. 2(b) and (d) of the Charter and constituted cruel and unusual punishment;

(g) the policy of the respondents to restrict the number and time of phone calls which might be placed by the applicants, as well as prohibiting phone communication by the applicants to police forces, the media or the Provincial Ombudsman violated the applicants' rights to freedom of expression and freedom of association; and

(h) the policy of the respondents which restricted the availability and form of religious practice available to the applicants was a breach of the right to freedom of religion.

Held, allowing the application in part:

(1) the lawful incarceration of the applicants as remand inmates bears with it necessarily reasonable limitations on their rights previously enjoyed in a free and democratic society. These restrictions are no doubt the sort of reasonable restrictions that are contemplated in s.1 of the Charter. The institution may and certainly must place restrictions and limitations on the rights of the applicants so that sufficient security will ensure that they will remain in custody and will not pose a danger to themselves or to other inmates or staff (p. 7);

(2) in considering complaints advanced by inmates it is appropriate to utilize the kind of "balancing approach" contemplated in Soloskey v. Government of Canada, (1979) 30 N.R. 380 (S.C.C.), at p. 396. This approach has long been used in the United States where, in Bell et al. v. Wolfish et al., (1978) 441 U.S. 520, at p. 537, it was held that the conceded authority of government to detain pending trial inherently entailed loss of freedom of choice and privacy which, while it interfered with the prisoner's desire to live with as little restraint as possible, did not convert the conditions or restrictions of detention into "punishment" (p.8);

(3) the government has legitimate interests that stem from its need to manage the facility which may require administrative measures to maintain security and order and to make certain that no weapons or illicit drugs reach the inmates. This is efficient management of the detention facility, a valid objective that may justify imposition of conditions and restrictions that are not intended as and do not indeed constitute punishment (p. 9);

(4) while the exercise facilities at the institution were not as elaborate for remand inmates as those for prisoners serving sentences, they were nevertheless adequate and did not violate basic standards of human decency. While some of the applicants deplore the lack of a rehabilitation programme such as given to the sentenced inmates the simple answer to this is that they are not in

the same category as the sentenced inmates as they are presumed to be innocent. It would be premature and highly impractical to institute rehabilitation for persons not yet adjudged guilty (pp. 9-15);

(5) some of the applicants complained that handcuffs and shackles are used when they are escorted outside the institution although they have never been charged with attempting to escape lawful custody. If there were no valid reasons for using handcuffs and shackles in a particular case that could constitute cruel and unusual treatment or punishment contrary to s.12 of the Charter, but simply to imply because some sentenced inmates are escorted without handcuffs or shackles does not necessarily mean that remand inmates are being discriminated against when these restrictions are imposed upon them. There is no basis for concluding that remand inmates pose any lesser security risk than convicted inmates. The institution's policy on the use of restaints reveals that they are viewed as an extraordinary security measure which is employed sparingly and always with care, discretion and judgment. Prison officials and administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgments are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters: Bell v. Procunier, 417 U.S. 827 (pp. 16-18);

(6) a strip search of a remand inmate is conducted after he has received a visitor. The obvious reason for this requirement is to prevent and control incoming drugs, weapons or other matter and which might pose a threat to institutional security. The practic of conducting strip searches is common in prisons in the United States and in Bell v. Wolfish, supra, at p. 558 et seq., it was held that the test of reasonableness under the Fourth Amendment required in each case a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted.

A detention facility is a unique place fraught with serious security dangers and, balancing the significant and legitimate security interests of the institution against the private interest of the inmates, the practice of conducting strip searches for the purpose of ensuring security and order at the institution is a permissible non-punitive objective (pp. 18-21);

(7) remand prisoners are eligible for two personal visits per week during visiting hours and also are entitled to business or professional visits with their lawyer and others. While the Deputy Director of the institution may restrict visiting privileges for security reasons, any such decision is subject to appeal by the inmate and, considering the average length of time that remand inmates are kept at the correctional centre, these visiting privileges do not come close to being cruel and unusual treatment or punishment. The restrictions imposed are incidental to another legitimate government purpose. i.e. security, rather than punishment. In determining whether restrictions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed that such considerations are particularly within the province and professional expertise of corrections officials, and in the absence of substantial evidence to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in these matters (pp. 21-26);

(8) remand inmates are entitled to one personal telephone call per day and as many business calls as they require. The complaint of the applicant Maltby that he has been refused permission to telephone the press is without foundation. The only purpose of such a phone call would be to create more havoc and confusion as the major aim of newspapermen is to create sensationalism to increase their circulation. That is not the way things are done in this country (p. 27);

(9) all incoming mail is opened in the presence of the inmate and with regard to outgoing mail the institutional staff is prohibited from opening Government, lawyer or Ombudsman mail. These are reasonable limits in the circumstances (pp. 28-31);

(10) remand inmates are not permitted to attend the regular church service as experience has demonstrated this to be impractical from an administrative or security point of view. Arrangements for visitation by the chaplain can be made and there is no reason why an inmate cannot include a clergyman on his list of people that he wishes to see and telephone him directly. People of the cloth are becoming a rare commodity indeed and they are torn asunder by demands from everywhere in the community. To blame the correctional centre for delays in seeing a priest is simply not being realistic. The religious programmes at the corrections centre, although not perfect, allow for freedom of conscience and religion within such reasonable limits as are feasible under the circumstances (pp. 31-34);

(11) pursuant to the provincial Election Act, remand inmates are not disqualified from voting. The only inmates who are disqualified are prisoners in jail or prison undergoing punishment for a criminal offence. Provision is not made in the statute for a mechanism similar to that set up for hospitals and sanitoria under the Act enabling inmates of those institutions to vote. To the extent that the statute makes no exception for remand inmates, their rights as guaranteed by s. 3 of the Charter have been violated and, on this ground only, the declaration sought will issue (addendum p. 2).

The Queen v. John Albert Marshall

Judgment of the Federal Court of Appeal rendered in Ottawa by Heald J. concurred in by Mahoney J. and Ryan J. on February 26, 1985.

This is an appeal from the decision of the Federal Court, Trial Division, finding the appellant negligent when the respondent injured his hand in an accident at Beaver Creek Correctional Camp and ordering the payment of $7,934.00.

ISSUE

1. Did the Trial Judge erred in law in defining the duty owed by the appellant or her servants to the respondent by imposing a higher standard than that required by law?

2. Did the Trial Judge erred in law in failing to consider the issue of contributory negligence on the part of the respondent?

HELD

1. The duty imposed by the Trial Judge "to see that the work is done without any danger to his wards" is considerably higher than that set out by the Supreme Court of Canada in the McLean case. The test was tantamount to making the appellant an insurer of the respondent. The Trial Judge erred in law in imposing such a stringent test.

2. The record does disclose evidence of contributory negligence on the part of the respondent. The Trial Judge erred in law in failing to address the issue. The appellant's servants did not fully discharge their duty of care and the respondent is guilty of contributory negligence. The appeal is allowed, the decision of the Trial Division is set aside and the amount of damages to be paid by the appellant is reduced to $3,967.00 plus costs.

Martens v. National Parole Board

This was a decision of the Supreme Court of British Columbia rendered by the Honourable Mr. Justice Legg on August 19, 1983.

The petitioner, relying on the relevant provisions of the *Parole Act* and the *Charter* applied for a writ of habeas corpus with certiorari in aid ordering that the Director of Matsqui Institution release him from custody.

Facts: The petitioner, who had been sentenced to a term of 8 years' imprisonment, was released on day parole on February 13, 1979. In August, 1979 he was granted full parole. A condition of the petitioner's parole was that he report regularly to his parole supervisor. As he failed to report regularly for a period of about 2 months, the petitioner's parole was revoked by the National Parole Board on December 31, 1982, and he was apprehended on January 5, 1983. On March 16, 1983 a post-revocation hearing was held and the decision was made by the Board not to change the revocation of parole. An Internal Review Committee of the Board affirmed the revocation decision in a letter to the petitioner, dated June 15, 1983.

Issue: Was the petitioner given a fair hearing at his post-revocation hearing on March 16, 1983?

Held: The principles of fundamental justice, as provided for in s. 7 of the *Charter* require that the petitioner should have been present throughout the post-revocation hearing. The exclusion of the petitioner from the initial 10 minutes of the hearing and the implication in the Board's letter of June 15, 1983 that the revocation of parole was not based solely on the petitioner's sloppy reporting but upon some other considerations which had not been revealed to the petitioner and which he had not had the opportunity of answering, were a significant departure from the principles of fundamental justice guaranteed by s. 7 of the *Charter*.

Decision: Habeas corpus should not issue. There should be a new post-revocation hearing complying with the principles of fundamental justice. If there is an unwarranted or unreasonable delay in convening and completing a new post-revocation hearing then a writ of habeas corpus will issue.

Martineau and Butters v. Matsqui Institution Inmate Disciplinary Boar

Judgement of the Supreme Court of Canada rendered by Mr. Justice Pigeon, Beetz, de Grandpré, Judson and Ritchie on March 8, 1977 in Ottawa.

This is an appeal from the decision of the Federal Court of Appeal dismissing appellant's application under s. 28 of the *Federal Court Act*, for lack of jurisdiction.

The Federal Court of Appeal did not have jurisdiction to review an administrative decision under s. 28 of the *Federal Court Act*.

Facts:

Inmates Martineau and Butters were charged under s.2.29 (g) (h) of the *Penitentiary Service Regulations*, with indecent actions. Both were sentenced to dissociation for 15 days. They have applied under s. 28 of the *Federal Court Act* for a review to set aside the disciplinary measure on the grounds that they were denied application of natural justice.

Issue:

Did the Federal Court of Appeal err in holding that the order did not come within the scope of s. 28 of the *Federal Court Act* because it was an order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis ?

Commissioner's directive No. 213 requires the Disciplinary Board when giving a disciplinary sanction to act justly and fairly. In order to make this disciplinary decision come within the scope of s. 28 of the *Federal Court Act*, it must be required by law to be made on a judicial or quasi-judicial basis. If one can say that the Commissioner's directives are law, then s. 28 of the *Federal Court Act* would apply and the decision could be reviewed by the Court.

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> However these directives are clearly administrative, they do not provide for penalty if not observed. They are only directions to the public servants as how to carry out their duties.

Pigeon J. cannot agree with the submission that s. 28(6) of the *Federal Court Act* implies that all federal tribunals, other than those enumerated, come within s. 28(1) of the *Federal Court Act*.

The Court agrees with what was established in Howarth. Even though disciplinary action implies a loss of remission, it does not change the nature of the disciplinary decision to make it one that should be taken on a judicial or quasi-judicial basis.

It cannot be said that whenever a decision affects the rights of the applicant, there is a duty to act judicially.

REFERENCES:

Martineau No. 2

Howarth (F.C.) (S.C.)

Mitchell

Bruce

Sauvageau

McGrath
Pagé
Cline
Dubeau
Ex parte McCaud (Nov. 1968)

Robert Thomas Martineau v. The Matsqui Institution Inmate Disciplinary Board

Judgement of the Supreme Court of Canada rendered by Mr. Justice Pigeon, Martland, Ritchie, Beetz, Estey and Pratte in December 1979 in Ottawa. Dickson, Laskin, McIntyre.

Inmate made an application to the Federal Court for certiorari under s. 18 of the *Federal Court Act*, to quash a disciplinary decision taken against him.

Issues:

Is certiorari under s. 18 of the *Federal Court Act* an available remedy in the case of violation of the duty to act fairly in an administrative decision "not required by law to be made on a judicial or quasi-judicial basis"?

In all administrative decisions, it exists a common law duty to act fairly. If such duty is not respected there is a remedy available under s. 18 of the *Federal Court Act*, against that decision. The Trial Division, through the exercise of the discretionary remedies mentioned in s. 18 of the *Federal Court Act*, has jurisdiction to quash such decision.

The decision does, no longer, need to require, by law, to be taken on a judicial or quasi-judicial basis. So long as the public body has power to take decisions affecting the rights of a person, certiorari is the proper remedy. Unlike s. 28 of the *Federal Court Act*, s. 18 has a broader application and applies to all administrative actions but it must not be understood that it also includes technical incidents in the taking of disciplinary measures, it applies only "where there has been a breach of a duty to act fairly in all circumstances".

The appeal is allowed.

References: Martineau and Butters v. The Matsqui Institution Disciplinary Board (1978) 1 S.C.R. 118.
Howarth (F.C.)(S.C.)
Pagé
Cline
Sauvageau
Mitchell
Bruce
McGrath
Ex parte McCaud (Nov. 1968)

WILLIS ELVIS JAMES MAXIE AND THE NATIONAL PAROLE BOARD AND THE CORRECTIONAL SERVICE OF CANADA

(Decision of Mr. Justice Muldoon of the Federal Court of Canada - Trial Division - dated June 4, 1985)

The applicant sought, inter alia, an order in the nature of certiorari to quash a decision of the National Parole Board revoking his mandatory supervision and an order in the nature of mandamus to reinstate his release.

FACTS The applicant, an inmate at a federal penitentiary, was released on mandatory supervision (MS) and subsquently committed various criminal offences which resulted in the imposition of a consecutive term of imprisonment. The applicant's MS was suspended shortly after the commission of the criminal offences and it was revoked while he was in custody as a consequence of the consecutive sentence.

ISSUE #1 Was the revocation of the applicant's MS while the applicant was in custody as a result of the new consecutive sentence, imposed while his MS was suspended, ultra vires the Board?

HELD No. Mr. Justice Muldoon states at page 8:

"On the plain words of the statute one can hardly conclude otherwise than that mandatory supervision could be and was, effectively revoked in this case. So clear are paragraph 10(1)(e) and subsection 15(2) and (4) of the Act, together with the relevant jurisprudence, that it is difficult to avoid tautology in expressing the conclusion.

The revocation of the applicant's mandatory supervision while he was in custody as a consequence of a new consecutive sentence which was imposed when his mandatory supervision was suspended, was certainly not per se invalid, ultra vires or contrary to law. In the circumstances, that revocation appears to have been quite unexceptionable."

ISSUE #2 Is s. 20 of the Parole Act inconsistent with the right conferred by section 9 of the Canadian Charter of Rights and Freedoms which provides that "everyone has the right not to be artibrarily detained or imprisoned?

HELD The applicant's right not to be arbitrarily detained or imprisoned was not impinged by the revocation of his mandatory supervision.

The applicant complained that the number of remission days lost as a consequence of the revocation in no way reflected the gravity of the conduct relied on as a basis for revocation. Mr. Justice Muldoon responded that "the best which can be said for this submission is that the elements of the applicant's plight were entirely in his own hands... No evidence is required to demonstrate that the board in fact directed its mind to the appropriateness of the consequences that is presumed." The Court rejected the applicant's complaint about the board's exercise of its discretion.

However, the Court went on to state that the statutory provisions could run afoul of s. 9 of the Charter and be ruled to be unconstitutional. In quoting from the recent Belliveau v. The Queen (1984) case, the Court pointed out that the mere fact that a statute sets out a specific procedure for detaining a person does not mean that the application of the statute is automaticaslly free from arbitrariness. In holding that the policy underlying the revocation provisions of the Parole Act were not arbitrary, Mr. Justice Muldoon stated:

> "Where, as in this case, Parliament enacts that the National Parole Board may revoke mandatory supervision when a breach of its term of condition occurs, the legislation is endowed with a rational purpose whose consequences are wholly proportional to the inmate's misdeed, that is, serving out the fit sentence judicially pronounced. The legislative purpose ... is "to rehabilitate the prisoner gradually, to control his behavior and to deter him from committing new crimes with the threat of revocation." That policy is quite rational, proportional and is not one of arbitrary imprisonment."

ISSUE #3 Did the delay in the applicant's eligibility for release on mandatory supervision and the resultant extension of his liability to be kept incarcerated, as a direct consequence of a loss of earned remission upon revocation of his mandatory supervision, constitute a violation of his constitutional rights protected by s. 7 of the Charter, which provides that everyone has the right to life, liberty and security of the person and the right not to be deprived therof except in accordance with the principles of fundamental justice?

HELD NO.

On the question of procedure, the Court held that there was no evidence to the effect that the applicant was denied any procedural rights to fundamental justice under the Parole Act. Mr. Justice Muldoon stated:

- "There is nothing contrary to fundamental justice in the board's acting upon the breaches of the paramount condition of mandatory supervision which inhere in the commission of those offences. Of course, it would be savagely disproportionate if the board could apply the Act to revoke for an offence, for example, for riding a bicycle on a street, but such is far from the case here. The applicant's criminal conduct here constituted serious breaches of term or condition of mandatory supervision; and the timing of his misconduct was his not the board's.

The Court also addressed the issue of whether s. 7 of the Charter has a substantive application and if so whether the revocation provisions of the Parole Act are contrary to fundamental justice. Mr. Justice Muldoon held that upon both a procedural and substantive application of s. 7, there was no violation of that provision by the revocation of mandatory supervision. He states:

- "The substance of the pertinent provisions of the Parole Act exact that the inmate who by criminal misconduct breaches the terms of the conditional remission accorded to him, may thereupon be obliged to bear the full consequence of the original and realized jeopardy in which he places himself. The provision for loss of that remission which would have carried qualified liberty, in the circumstances, violates no principle of fundamental justice. The dashing of the inmate's expectation of avoiding the full term of imprisonment lawfully and fittingly imposed, is a consequence for which he has only himself to reproach."

ISSUE #4 Can the Federal Court of Canada review or intervene with the sentence imposed on the applicant for being unlawfully at large which was passed in disregard to s. 137 of the Criminal Code?

HELD No. However, the Court did note a possible solution:

> "The remedy ... does not lie within the jurisdiction of the Federal Court of Canada to quash that sentence for being unlawfully at large. Nor can this Court require the National Parole Board to exercise its discretion pursuant to subsection 20(3) of the Parole Act in order to recredit part of the applicant's lost remission. That would effect a practical but indirect compensation for him, but it cannot be ordered since the board did not pass the impunged sentence. It is unlikely that anyone would attack the board's decision if it chose to recredit because of the mitigating circumstances. This possible avenue is noted merely in passing ..."

Willis Elvis James Maxie v. The National Parole Board et al.

Judgment of the Federal Court of Appeal rendered by the Chief Justice, the Honourable M. Justice Thurlow, on November 13, 1986.

This is an appeal from a judgment of the Federal Court of Canada, Trial Division, which dismissed the appellant's application for a writ of certiorari quashing the revocation by the National Parole Board of the appellant's mandatory supervision and for a mandamus ordering the release or recalculation of his mandatory supervision date in accordance with the Constitution's Act, 1982.

FACTS : The appellant, who had been on day parole for about two months, was released on mandatory supervision on June 27, 1982. On June 30, his mandatory supervision was suspended and he was taken into custody; on July 14, he was convicted on two counts of breaking and entering and theft committed on June 26 and 27, and on one count of assaulting a peace officer committed on June 28. He was sentenced to terms totalling 27 months consecutive to his previous sentence. He was also convicted for having intoxicants on an Indian reserve on June 28 and fined to $200, and in default of payment, to be imprisoned for 15 days; he never paid the fine.

On August 4, 1982, the National Parole Board reviewed the appellant's case under the Parole Act and revoked his mandatory supervision. In view of section 20 of the Act, the effect of such revocation was to require him to serve the remainder of the earlier sentence, as well as the new one, in custody, subject to his release on parole or on mandatory supervision as a result of remission earned in the meantime.

ISSUES : 1) Whether the National Parole Board's decision to revoke the appellant's mandatory supervision was authorized by the Parole Act in those circumstances.

2) Whether the appellant's recommittal to custody to serve the remainder of his sentence violated his rights under sections 7 and 9 of the Charter.

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DECISION: The appellant's submission that the revocation was ultra vires of the Board's powers seeks to put too narrow limits on the Board's authority to exercise its discretion conferred on it by the statute. Even if the Act so limited its discretion, which it does not, it could not be contended that the decision to revoke the appellant's mandatory supervision was other than for the purposes of subjecting him to closer supervision and to protect the public, in view of his propensity to misconduct. Nothing in the facts disclosed in the case indicates that the Board's discretion was exercised otherwise than on proper grounds.

As for the submissions regarding section 9 of the Charter, they should not be accepted. The question for the Board was to determine whether the appellant should be required to serve the remainder of his sentence or some part of it in custody rather than on mandatory supervision, having regard to what his conduct disclosed as to the need to exercise closer control over him. In view of the offences he committed before and during the first days of his mandatory supervision, this was an obvious case for prompt revocation of his right to be at large, as these offences showed that he had yet to benefit the slightest from his incarceration. The respondents did not have to establish the correctness of their actions: the onus of showing something illegal about the decision rested on the appellant.

With respect to submissions resting on section 7 of the Charter, there is nothing fundamentally unjust in the automatic consequence of revocation under section 20 of the Act. The resulting incarceration in those cases is not a new sentence, but the old one that is to be served in custody rather than on mandatory supervision. Furthermore, the release on mandatory supervision is never compulsory: it is an option which the inmate refuses or accepts, with all its possible consequences. The principle against double jeopardy for the same conduct is not affected either: the incarceration for the new offences is for breaching the criminal law while the incarceration resulting from the revocation of the mandatory supervision derives from breach of the condition on which the inmate was at large.

The appeal was dismissed.

Norman Douglas McCaud

Judgement of the Supreme Court of Ontario rendered by Mr. Justice Van Camp on September 26, 1975.

This is a motion of Habeas Corpus seeking release on the grounds that there is an error in the computation of days of imprisonment.

Facts:

On February 3, 1971: sentence of 3 years and a further concurrent month in penitentiary.

He was released on temporary absence on December 22, 1971 and was to return on December 28, 1971.

He failed to return and was delivered into custody on January 15, 1975.

During that period, he was in close custody, that custody was not in a Canadian penitentiary.

Issue:

Should the time spent in custody not in a Canadian penitentiary count as part of the time served on the sentence ?

Applicant submits that under s. 137(1) of the *Criminal Code*, he should be credited the time spent in custody whether it was in a Canadian penitentiary or not.

The applicant does not come within s. 137(1) because he was acquitted on the charge of escape, and s. 137(1) only applies to persons convicted for an escape.

Even though we can say that when a statute is ambiguous, it should be interpreted in favour of the liberty of the subject, but in this case the statute in question cannot even be applied.

The motion is dismissed.

McDonald v. The Deputy Attorney General of Canada

Judgement of the Supreme Court of Ontario (Appeal Division) rendered by Mr. Justice Howland, Arnup and Zuber.

This is an appeal of a judgement rendered by Galligan, J. of the Supreme Court of Ontario which dismissed an application made by Robert McDonald for a writ of habeas corpus.

Facts

The appellant was an inmate serving a sentence of eleven years when, in 1971, he failed to return from leave on a temporary absence permit.

After having been extradited from Australia, he was tried in provincial court at Kingston on a charge of being unlawfully at large and was found not guilty on the grounds that the Crown failed to prove that the applicant was the same person as the Robert McDonald named in the warrants of commitment issued as a result of the initial two convictions.

Issues

1. Does the time, during which an escaped person is unlawfully at large, count as part of the service by him of the term of imprisonment imposed upon him?

   Even though, in some decisions, the common law rule was interpreted to mean that time spent while unlawfully at large is to be counted as part of the original sentence, in the view of the court, it is a wrong interpretation. The Stanton case must not be regarded as authority for that interpretation as the inmate was at large through no fraud or wrongdoing on his part.

   Consequently, the time spent by the inmate, while unlawfully at large, must be served by him in a penitentiary.

2. Did the acquittal of the inmate on the charge of being unlawfully at large constitute as res judicata a finding that the appellant was lawfully at large?

   The court concludes that the acquittal does not assist the appellant in this case. It is clear that he has not served the sentence of eleven years imprisonment imposed on him in October 1968, since he was out of custody, without lawful excuse, for almost nine years.

The appeal is dismissed.

REFERENCE: Dunlop

KIRK MCLAREN MCILVRIDE AND THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF BRITISH COLUMBIA AND THE DIRECTOR OF KENT INSTITUTION

Judgment by the Supreme Court of British Columbia, rendered by Mr. Justice Gow, November 3, 1987.

FACTS:

The petitioner applied for an Order for relief in the nature of Habeas Corpus with Certiorari in aid for his release from administrative segregation at Kent Institution and his return to Phase 4 of the Special Handling Unit Program.

The petitioner, an inmate with numerous serious offences on his record, was charged with aggravated assault and attempted murder following an altercation with another inmate. Previous to the incident he was in Phase 4 of a Special Unit Handling Program and after the charge he was returned into Phase 1 - the most restrictive phase. He was acquitted of the criminal charges but he remained in Phase 1 confinement.

ISSUE:

Do the Warden's proceedings combined with the criminal proceedings, amount to "double jeopardy" as defined by section 11(h) of the Charter?

HELD:

The Warden's proceedings constitute an internal administrative decision while the criminal proceedings are separate. The application is dismissed and the inmate remains in Phase 1.

To determine whether the petitioner is being tried twice for the same offence the court had to decide how the Warden's proceedings differ from the criminal proceedings. The court decided that as shown by the Court of Appeal in Landry v. Legal Services Society (1986, 4, Western Weekly Reports p. 645) proceedings under the Special Handling Unit Regulations are internal proceedings designed to further the well-being of the prison community. Criminal proceedings are for the protection of the community at large. The commencement of one of the two proceedings does not preclude the other.

The petitioner's return to Phase 1 is simply an internal disciplinary reaction to the breaking of probationary rules and in no way is it precluded by the acquittal on criminal charges.

McInroy v. Benner and Her Majesty the Queen

Judgement of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Jerome, on May 24, 1985.

The Applicant seeks orders in the nature of certiorari and mandamus quashing the decision that was made of transferring him to the Special Handling Unit of the Québec Correctional Development Centre in Laval, Québec, and directing the Respondent Benner to allow him to be heard, present evidence, examine witnesses, and to be represented by counsel in the proceedings looking into his conduct while incarcerated at the Edmonton Institution.

FACTS

McInroy was convicted of murder on October 6, 1975. While serving his life sentence, he was convicted of attempted murder of another inmate. he was transferred to a Special Handling Unit in 1977, and again on May 15, 1984. This latter transfer is the subject matter of this application, and the events that led to it occurred as follows:

On January 27, 1984, two inmates were stabbed at Edmonton Institution; the Applicant received a Notification of Segregation on February 2, 1984 and a Notification of Recommendation of Transfer on February 7, 1984, both of these notifications mentioning the good order of the institution as a justification. On March 8, 1984 he received another Notification of Recommendation of Transfer, outlining the stabbing incident as a justification, and he was shown the progress summary that had been prepared about his case.

On March 18, 1984 the Applicant filed a Statutory Declaration denying allegations being relied upon for the recommendation of the transfer. A month later, after considering the recommendation, the progress summary, and the Applicant's response, the National Special Handling Unit Committee authorized the transfer.

Subsequently, the Applicant met twice with the Committee, after requesting a review of the decision. On December 27th, he was given the opportunity to comment in writing, which he did, further information concerning an alleged escape plot and drug trade at the Edmonton Institution.

On January 14, 1985, the Committee reviewed the case, considering all documentaion, including the Applicant's denials, but maintained its decision.

ISSUE Whether the duty to act fairly required, in these circumstances, an oral hearing where the Applicant would be represented by counsel and have the opportunity to cross-examine witnesses and present evidence.

DECISION There is no requirement in either the Penitentiary Act or Regulations that an inmate be granted an oral hearing before the Special Handling Unit Review Committee. It is, however, well established that prison authorities have a duty to act fairly in respect to administrative decisions concerning the transfer and classification of inmates. In this case, the Applicant was notified of the transfer recommendation and its reasons; he was shown a copy of the progress summary which would be considered by the Committee in making its decision. Furthermore, he was given the opportunity to respond to each of the notifications he received, and to the progress summary, and his comments were considered by the Committee before any decision was rendered. He was also given an opportunity to comment on his transfer after receiving the reports concerning his alleged involvement in an escape plan and in the drug trade in Edmonton Institution.

The Applicant was given more than sufficient opportunity to present his comments on the recommendation for transfer and the material in support of it, and was therefore treated fairly throughout the transfer process.

The application was dismissed.

Michel v. Caron et al.

Decision of Mr. Justice Pinard of the Federal Court (Trial Division) on an application for certiorari rendered May 9th, 1989.

Facts:

The Applicant was charged with both an "intermediary" and a "serious" type offence following his alleged involvement in a drinking bout and brawl at Port-Cartier.

At the initial appearance before the Disciplinary Tribunal, the Applicant left the hearing without entering a plea or providing the Tribunal any supporting documents after being told that the Tribunal would be unable to render its decision that same day as the witnesses had not yet been summoned. The Applicant had his hearing of the "intermediary" type offence conducted more than one month later and without legal representation. While the Tribunal treated the Applicant as having pleaded "not guilty", he was nevertheless found guilty of the offence. The proceeding of the "serious" type offence was initiated but later suspended pending the outcome of this application for certiorari of the initial decision.

Issue:

Whether the Tribunal acted with such irregularities so as to breach its duty to act fairly.

Held:

With respect to the "intermediary" type offence and the lack of legal representation and absence of witnesses for the Applicant, the Court held that the Tribunal acted fairly as the Applicant did not request representation nor did he ask to produce witnesses.

As to the Applicant's argument of unreasonable delay between the time of the first appearance and the time of the hearing, in contravention of the Commissioner's Directive, the court stated that the failure to apply such guidelines to the letter does not

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necessarily constitute a breach of duty as they are not legally binding. In interpreting the duty to act fairly, the Court stated that the one month delay was not unreasonable in light of the Applicant's refusal upon first appearance to enter a plea and that the proceeding was adjourned to the earliest day possible where all of the witnesses in the case could attend.

With respect to the "serious" type offence, the Applicant had requested that the preliminary decisions of the Disciplinary Tribunal be quashed. The court held this request to be premature and it was promptly rejected. In any event, the court went on to state that the Applicant's arguments were not convincing. As to the alleged effect of the delay on the possibility of hearing a witness and the chairperson's refusal to hear other witnesses, the Court found such conduct entirely reasonable in light of the safety of one of the witnesses and the neglect of the Applicant to signal his intention to call any witnesses at first instance. Furthermore, the Court found that all witnesses were, contrary to what was alleged by the Applicant, heard in the presence of both the Applicant and his lawyer. As such the Court found that in all respects the Tribunal acted in accordance with its duty to act fairly.

Milbury v. Her Majesty The Queen

This is the summary of a judgement of the Supreme Court of Nova Scotia rendered by Mr. Justice Burchell on February 15, 1983.

This is an application for *habeas corpus*.

Facts:

The trial judge directed a sentence for being unlawfully-at-large to be consecutive to other offences for which the inmate was then being sentenced rather than consecutive to the sentence being served at the time of the escape as required by section 137 of the *Criminal Code*.

Issue:

Can the escape sentence pursuant to section 137 of the *Criminal Code* be consecutive to other sentences imposed after the inmate actually escaped from prison, or does it have to be consecutive to the portion of the term the inmate was serving at the time of his escape that he had not served?

Held:

Mr. Justice Burchell, in his oral decision from the bench, ruled that section 137 of the *Criminal code* only allows the escape sentence to be consecutive to the portion of the term which the prisoner was serving at the time of his escape which he had not served and ordered that the inmate be released from custody on a certificate of mandatory supervision.

Reference:

Sinobert.

Re Robert Miller

This is the summary of a judgement of the Honourable Mr. Justice Steele, of the Supreme Court of Ontario, rendered on March 5, 1982.

The application was for a writ of habeas corpus ad subjiciendum with certiorari in aid to show cause why the applicant should be kept in detention in administrative segregation in Millhaven Institution.

Facts:

The applicant acknowledged that all warrants committing him to penitentiary and transfer warrants until he was admitted to Millhaven were valid and were not under attack.

Issue:

The only question was whether he was improperly maintained in a segregated or security area within the prison, no proper hearing or order having been obtained, as it was alleged under the Penitentiary Service Regulations.

Held:

Section 18 of the *Federal Court Act* precludes the Trial Division of the Supreme Court from dealing with anything other than the warrants of committal which, on their face, bear no irregularities and are not attacked. The internal procedures within the penitentiary are matters of administration, the review of which may be within the jurisdiction of the Federal Court of Canada, and any application relating thereto should be brought in the Federal Court.

The Queen v. Robert Miller

This is a decision of the Supreme Court of Canada rendered on behalf of the court by the Honourable Mr. Justice Le Dain on December 19, 1985.

The appellant appealed the decision of the Ontario Court of Appeal allowing an appeal from the Supreme Court of Ontario which dismissed the respondent's application for habeas corpus with certiorari in aid.

FACTS Following a disturbance at Matsqui Institution the respondent inmate was transferred to Kent Institution where he was placed in a special handling unit (S.H.U.). The respondent was subsequently transferred to Millhaven Institution where he was also placed in an S.H.U. The respondent was advised that he had been placed in an S.H.U. because of his participation in the disturbance, but he was never given an opportunity to confront the evidence of his involvement in the incident.

ISSUES

1) Does a provincial superior court have jurisdiction to issue certiorari in aid of habeas corpus against a federal board, commission or other tribunal despite the exclusive jurisdiction in respect of certiorari of the Federal Court of Canada under s. 18 of the Federal Court Act?

2) On an application for habeas corpus alone, may a court consider affidavit evidence to determine whether a detention is unlawful by reason of an absence or excess of jurisdiction?

3) Does habeas corpus lie to determine the validity of confinement in an S.H.U., and if such confinement is found to be unlawful, to secure the release of the inmate into the general population of the institution?

DECISION

1) A provincial superior court has jurisdiction to issue certiorari in aid of habeas corpus notwithstanding s. 18 of the Federal Court Act. The provisions of the Federal Court Act indicate a clear intention on the part of Parliament to leave the jurisdiction by way of habeas corpus to review the validity of a detention imposed by federal authority with the provincial superior courts. While s. 18 confers an exclusive and

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very general review jurisdiction over federal authorities by the prerogative and extraordinary remedies, to which specific reference is made, it deliberately omits reference to habeas corpus. This omission was not an oversight but a well considered decision. Considering the importance of certiorari in aid to the effectiveness of habeas corpus, a remedy included as a guaranteed right in s. 2c)(ii) of the Canadian Bill of Rights and s. 10c) of the Canadian Charter of Rights and Freedoms, it cannot have been intended that the reference to certiorari in s. 18 should have the effect of undermining or weakening the habeas corpus jurisdiction of the provincial superior courts by the exclusion or denial of certiorari in aid. To avoid such a construction, it is possible to conclude that, because of the association in that section of certiorari with the other prerogative and extraordinary remedies, the reference to certiorari in s. 18 is to the independent remedy of certiorari to quash the decision of an inferior tribunal and not to certiorari as an ancillary procedure used to serve an essentially evidentiary purpose. Indeed, it is unlikely that Parliament intended to confer an exclusive jurisdiction to issue certiorari in aid when it had clearly withheld the jurisdiction to issue habeas corpus.

2) It is well established that affidavit evidence is admissible on certiorari to show jurisdictional error. Subject to the limitation arising from the conclusive character of the records of courts of superior or general common law jurisdiction, a court may also on an application for habeas corpus without certiorari in aid consider affidavit or other extrinsic evidence to determine whether there has been an absence or excess of jurisdiction. The proposition that this Court was limited on habeas corpus to an examination of the warrant of committal in determining whether there had been a jurisdictional error goes beyond the true basis of the court's jurisprudence on this question.

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3) Habeas corpus lies to determine the validity of a particular form of confinement in a penitentiary notwithstanding that the same issue may be determined upon certiorari in the Federal Court. The proper scope of the availability of habeas corpus must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction. The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison setting should not be compromised by concerns about conflicting jurisdiction. Confinement in a special handling unit or in administrative segregation is a form of detention that is distinct and separate from that imposed on the general inmate population. It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority. There is no reason in principle, in view of the nature and role of habeas corpus, why that remedy should not be available to challenge the validity of such a distinct form of detention in which the actual physical constraint, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.

Appeal dismissed.

Claude Millette v. François Alarie and the Attorney General of Canada

Judgment of the Federal Court of Canada - Trial Division, rendered by Mr. Justice Joyal on October 19, 1989.

This was an appeal by the respondent and a third party claimant from a decision rendered by the service master on August 15, 1989. The decision followed a witness refusal to answer certain questions which were being asked by the applicant's counsel.

Facts

The applicant was being held at Donnacona Institution on a life sentence which commenced in 1983 as well as on a 15 year sentence which commenced in 1984. On May 1988, while the applicant was being held at Leclerc Institution, he was placed under administrative detention for the reason that he was suspected of having participated in a conspiracy to escape. Shortly thereafter, he was transferred to Donnacona Institution and this latter transfer was ruled final on June 2, 1988.

The applicant denied having participated in a conspiracy to escape and submitted that, in light of the refusal on the part of the authorities to provide the facts that supported their accusation, the decision to transfer him was arbitrary and unjust and caused him serious harm.

The respondent adduced as evidence the affidavit of a Mr. Dubois which supported the accusation but yet failed to offer any particulars with respect to the aforementioned conspiracy. Counsel for the applicant, during the cross-examination of Mr. Dubois attempted to ascertain information relating to the particulars. Mr. Dubois refused to answer the questions stating that he would not endanger the lives of his informants. The senior master ruled in favour of the applicant which prompted the present appeal.

Issue

Were the authorities privileged in the sense that they did not have to reveal their sources?

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Judgment

The Court held that the refusal to answer questions on the ground that it could endanger the lives of the informants was not tantamount to refusing to produce all of the relevant information. In fact, the Court stated that while protecting the lives of the informants, the authorities could disclose the essential facts supporting their accusations. (Demaria v. Comité Régional de classement de détenus [1987] 1 F.C. 74).

However, in the case at bar the Court ruled that the information was confidential and that the witness could not be ordered to answer the aforementioned questions (Bisaillon v. Keable et al. [1983] 2 S.C.R. 60). Furthermore, the Court held that if the questions were irrelevant to the issue or did not threaten to reveal the identity of the informants then the information could not be classified as confidential.

The appeal by the respondents was allowed and the senior master's order was overturned.

The Queen v. Mingo, O'Hearn, Elton, Fisher, Stefanek

This was a ruling by the Honourable Mr. Justice Toy made on October 26th, 1982, with the jury out.

The applications by Mingo, Stefanek, O'Hearn and Fisher were for stays to be entered and that the jury be instructed to return not guilty verdicts on the following bases:

(1) that in the circumstances the defence of res judicata was available;

(2) that the doctrine of issue estoppel was applicable;

(3) that in addition to res judicata and issue estoppel the doctrine or concept of abuse of process is applicable because the cases against the accused were unreasonably split up.

Facts

The five accused were brought before the court for the alleged involvement in an inmate riot at Kent Institution. The two charges in the indictment are committing mischief in relation to public property by wilfully damaging and wilfully setting fire to Kent Institution, offences provided for in Sections 387 and 389 of the *Criminal Code*. Counsel for the accused Mingo spoke on behalf of the others with regard to the application. Mr. Justice Toy therefore discussed the facts pertaining to Mingo in order to determine the issue.

Following the incident at Kent Institution, members of the RCMP were called in to conduct an investigation. They interviewed prison officials and came to a determination as to what offences had been committed. In the case of inmate Mingo there were fourteen offence reports, two of which covered the same event witnessed by two separate penitentiary officers. The RCMP officers decided that seven of the offence reports dealing with six incidents would be dealt with in "outside court" and left the seven other offence reports for penitentiary officials to process and proceed with internally or in "disciplinary court". On July 28th, 1981, following disciplinary court proceedings, Mingo was sentenced to an aggregate term of 90 days punitive dissociation and the loss of one hundred and thrity-five days of earned remission.

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Counsel for Mingo argued that in addition to res judicata and issue estoppel the unreasonable splitting of the case against Mingo must be considered as an abuse of process. The penitentiary officers could have or should have charged all the offences as either disciplinary offences in disciplinary court or criminal offences in criminal court. Mingo's punishment in disciplinary court and the subsequent laying of criminal charges encompassing the same transaction or series of events is an abuse of process.

Issue

Should the indictment or at least count 2 of the mischief charge be stayed on the grounds of res judicata, issue estoppel and abuse of process?

Held

1. There was no abuse in Mingo's case. At the stage in the investigations when the RCMP gave approval for penitentiary officials to proceed in disciplinary court on seven of the offence reports, there was no conceivable way they could know what the outcome in the disciplinary court would be. There was nothing oppressive, deceitful or improper in the RCMP allowing or counselling disciplinary court proceedings.

2. A disciplinary court is not public court, but rather a private or domestic court exclusively maintained to adjudicate upon inmates' disciplinary offences and to order the restricted punishments of loss of earned remission and punitive segregation. Such a court facilitates a rapid disposition of cases and enables the institution head to maintain discipline.

3. Mingo is not entitled to a stay or a directed verdict with respect to the charges he had already faced in disciplinary court. "Offences" used in the *Penitentiary Service Regulations* is not equivalent to "offence " in section 11(h) of the Charter. At page 14 of his decision Mr. Justice Toy states:

> "In my respectful view the authors of the new Charter when they employed the unqualified word offence as opposed to "criminal offence" were doing nothing more than providing for the equal protection of Canadian citizens from breaches of their rights under provincial as well as federal laws insofar as public as opposed to private or domestic prohibitions were concerned. The test of what constitutes an offence falls to be determined by examining the enactment and determining, insofar as federal legislation is concerned, if the allegation is

dealt with by a court with jurisdiction to hear an indictable or summary conviction offence. In the case of provincial legislation, if the allegation is dealt with by a court with jurisdiction to hear an offence triable under the provisions of the Offence Act R.S.B.C. 1979 Chapter 1-305."

Decision

Applications of Mingo, Stefanek, O'Hearn and Fisher, for stays to be entered and for a direction to the jury to return a not guilty verdict, refused.

The Queen v. Mingo, O'Hearn, Elton, Fisher, Stefanek # 2

This was a ruling by the Honourable Mr. Justice Toy made on October 26th, 1982, with the jury out.

Counsel for Mingo and Elton applied for an order stating that the rights of Mingo and Elton under subsections 11(a) and 11(b) of the *Canadian Charter of Rights and Freedoms* were denied.

Facts

Mr. Elton's case is from the same situation. On June 12th, 1981, Elton was removed from the general population at Kent Institution and placed under administrative segregation until October, 1981. He was charged with a disciplinary offence under the *Penitentiary Service Regulations*, but the charge was dismissed on August 28th, 1981. Elton repeated requests to be removed from segregation were refused pending investigations being made by the R.C.M.P. concerning possible criminal charges against Elton. The information charging Elton and the others was sworn in on October 9th, 1981.

Like Mr. Elton, Mingo was also placed in administrative segregation, but as the facts in the summary of the previous ruling by Mr. Justice Toy, he was found guilty on all seven offences with which he was charged in disciplinary court.

Both accused relied on subsections 11(a) and 11(b) of the Charter. Elton's counsel submitted that there was no reason for the four month delay in charging him nor for keeping him in administrative segregation. In addition it was argued that the undue delay in proceedings has impaired the memories of possible witnesses. Mingo's counsel made similar submissions.

Crown counsel argued that the Charter is substantive, not procedural and that as a consequence had no retroactive or retrospective effect on events that occurred prior to April 17th, 1982. In addition it was submitted that there was no unreasonable delay.

Held

1. The Charter, having become law on April 17th, 1982 has no application to the failure of the Crown to inform the accused of the charges between June 7th, 1981 and November 5th, 1981 when the charges were first read to the two accused. In addition, following Judge Trainor's reasoning in R. v. Belcourt, time starts to run from the

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issuing of the process or the laying of an Information and not the date of occurrence. Therefore, there was no abuse of subsection 11(a) of the Charter.

2. With regard to section 11(b) Mr. Justice Toy also followed Judge Trainor's reasoning in R. v. Belcourt as stated above. There are very strict time limits in the *Criminal Code* regarding summary conviction offences, but for indictable offences there is no time limit.

Decision

The accused men were brought to trial within a reasonable time and their claims that their rights had been denied under sections 11(a) and 11(b) of the Charter were without merit.

Applications dismissed.

Fred Harold Mitchell v. Tom Crozier et al.

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice McNair, on February 3, 1986.

The applicant seeks orders in the nature of certiorari quashing his convictions on three disciplinary offences, as well as the decision of the Regional Transfer Board to transfer him to a higher security institution.

FACTS

Following incidents that occured on December 24, 1984, the applicant, an inmate at the minimum security facility of Elbow Lake Institution was charged with three breaches of the Penitentiary Service Regulations; he was then subjected to an emergency transfer to Kent Institution. On January 8th, he appeared before the Disciplinary Court; after the first two charges were dealt with as serious ones, the applicant required counsel when the third charge came up, but this request was denied. He was then convicted of the three charges, following which he lost remission.

The respondent conceded that the third charge should be quashed as well as the three sentences; consequently, only two issues were left to the decision of the Court.

ISSUES

1) Whether the transfer and reclassification decision were flawed by the fact that they were made relying on file material that was not disclosed to the applicant.

2) Whether the refusal of representation by counsel on the hearing of the first two charges, which were mistakenly characterized as minor ones by the applicant, violated section 7 of the Charter and the duty of fairness.

DECISION

The decision to transfer a prisoner from one institution to another is essentially an administrative matter that should only be interfered with by the Courts on the rare occasions when it is readily apparent that the prisoner so transferred has not been dealt with fairly, taking all factors into account.

The contention of the applicant that he should have been given copies of the working progress summary and all other adverse case documentation in his file or notice thereof in order to respond to the case against him is totally unacceptable in the context that it would place an impossible and time-consuming burden on prison authorities that is not justified by any reasonable standard of fundamental justice.

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However, he should have been advised of the allegations referring to his deteriorating behavior and conduct, as they were relevant to his emergency transfer. Furthermore, there is no evidence that the applicant was promptly notified of the final reclassification decision by the Regional Transfer Board.

Consequently, the final decision on the applicant's emergency transfer should be quashed, and his S-2 security rating should be reinstated.

Regarding the right to be represented by counsel on the first two disciplinary charges, it is well settled that the decision to forfeit an inmate's earned remission must be made in accordance with the principles of fundamental justice, pursuant to section 7 of the Charter. Therefore, the principle is that the applicant was entitled to be represented by counsel in this case. However, this right must be judged according to the particular circumstances of the case. The applicant took it upon himself to categorize the charges as being minor in nature. He was, or should have been fully aware of his right to be represented by counsel, and chose not to do so. An accused inmate's failure to exercise his right to request representation by counsel, of which he was or should have been aware of, cannot be afterwards seen to constitute a deprivation of his right to liberty within the meaning of section 7 of the Charter.

The application was allowed in part.

R. v. Moore

Judgment of the Ontario Court of Appeal, rendered by Justices Dubin, Lacourcière and Goodman, on February 21, 1983.

Application by inmate for habeas corpus following suspension of her mandatory supervision immediately upon her release from the institution.

FACTS: The applicant, an inmate of a penitentiary, was due for release on mandatory supervision. Immediately upon her release from the institution, and only after having walked out of the gate, she was arrested pursuant to a warrant of apprehension and suspension of her mandatory supervision. Habeas corpus was granted and the Crown appealed.

ISSUE: Whether the National Parole Board is entitled to forfeit, in whole or in part, the period of earned remission immediately upon the release of an inmate who, as a result of earned remission, is entitled to be released from imprisonment under mandatory supervision for the period of such earned remission.

HELD: The procedure of "gating" is not authorized by statute and the inmate was therefore entitled to her release. An inmate who is eligible for release as a result of earned remission pursuant to the *Penitentiary Act*, is entitled to be released under mandatory supervision subject to such terms and conditions as may be imposed by the NPB. The power to suspend or revoke such mandatory supervision can only be invoked by the NPB by reason of post-release conduct of the inmate while at large as if he were a paroled inmate and on parole.

R. v. Moore; Oag v. R., N.P.B. and Warden of Edmonton Institution.

Judgment of the Supreme Court of Canada, Laskin C.J.C., Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer & Wilson, JJ; judgment rendered orally by Laskin C.J.C. on May 17, 1983.

Application by inmates for habeas corpus following suspension of their mandatory supervision immediately upon their release from the institution.

FACTS: The applicants, inmates of a penitentiary, were due for release on mandatory supervision. Immediately upon release they were arrested pursuant to a warrant of apprehension and suspension of mandatory supervision. Habeas Corpus was granted. The Crown appealed, and in the case of Moore, was unsuccessful and appealed to the Supreme Court of Canada. In the case of Oag, the Alberta Court of Appeal reversed the order of the trial court and Oag appealed to the Supreme Court of Canada from that judgment.

ISSUE: Whether the National Parole Board is entitled to forfeit, in whole or in part, the period of earned remission immediately upon the release of an inmate who, as a result of earned remission, is entitled to be released from imprisonment under mandatory supervision.

HELD: The Court applied the judgment of Dubin J.A. in Moore, as varied by Seaton J.A. in Truscott.

Section 16(1) of the Parole Act does not authorize the parole board to suspend mandatory supervision in the absence of grounds arising from post-release conduct which would justify suspension. Both Moore and Oag were entitled as of right to their release on mandatory supervision.

See:

R. v. Moore (Ont. C.A.)

Truscott v. Director of Mountain Institution (B.C.C.A.)

Re Moore and The Queen

This was a judgment of the Supreme Court of Ontario, rendered by Mr. Justice Ewaschuk on January 10, 1984.

The applicant applied to the Court to have Part XXI of the Criminal Code entitled "Dangerous Offenders" be declared ultra vires as infringing sections 7, 9 and 12 of the **Canadian Charter of Rights and Freedoms.**

FACTS — Applicant had been convicted of a serious personal injury offence and had been sentenced to imprisonment for 10 years or more. The Crown gave notice to the applicant that an application would be brought to have the applicant declared a dangerous offender. The applicant brought this application to challenge the dangerous offender provisions of the **Criminal Code** as infringing the **Charter.**

ISSUE — Whether the dangerous offender provisions of the **Criminal Code** violate the **Canadian Charter of Rights and Freedoms**?

HELD — (1) Section 7 of the **Charter** is not violated by the fact that on an application to have an accused declared a dangerous offender, evidence may be adduced from experts which may be highly speculative as to future dangerousness. While it is an aspect of natural justice that evidence to be admissible must have some probative value, evidence respecting future dangerousness has such probative value. Section 695.1 of the **Criminal Code** provides that the accused's detention is to be reviewed by the National Parole Board after three years and thereafter every two years. At the three year interval and subsequently the Parole Board must consider new evidence as well as the initial evidence in determining if the accused remains dangerous. It is in that sense that evidence respecting future dangerousness is probative

(2) That the indeterminacy aspect of a finding of a dangerous offender does not constitute cruel and unusual treatment within the meaning of section 12 of the **Charter.**

The term "cruel and unusual treatment or punishment" should be interpreted as "interacting expressions colouring each other ... to be considered together as a compendious expression of a norm" which must be given meaning in the context of contemporary Canadian society.

Applying a five part criteria to determining if the indeterminate sentence resulted in cruel and unusual treatment or punishment Ewaschuk J. stated:

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(a) that the dangerous offender provisions would be acceptable to a large segment of the Canadian public,

(b) that the dangerous offender provisions could be applied on a national basis with ascertained or ascertainable standards,

(c) that there is a social purpose in the provisions, namely protection of society from dangerous offenders,

(d) the dangerous offender provisions do not offend public standards of decency and propriety given all the requirements and safeguards, and

(e) the indeterminate sentence is not degrading to human dignity so as to constitute cruel and unusual punishments:

In considering the meaning of "cruel and unusual" no reference need be made to s.1 of the **Charter**. Where the particular **Charter** provision contains its own modifier, e.g. unreasonable, arbitrary or cruel and unusual, the provision is self defined as to what constitutes a reasonable limitation.

(3) That the dangerous offender provisions of the **Criminal Code** did not lack appropriate legislative criteria or standards so as to amount arbitrary detention or imprisonment within the meaning of section 9 of the **Charter**. The legislative criteria for finding a person a dangerous offender is perhaps the most detailed and demanding in the **Criminal Code**. Any residual discretion in a judge not to find a dangerous offender adds rather than derogates from the statutory criteria.

Application dismissed.

IAN ROSS MOORING v. DEAN FOX

Decision of the Federal Court (Trial Division) rendered December 11, 1989 on an application for certiorari to quash the decision of Dean Fox, an independent chairperson.

FACTS

The inmate was charged with serious misconduct, i.e. assaulting a guard.

The charge was heard on July 28, 1989. The guard who was allegedly assaulted testified and no other witness was called. The inmate then gave evidence, at the completion of which the ICP, rather than make a decision on the evidence before him, adjourned the hearing to hear further evidence from another guard. That guard was heard and cross-examined one week later and the inmate was convicted.

ISSUE

Whether the case against the inmate was improperly split, thereby denying the inmate a fair hearing contrary to section 11(d) of the Charter of Rights.

DECISION

Commissioner's Directive 580, paragraph 19, provides that the inmate shall be given the opportunity to give evidence after all of the witnesses against him/her have been heard. This does not, however, require that under no circumstances may further witnesses be heard after the accused gives his evidence.

The disciplinary hearing is relatively informal. The purpose of the directive is to ensure that the inmate knows that he can give evidence at the hearing. If, under the strict rules of evidence in criminal matters, the evidence given by an inmate in a disciplinary hearing would permit the Crown to call evidence in reply or rebuttal in a criminal trial, then an ICP is entitled to receive the same evidence after the inmate has given his. In this case, the evidence of the second guard constituted reply evidence so the issue of case splitting does not arise. Paragraph 19 of CD 580 does not afford the inmate greater protection than that afforded an accused in criminal matters to which strict rules of evidence apply.

Réjean Morin v. National Special Handling Unit Committee, et al

This is the summary of a judgement of the Québec Superior Court given by the Honourable Justice Bergeron on November 18, 1981 in Montreal.

The applicant asked that a writ of habeas corpus be issued in order to be transferred from SHU Quebec to a medium security institution.

Facts:

Following the killing of an inmate, the applicant was transferred from Leclerc medium security institution to a maximum security penitentiary, and from there to the Special Handling Unit of the Centre de Développement Correctionnel because of his alleged participation in the killing.

The applicant was then found not guilty by a jury of the accusation of first degree murder laid against him in criminal court.

Notwithstanding this acquittal, the penitentiary authorities continued to detain the applicant in the SHU, the detention being based on a police report dealing with the participation of Morin in the incident.

Issue:

Does the Court have jurisdiction to issue a writ of habeas corpus to change the conditions of detention of a person who is otherwise legally held?

Held:

With great respect for the contrary opinion expressed by Berger C.J.B.C., in the Oswald case, the court is of the opinion that habeas corpus is not an available remedy to change the conditions of detention of a person who is otherwise legally held in accordance with a valid warrant of committal.

Comments:

Although this is not the basis for his decision, it is interesting to note that Mr. Justice Bergeron made an important comment to

the effect that because the reasons for which the authorities decided to continue to detain Morin in the SHU were rejected during the latter's trial, then Morin can apply for certiorari, in the Federal Court, to correct the denial of natural justice or absence of equity of which he was the victim. As a matter of fact, Morin did apply for certiorari and the hearing, before Mr. Justice Marceau of the Federal Court, was held February 1st.

Rejean Morin v. National Special Handling Unit, Yeomans, Goulem and Kaplan

This is a decision of the Supreme Court of Canada rendered on behalf of the Court by the Honourable Mr. Justice Le Dain on December 19, 1985.

The appellant appealed the decision of the Quebec Court of Appeal affirming the decision of the Quebec Superior Court, which denied the appellant's application for a writ of habeas corpus without certiorari in aid to obtain his release from a special handling unit (S.H.U.).

FACTS — Following the death of a fellow inmate the appellant was transferred from Leclerc Institution to Laval Institution. The appellant was subsequently charged with murder and was immediately transferred to the Centre for Correctional Development, where he was placed in an S.H.U. The appellant was eventually acquitted of the murder charge. Despite the acquittal the appellant was kept in the S.H.U. and his requests to be transferred to a medium security institution were refused.

ISSUE — Does a provincial superior court have jurisdiction to issue a writ of habeas corpus to determine the validity of the confinement of an inmate of a federal penitentiary in an S.H.U.?

DECISION — The court applied the reasons for judgment given in R. v. Miller in determining that a provincial superior court has jurisdiction to issue a writ of habeas corpus to determine the validity of the confinement of an inmate of a federal penitentiary in an S.H.U. notwithstanding that the same issue may be determined upon certiorari in the Federal Court.

Habeas corpus lies to determine the validity of a particular form of confinement in a penitentiary notwithstanding that the same issue may be determined upon certiorari in the Federal Court. The proper scope of the availability of habeas corpus must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction. The general importance of this remedy as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison setting should not be compromised by concerns about conflicting

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jurisdiction. Confinement in a special handling unit or in administrative segregation is a form of detention that is distinct and separate from that imposed on the general inmate population. It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority. There is no reason in principle, in view of the nature and role of habeas corpus, why that remedy should not be available to challenge the validity of such a distinct form of detention in which the actual physical constraint, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.

Appeal allowed.

This is a judgement rendered by the Saskatchewan Court of Appeal on June 30, 1982.

This is an application for a writ of habeas corpus with certiorari in aid.

On October 27, 1980 Morin, who was at the time serving a sentence of two years less one day in the Prince Albert Correctional Centre, was transferred to the Saskatchewan Penitentiary. The transfer was required because of the danger which the inmate presented to the security of the institution.

In the Province of Saskatchewan guidelines have been established for the transfer of inmates between the provincial facility and federal penitentiary which include a procedure for an appeal to the Director of Correctional Centres prior to an involuntary transfer. In this case the authorities failed to notify the inmate of the intended transfer.

Held

A transfer from the Provincial Correctional Centre to the penitentiary is sufficiently akin to discipline to require fairness on the part of the custodial staff pursuant to the principles set out in *Re Nicholson and Haldimand-Norfolk Regional Board of Com'rs of Police* and *Martineau* (No. 2).

The failure to notify the inmate of the transfer amounted to unfairness towards him.

However, it does not follow in every case of unfairness that the court will exercise its discretion to interfere. In view of the fact that the transfer was required because of the danger which the inmate presented to the security of the institution, and that immediate action was required to defuse a dangerous situation, the relief sought by the inmate should be refused. The prison authorities were justified in taking the view that their purpose would be defeated if the inmate were given notice of his transfer to the penitentiary and the requirements of prison discipline and effective administration outweighed the requirement to act towards the inmate with the fairness to which otherwise would have been entitled.

Reference:

Bruce v. Yeomans
Cline v. Reynett
Collin v. Lussier
In Re Anaskan
MacGrath
Martineau #1, #2
Morin v. Comité national chargé des causes d'USD (C. Féd.)
Pagé
Plante
Sauvageau

Morin v. Sauvé in his capacity as Chairman of the National SHU Review Committee et al

Judgement of the Federal Court of Appeal of Canada on May 15, 1985.

This is an appeal from a judgement of the Trial Division of the Federal Court, which had refused to issue a writ of certiorari to quash the decision of respondents to keep the appellant in a Special Handling Unit.

FACTS

Appellant Morin was placed in a Special Handling Unit for dangerous inmates after he was charged with the murder of another inmate.

He was acquitted following a criminal trial and asked to be transferred to a medium-security establishment.

After reviewing his file Mr. Sauvé, the Chairman of the National Committee responsible for reviewing the request, wrote Morin telling him of the decision to keep him in a Special Handling Unit.

Morin applied for a writ of habeas corpus in the Superior Court, which he was denied on the ground that the Court lacked jurisdiction in the matter under section 8 of the Federal Court Act.

He subsequently applied to the Federal Court for a writ of certiorari to vacate the decision of respondents; he is now appealing from the refusal of the Trial Division to grant this writ.

ISSUE

The issue is whether Sauvé, in deciding to keep Morin in special handling despite his acquittal, so misdirected himself in law as to justify intervention by the Court. It is therefore necessary to decide whether the concept of res judicata applies here.

DECISION

(a) Dissent (Pratte J)

Sauvé was responsible for making the decision and determining whether Morin was a dangerous inmate. He did not have to rely blindly on the verdict of the jury, which had to follow very special rules of procedure, and could not base its verdict on mere probability. The verdict of acquittal rendered at the trial meant that a doubt remained as to Morin's guilt; this does not conflict with Sauvé's decision, which simply meant that Morin was probably guilty.

The appeal should be dismissed.

(b) Majority (MacGuigan and Hugessen JJ)

The decision was purely administrative, and is therefore subject to review only if Sauvé in making it misdirected himself in law: the question threfore arises as to the scope of the concept of double jeopardy in Canadian law so as to determine whether he was in error in not applying it in the case at bar.

Canadian and English precedents in this area deal only with the concept of res judicata in the context of successive criminal proceedings: one must therefore look at the American experience. After reviewing several judgements and articles of scholarly commentary, the judge concluded that though at the time in question the Canadian Charter of Rights and Freedoms did not exist, the conditions for applying collateral estoppel may be used here, since this concept is the American equivalent to the Canadian concept of res judicata. American law recognizes two conditions for applying this concept: identity of matter and criminal sanctions.

It appeared from the affidavit summarizing the events, signed by Sauvé, that his decision was based on documents which he had on hand, and on his personal belief in Morin's guilt; the affidavit further indicated that the possibility of an appeal from the verdict of acquittal had no influence on his decision.

Sauvé therefore had no evidence, other than that considered by the jury at the trial, to establish that Morin's conduct required particularly severe treatment. He based his decision on a matter which had already been decided by the jury in light of the same facts, namely the involvement of Morin the murder of another inmate. The identity of matter test is adequately satisfied.

With respect to the second condition regarding the nature of the penalty, the question is whether correctional discipline is closer to civil or criminal proceedings. The language of CD 274, which deals with Special Handling Units, its purpose and its effect correspond more closely to the criminal than the civil law.

Special handling is not punishment as such: it is often triggered by some event but is also often anticipatory. It is preventive in nature, like s. 688 of the Criminal Code. Moreover, Sauvé's intention of saving Morin further problems is an objective that is characteristic of the criminal law.

Special handling must therefore be regarded as analogous to a criminal sanction, the second test for applying the concept of collateral estoppel. It is true that Sauvé's discretionary decision would not have to be varied if it was taken in light of facts which had not been disclosed in the criminal trial or as a result of circumstances having no connection with the murder with which Morin was charged. In the circumstances of the case at bar, however, the confinement proceedings following the acquittal were identical to the criminal trial with regards to their matter, and they involved criminal sanctions. The refusal to give full effect to the acquittal rendered at the conclusion of the criminal trial was therefore wrong in law: the concept of res judicata should have been applied, since its conditions of application were met.

The appeal should accordingly be allowed. (Since a writ of certiorari would not be effective, as the inmate was no longer in special handling, the judge rendered a declaratory judgement that the decision to keep the appellant in a Special Handling Unit after his acquittal on May 30, 1981 had no legal justification).

Kim Grant Morley v. The Director of Stony Mountain Institution

Judgement of Court of Queen's Bench of Manitoba rendered by Mr. Justice Morse on April 8, 1981.

This is an application for Habeas Corpus.

Facts

The inmate was convicted and serving his sentence in Canada for various offences. One of those offences was for attempted escape, which he was convicted of on June 27, 1977. While still serving these sentences, the inmate escaped to the United States where he was arrested and then granted bail on a burglary charge on January 4, 1980, but was arrested on the same date on application of the Canadian authorities. On April 24, he was sentenced to one year, to run concurrently with "sentence now serving in Canada". The inmate waived extradition on May 3, 1980 and was returned voluntarily to Canada on June 3, 1980. He was sentenced to six months "consecutive to all terms being served at this date".

Issues

1. On June 27, 1977, was the applicant convicted of an offence under section 132(b) or under section 133(1) of the *Criminal Code*?

   If the applicant had been convicted under section 132(b), there would be no forfeiture of statutory remission under section 22(4) of the *Penitentiary Act*.

   Since it is unclear as to which provision applies, the interpretation most favourable to the liberty of the subject must be given to the offence and, as well, the original Information charging the offence made reference to section 132(b) of the *Criminal Code*. Consequently, the applicant should be treated as having been convicted of an offence under section 132(b) of the Code and he does not forfeit any statutory remission under section 22(4) of the *Penitentiary Act*.

2. Should the time spent in custody in the United States be credited to reduce the inmate's total sentence?

Under section 137(1) of the *Criminal Code*, the inmate is not entitled to be credited with the time spent in custody in the United States because the intention of Parliament was that the unexpired term of imprisonment which the escapee was serving at the time of his escape must be served, although the sentence for escape may be served either concurrently or consecutively to that unserved term, depending on the order of the court.

REFERENCE: Norman Douglas McCaud, September 26, 1975.

Kim Grant Morley v. The Director of Stony Mountain Institution

Judgement of the Manitoba Court of Appeal rendered by Mr. Justice Freedman and O'Sullivan on June 26, 1981.

This is an appeal from the decision of the Court of Queen's Bench which denied the applicant's motion for discharge.

Facts

The applicant was an inmate serving his sentence in Canada for various offences. While still incarcerated, he escaped to the United States where he was arrested and granted bail on a burglary charge on January 4, 1980 but was rearrested on the same date on application of the Canadian authorities. On April 24, he was sentenced to one year, to run concurrently with the "sentence now serving in Canada". The inmate waived extradition on May 3, 1980 and was returned voluntarily to Canada on June 3, 1980. He was sentenced to six months "consecutive to all terms being served at this date".

Issue

The question which arises here is whether or not the time spent, by the inmate, in custody in the United States, should be credited towards the inmate's total sentence.

The appeal was dismissed for the reasons given by the learned trial judge which consisted in:

> "Under s. 137(1) of the Criminal Code, the inmate is not entitled to be credited with the time spent in custody in the United States because the intention of parliament was that the unexpired term of imprisonment which the escapee was serving at the time of his escape must be served although the sentence for escape may be served either concurrently with or consecutively to that unserved term, depending on the order of the court".

Ref.: McDonald

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Grant Munday v. Director of Mountain Institution

This is a judgement rendered by Mr. Justice Mackoff of the British Columbia Supreme Court on September 18, 1981.

Facts:

The applicant Munday had his mandatory supervision suspended. The fourteen-day review of Munday's suspension required by subsection 16(3) of the *Parole Act* did not occur. Consequently, the Parole Service cancelled the suspension and issued a new warrant. The reasons laid down in the second suspension warrant simply repeated the reasons provided in subsection 16(1) of the Act, and no further reasons were given on the warrant itself. Munday was never released during the interim period between the cancellation of the first warrant and the date the new warrant was issued.

Held:

Mr. Justice Mackoff granted the release sought by the applicant, Munday, by way of a writ of habeas corpus, for the following reasons:

1. Lack of information in the second suspension warrant to enable Munday to know with some specificity the case against him. Procedural fairness in this case requires that the inmate know the case against him when his mandatory supervision is suspended. The specific reasons for suspension must appear on the fact of the warrant. Failure to meet that requirement meant the warrant was invalid and the decision made pursuant thereto illegal.

2. Not bringing to Munday's attention the fact of release and new warrant on the date same were said to be executed. All documentation affecting a man's liberty (be he a free man or an inmate) must be communicated to him without delay. His Lordship did not go so far as to say a copy must be given to him unless he requests same, in which case he should be given a copy. Although His Lordship did not so state, it would seem that reading the document and making a notation thereon or having him sign that he understands may satisfy the requirement for communication.

3. On the facts before the judge, there was no rationale basis for believing that Munday had to be apprehended to prevent a breach of a term or condition of mandatory supervision.

This decision, and particularly points 1 and 3 thereof, is now under appeal. It should be noted that reason (1) of the decision is contrary to the previous cases of Lewis and Sowa and to two other decisions which are contemporary to the Munday case, namely Hunchak and Witherspoon.

GRANT ALLEN MUNDAY v. THE WARDEN OF MOUNTAIN INSTITUTION (APPELLANT)

Judgement of the British Columbia Court of Appeal rendered by Mr. Justice Nemetz, Seaton and Carrothers, on June 28, 1982.

This is a Crown appeal from a judgement of the Supreme Court of British Columbia who ordered the issue of a writ of habeas corpus.

Facts:

On January 26, 1976, the respondent was sentenced to a term of eight years in prison for the crime of robbery. On May 10, 1981, he was released on mandatory supervision. His mandatory supervision was suspended under s. 16(1) of the *Parole Act* on August 10, 1981, and the arrest took place on August 12.

There was no review of the case within 14 days of the recommitment. The suspension was cancelled on September 2, 1981. However, the mandatory supervision was again suspended on September 3, 1981, in order to prevent a breach of a term or condition. On this occasion the case was reviewed in accordance with s. 16(3) and referred for hearing to the National Parole Board. The Board did not proceed with the hearing because the respondent was released by an order in the nature of habeas corpus on September 18, 1981. On September 22, 1981, a new certificate of release on mandatory supervision was issued.

Issue:

The issue to be determined is whether the designated person, under s. 16(1), had or lost his jurisdiction to issue the second warrant of suspension, issued on September 3, 1981.

Nemetz, C.J.:

The learned trial judge looked behind this second warrant and held that there was no rational basis to believe that the respondent should have been apprehended to prevent a breach of a term or condition of his mandatory supervision. The fact that the respondent was in custody when the second warrant was issued posed a problem to the judge. However, in my opinion, it should not have done so. I will assume that the second warrant was issued to cure the careless procedural defects which arose from the issuance of the first warrant. However, the events leading up to the first apprehension still could constitute grounds which could satisfy the designated officer that the respondent should be returned to custody. The legislative scheme vests in the Board the duty of deciding what should happen to an inmate whose mandatory supervision has been suspended. The Board would have

dealt with this matter in accordance with the scheme within a short period of time. If there had been no rational basis for the suspension in the first place, the Board would have had the power to cancel the suspension pursuant to s. 16(4).

It is my view that a judge on a habeas corpus application should not interfere with the assessment made by a designated person unless it can be shown that it was made in bad faith or contrary to the considerations in s. 16(1). Neither of those considerations was clearly shown in this case.

Appeal allowed.

NAPOLEON NILGHE v. JIM O'SULLIVAN

Fiat on a habeas corpus application rendered by Milliken J. of the Saskatchewan Court of Queen's Bench on December 15, 1989.

FACTS

On July 17, 1989 Nilghe was placed in administrative segregation. At the time he was not seen by the warden but was given a notice stating that he was being placed in segregation "due to reasonable and probable grounds he was involved in muscling of other inmates".

On two (2) occasions Nilghe was brought before the Classification Board and advised he was muscling other inmates. Nilghe asked for information as to when he was supposed to have intimidated and muscled, and when such occurrences took place. The penitentiary authorities refused to reveal such details.

ISSUE

Do the rules of procedural fairness or the principles of fundamental justice require that an institutional head under section 40(1)(a) of the PSR give an inmate sufficient reasons for his segregation so as to allow the inmate an opportunity to present reasons why he should not be segregated before the institutional head makes the segregation order under section 40(1)(a)?

DECISION

The Warden had to make the decision in this case urgently in order to attempt to reduce the tension in the inmate population. Because of the urgent nature of the decision to impose segregation there could be no requirement of prior notice and opportunity to be heard before the decision was made. The refusal to give details of the muscling was for the purpose of protecting informers; if details were given which would enable the names of the informants to be ascertained then their lives might be endangered. Nilghe was not charged with an offence and therefore it was not necessary for him to be given the fullest opportunity to convince of his innocence. Various administrative decisions are not on the same level and therefore do not require the same amount of particulars of the alleged wrongdoings.

Oag v. The Queen, the National Parole Board and Robert Benner

Judgement of the Court of Queen's Bench, Alberta, rendered by Mr. Justice D. C. McDonald on December 31, 1982.

This was an application for a writ of habeas corpus requiring the respondents to release the applicant from custody.

Facts

At the time of the application, the applicant was serving terms of imprisonment for offences such as armed robbery, forcible seizure of a person, unlawful confinement of a person and attempted murder. The sentence is due to expire on October 19, 1987. In December, 1982, the authorities at Edmonton Maximum Security Institution realized that on the basis of the method of calculation approved in McIntyre v. the Queen, the applicant ought already to have been released on mandatory supervision. Consequently, it was decided that he would be released on December 6th, 1982. Upon learning that the applicant was to be released on mandatory supervision, the Chairman of the National Parole Board,issued a Warrant of Suspension of the mandatory supervision, because the applicant was considered to represent an undue risk to the community, as a result of his history of violent behaviour. The letter, informing the applicant of the suspension, was given to him while he was still in handcuffs at the police station. Upon being given the letter the applicant was arrested and returned to Edmonton Institution. The suspension was purported to have been carried out pursuant to section 16(1) of the *Parole Act*.

Issue

Was the issuance of the Warrant of Suspension in the circumstances permitted under the provisions of section 16(1) of the *Parole Act?*

Held

The suspension was without statutory authority, and therefore the authorization of apprehension and the recommittal to custody were also without statutory authority. The applicant was never released from custody. The powers of suspension, apprehension and recommittal provided for in section 16(1) cannot arise until mandatory supervision itself is in existence.

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The effect of section 15(1) of the *Parole Act* is that mandatory supervision commences upon the release of the inmate from imprisonment, and therefore as long as an inmate remains in custody the powers provided for in section 16(1) cannot be exercised.

Comment

While Mr. Justice McDonald found that the conclusion reached regarding section 16(1) made it unnecessary to consider the second issue raised by the applicant he responded to it anyway. The second issue raised was that there was no evidence upon which the Chairman of the National Parole Board could reasonably decide that keeping the applicant in custody was necessary to protect society. Mr. Justice McDonald concluded that there was ample evidence upon which the Chairman could decide that keeping the applicant in custody was necessary to protect society. He further stated that the institutional record of the applicant was relevant to that issue.

Order

An order in the nature of habeas corpus was issued requiring the respondents to release the applicant from custody.

NOTE: Applicant has since been released again and suspended so that a new case, which is now underway could decide the real issue i.e. must the paroled inmate do certain acts after his release or may the authorized official suspend MS simply on pre-existing grounds ?

Oag v. Her Majesty the Queen et al

Judgement of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Muldoon, on October 25, 1985.

FACTS: The plaintiff was arrested upon his release on mandatory supervision on two occasions; such action was amply declared as being wrong in law by decisions of the Supreme Court in companion appeals on the same subject.

The plaintiff accordingly sues the defendants for false arrest, false imprisonment and assault and battery; he further, or in the alternative, sues them for damages pursuant to subsection 24(1) of the Canadian Charter of Rights and Freedoms, alleging violation of his rights guaranteed by sections 7 and 9.

The defendants now place a motion for an order

1) striking out the statement of claim as against the defendants (except Her Majesty) and dismissing the action against them.

2) striking the statement of claim and dismissing the action entirely.

ISSUES: 1)Whether the individual defendants and the National Parole Board should be striken from the statement of claim.

2)Whether the plaintiff's action, as a whole, should be dismissed.

DECISION: With regards to the individual defendants, their names should clearly by striken from the statement of claim as the action against them is not based in "federal law" or in "laws of Canada", pursuant to the definition given to those terms by the Supreme Court of Canada. On the other hand, Her Majesty should be retained as a defendant, pursuant to the Crown Liability Act. The last question remaining relates to the status of the National Parole Board in this matter.

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Mr. Justice Muldoon raises the question whether subsection 24(1) of the Charter is intended to preserve the notion that even the State itself is not immune from having to accord redress to an individual whom it, or its boards, commissions or other tribunals has wronged. Accordingly, that subsection must be able to circumvent the Crown Liability Act, to prevent the imposition of narrow constraints upon the "appropriate and just" potential Charter remedies where Crown liability is concerned.

With regards to recent approaches that have been developed relatively to constitutionally entrenched remedy provisions, the NPB is not a defendant per se because it is not the responsible State officer to answer for the States's alleged liability, and moreover has no sufficient resources of its own to satisfy a judgment in the event that State liability be established.

Accordingly, since the board is not exigible under any ordinary law of Canada, and since it is not an appropriate defendant, it must be striken from the statement of claim.

The first branch of the defendants' motion succeeded, but the second one was dismissed, the Court wishing to allow reasonable time to the plaintiff to amend his statement of claim in view of his significant loss of defendants.

Clifford Robertson Olson v. Her Majesty the Queen

This is a judgement of the Court of Appeal for Saskatchewan rendered by Mr. Justice Culleton on September 19, 1979 in Regina.

This is an appeal from a judgement dismissing an application for Habeas Corpus based upon the allegation that the Penitentiary authorities had no right to detain him in custody as the warrants of committal indicated that he would serve his sentence in a provincial correctional institution.

Facts:

On January 17, 1979, the Court of Appeal of Alberta reduced applicant's sentence so that he would be imprisoned in a provincial institution rather than in a penitentiary.

There was, at that time, a portion of a sentence to be served in a penitentiary and according to s. 659(2) of the *Criminal Code*, he was confined to a penitentiary.

Issues:

Did the penitentiary authorities have the right to detain the applicant in a penitentiary?

The warrants of committal indicated that the accused was to serve his sentence in a correctional institution but then he became subject to the *Parole Act* and the *Criminal Code*. Since the remanet of his sentence and the new sentences exceeded two years, he was properly transferred to a penitentiary.

The appeal is therefore dismissed.

REFERENCES:

Olson v. the Queen (Supreme Court of Canada)

Clifford Robert Olson v. Her Majesty the Queen

This is a judgement of the Supreme Court of Canada rendered by Mr. Justice Martland, Pigeon, Dickson, Estey and Chouinard on December 21, 1979 in Ottawa.

This is an appeal pursuant to subsection 719(3) of the *Criminal Code of Canada* from the judgement of the Court of Appeal for Saskatchewan which dismissed the appelant's appeal from the judgement of Sirois J. who refused the appelant's application for a writ of Habeas Corpus ad jubjiciendum.

Facts:

Inmate's mandatory supervision was revoked on September 8, 1978. It was to end on September 21, 1978.

On September 6, 1978, the accused was sentenced to two 2-year terms to be served concurrently in a penitentiary.

On September 27, 1978, he was sentenced to 9 months consecutive in a provincial correctional institution. He was committed to a penitentiary.

The Appelate division of the Supreme Court changed the sentences and it appears in the warrants of committal that the accused was to serve his term in a provincial correctional institution.

Issues:

Is the warrant of committal, mentionning the place of confinement, considered to be the intention of the court as to change the application of s. 659(1) of the *Criminal Code ?*

The judgement of the appelate division has no mention as to where the inmate should be incarcerated, therefore it appears that the form of the warrants of committal were the result of an administrative error and are defective in that respect.

Order: Inmate is not unlawfully detained in a penitentiary and is required to remain there.

The appeal is therefore dismissed.

REF: Olson v. The Queen (Saskatchewan Court of Appeal)

Her Majesty the Queen v. Clifford Robert Olson

Judgment of the Ontario Court of Appeal rendered by the Honourable M. Justice Brooke on September 23, 1987.

This is an appeal from an order of M. Justice Mahoney dismissing the appellant's application for a writ of habeas corpus with certiorari in aid and claiming relief under subsection 24(1) of the Charter.

FACTS : On January 14, 1982, the appellant was convicted of eleven counts of first degree murder and sentenced to life imprisonment without parole eligibility for twenty-five years. He was incarcerated in Kingston penitentiary and detained in administrative segregation. Both the place of imprisonment and the nature of his confinement were determined because of his previous conduct and the risks which he created to himself and the institution.

Since 1982, the appellant has repeatedly attempted to persuade the authorities to transfer him to British Columbia, his home province. This was always refused, in view of his record.

In 1985, CSC authorities decided to transfer the appellant to the protective custody unit in Saskatchewan penitentiary. However, the media, probably through the appellant or his lawyer, were made aware of the decision; the result was that the escape from notoriety, which was an important objective sought by CSC in transferring the appellant, was lost. To the contrary, the measure, rather than being a quiet solution to a difficult case, became a serious problem to the detriment of the administration of the system. The transfer was therefore cancelled.

The appellant continued to press for a transfer to British Columbia; he also kept requesting his release from administrative segregation, alleging that he was being kept there by order of the Solicitor General and that such detention was unlawful.

ISSUES : 1) Whether the confinement of the appellant in administrative segregation is the result of a lawful order;

2) Whether administrative segregation constitutes cruel and unusual punishment in violation of section 12 of the Charter;

DECISION: One of the appeal grounds of the appellant is that the trial Judge erred in proceeding to dismiss the application in his absence. The procedure with respect to writs is not affected by the fact that the violation of a Charter right is alleged. The Judge had jurisdiction to proceed as he did. However, since there were serious matters involved in the application, he should have made an order allowing the appellant to argue his case. Nevertheless, issuing the writ now and having the parties argue their case in front of a single judge would be unneccessary, as the whole case is before this court and should be dealt with now.

With respect to the validity of the appellant's detention, there is no doubt that the original decision to place him in administrative segregation was lawful. The question arising is whether or not at some point in time such continued detention was based on an order of the Solicitor General rather than on recommendation of the Segregation Review Board. The analysis of this issue as well as of the Charter issue is possible by way of habeas corpus, according to the recent decisions in the cases of Miller, Morin, and Cardinal and Oswald, where the Supreme Court of Canada established that this remedy was available to review something less than a total deprivation of liberty.

It is clear that the Solicitor General has no power nor authority to order the detention of the appellant in administrative segregation. This power belongs exclusively to the institutional head. Therefore, the detention of the appellant in segregation is unlawful if it results from an order of the Minister. However, the record in this case clearly establishes that the decision to confine the appellant in segregation was taken by the institutional head, and quite properly so, considering the risks for the appellant's safety and the necessity to preserve the security and good order of the institution. In these circumstances, the existence of an illegal order by the Solicitor General cannot place in doubt the appellant's confinement in administrative segregation which is otherwise lawful.

As for the appellant's contention that his continued confinement in administrative segregation constitutes cruel and unusual punishment contrary to section 12 of the Charter, it must be analyzed in light of the recent decision of the Supreme Court of Canada in the Smith case. In view of the criteria set out in that case, the question comes down to whether or not the detention of the appellant in segregation and protective custody units is treatment that is so excessive as to outrage standards of decency. In this case, considering the appellant's past criminal record and the crimes for which he is now incarcerated, the authorities were justified to fear for the maintenance of good order and discipline in the institution where he must serve his sentence, for the protection of the staff and other inmates, as well as for the appellant's life. Segregation to a prison within a prison is not per se cruel and unusual treatment within the meaning of the Charter. It could become so, if it were so excessive as to outrage standards of decency but such a case has not been made out here. The appellant has the continued attention of his case management team, the Segregation Review Board, the Director and those above him; he is continually observed and his health is protected.

The application was dismissed.

R. v. Olson

Judgment of the Supreme Court of Canada rendered on April 13, 1989.

FACTS:

The applicant challenged the legality of CSC's decision to place him in administrative segregation. Furthermore, he argued that his continued detention in administrative segregation amounted to a cruel and unusual punishment under section 12 of the Charter. The applicant applied to the B.C. Supreme Court for a writ of habeas corpus to be released from segregation. The Ontario Supreme Court rejected this application. The inmate appealed this decision to the B.C. Court of Appeal. The Ontario Court of Appeal rejected the application.

The Court of Appeal held that the written material filed by the applicant disclosed an arguable case and that the Court of first instance ought to either have issued the writ of habeas corpus or, in some other manner, afforded the appellant an opportunity to appear and make submissions.

By virtue of the combined effect of the Habeas Corpus Act and Rules 9 and 11 of the Ontario Supreme Court Rules respecting criminal proceedings the application for a writ of habeas corpus is a two-stage process. In the first stage, the Court must determine whether probable and reasonable grounds for the complaint exist as provided by section 1 of the Habeas Corpus Act. In the affirmative, the writ issues and the merits are determined on the return of the writ. However, Rule 11 provides a mechanism for collapsing these two stages into one. Rule 11 provides that on content the issue of the writ, the return thereto in presence of the detainee may be dispensed with. This is the usual practice where the applicant is represented by counsel. Where a written application by a prisoner proceeds to the second stage of detailed considerations of the merits, it is common practice to dispense with the formality of issuing the writ by simply ordering the prisoner to be brought before the Court to make submissions.

The Ontario Court of Appeal was of the opinion that probable and reasonable grounds for the complaint existed and that the matter should have proceeded to the second stage, either by issuing the writ or by having the appellant brought before the Court to present his case.

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The Court of Appeal concluded that it was unnecessary to send the applicant back to the court of first instance because all the relevant material was before that Court and upon the invitation and with the full participation of the appellant the merits were fully examined. The Court concluded that the grounds and facts had no merit. i.e.: The appellant was lawfully placed in segregation and his continued detention in segregation did not contravene section 12 of the Charter.

Olson appealed this decision to the Supreme Court of Canada.

ISSUE:

Whether the Court of Appeal had jurisdiction to dispose of the application for a writ of habeas corpus or whether the application should have been sent back to the Court of first instance.

DECISION:

The Supreme Court of Canada ruled that by virtue of Section 719(2) rendering applicable Part XVIII of the Criminal Code, Section 613(1)(b)(IV) applies. Those provisions, although drafted to meet the situation of an appeal from a conviction, are to be read mutatis mutandis, and are broad enough to permit a Court of Appeal to have dismissed the application for habeas corpus on the merits in the circumstances presented here. Even if the Court of Appeal did err in failing to remit the matter to the Court of first instance, the error was purely a mechanical one which could be cured by Section 613(1)(b)(iii).

Appeal dismissed.

PEARCE V. GALLAGHER

Judgment of the Federal Court (Trial Division) rendered by Associate Chief Justice Jerome on February 10, 1989, on an Application for Mandamus.

Facts:

Robert Pearce, an inmate at Edmonton Institution being voluntarily held in the segregation unit, brought an Application for Mandamus directing the Warden of the Institution to comply with sections 16, 20 and 40 of the Penitentiary Service Regulations. Pearce complained generally about the lack of programs in segregation and specifically requested a substance abuse treatment and counselling sessions for him and his wife. He claimed that he was denied access to the same programs and facilities that are available to general population inmates.

Issue:

Whether Mandamus is available to compel the Warden of the Institution to provide access to specific programs for an inmate voluntarily in segregation.

Decision:

There was no question that the inmate was voluntarily in segregation; the Court found no basis to conclude that his placement there offended his rights. Dissociation must be different from being among the general prison population since by definition it has to deprive prisoners of some of the programs enjoyed by general population inmates. There is nothing specific in the Statutes or Regulations spelling out the kinds of programs which must be available in an institution. There is therefore no provision or subsection of the Statutes or Regulations that can be incorporated into an Order of Mandamus. It is not open to the Court to direct the head of the institution to treat a particular inmate in a particular way. Mandamus is not available to enable the Court to decide to exercise the interpretive and administrative responsibilities of the head of the institution. Even if the issue were to reduce itself to a question of discretion in issuing Mandamus, the Court would not interfere with the day-to-day operation of the institution except upon the clearest ground. The balancing of the effects of dissociation and access to programs must be done by the head of the institution in order to achieve the best possible compromise between total dissociation from any of the programs and dissociation for the protection of the inmate. Whether the head of the institution in a particular case has found the right balance is not really the subject of court interference.

The Application was denied.

Paul Perron v. The Commissioner of Corrections and the National Parole Board (1)

Judgment of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Mahoney on December 22, 1982.

This is an application for *certiorari*, quashing the National Parole Board's decision denying inmate Perron's request for day parole. In another application, inmate Perron seeks *mandamus* directing the Commissioner to transfer him from Millhaven to Collins Bay or in the alternative, *certiorari* quashing the decisions (1) to transfer Perron from Collins Bay to Millhaven and (2) refusing to return him to Collins Bay.

Facts:

Prior to July 26, 1982, Perron was an inmate at Collins Bay. On July 26, Perron was charged with possession of contraband in disciplinary court. He was eventually acquitted on September 24, 1982. On July 27, Perron was transferred to Millhaven. Perron's requests to be returned to Collins Bay were refused, both before and after his acquittal in disciplinary court.

Following Perron's acquittal on the disciplinary charge, the National Parole Board rejected his application for day parole because, *inter alia*, he had been returned to maximum security for "security reasons".

Issue:

Perron alleged that the decisions to transfer him to Millhaven and to refuse to return him to Collins Bay were, in the circumstances, illegal. He also attacked the decision of the National Parole Board on the basis that it had abrogated its own power and unduly fettered its discretion by relying on the Commissioner's decision that he represented a security risk.

Held:

An inmate has no right to be kept in a particular institution. In deciding to transfer or refuse to transfer, the Commissioner is required to observe a general duty of fairness. There was no unfairness in the process by which the Commissioner arrived at the decisions he had a right and duty to make.

The National Parole Board accepted the Commissioner's conclusion. There is nothing wrong with that. It was within the particular competence and responsibility of the Commissioner to make such a determination. The Board was under no obligation independently to investigate.

Frank Robert Piché, Gaylord Neufled, David Siegfried Daher, Raymond Joseph Breland and Michael Smyth, v. the Solicitor General of Canada, the Commissioner of Corrections and the Institutional Head of Stony Mountain Institution

This is an application for a declaration and an injunction relative to the decision taken by the Solicitor General of Canada and the Commissioner of Corrections to resort to double-bunking.

This is a judgment of the Federal Court, Trial Division, rendered by Mr. Justice Nitikman on November 2, 1984.

ISSUE

Whether the decision violates subsection 5(1) and section 37 of the Penitentiary Service Regulations. Whether the decision violates the provisions of sections 7 and 12 of the Charter. Whether the applicants should be granted some form of remedy or relief by the Court pursuant to subsection 24(1) of the Charter.

FACTS

On or about June 3, 1982, the defendants decided to resort to double-bunking in order to accommodate an overall inmate population in excess of available facilities. On or about August 11, 1982, the Warden of Stony Mountain Institution decided to implement the use of double-bunking in certain general population cells in the institution. Double-bunking was planned for newcomers to the institution, on a compulsory basis, but double-bunked inmates were to move to single cells on a seniority basis as space became available. Installation of double bunks began in general population cells at Stony Mountain on August 12, 1982. The plaintiffs seek a declaration that the implementation and continuation of double-bunking at Stony Mountain constitutes a breach of fairness, natural justice and fundamental justice. They seek a declaration that double bunking constitutes a breach of subsection 5(1) and section 37 of the Penitentiary Service Regulations and violates the plaintiffs' right to privacy as well as section 7 of the Charter. Furthermore, the plaintiffs seek a permanent injunction restraining and enjoining the defendants from the use of double-bunking at Stony Mountain.

DECISION

On the issue of fairness, it is not in dispute that the decision to institute double-bunking because of the necessity to accommodate the overall population in excess of available facilities at Stony Mountain was a policy decision by the Solicitor General. It was a necessary decision and as such is not open to question. The Court is satisfied that the decision of the Solicitor General of Canada, in view of the overpopulation problem, was fairly arrived at. Respecting subsection 5(1) and section 37 of the Penitentiary Service Regulations, the Court is satisfied that the institutional head of Stony Mountain carried out in full and proper manner the responsibilities imposed on him by those sections.

Furthermore, based on the evidence adduced and on the case law, the Court is satisfied that there was not at Stony Mountain any invasion of the plaintiff's right to privacy. This finding pertains to the right to privacy per se, independent of the issue of cruel and unusual treatment or punishment.

On the issue of life, liberty and security of person, the Court agrees with the statement of Mr. Justice Pratte in Her Majesty The Queen et al and Operation Dismantle Inc. et al when he stated at page 6 that in his opinion the protection provided by the Right in the phrase "liberty and security of person" in section 7 of the Charter is security against arbitrary arrest or detention, of which security the person cannot be deprived otherwise than in accordance with the principles of fundamental justice. In the case at hand, there is no arbitrary arrest or detention. The inmates were already confined in the institution under the terms of the sentence imposed on them. The Court is satisfied that no breach by the defendants of the plaintiff's life, liberty and security of person occurred.

On the matter of double-bunking constituting cruel and unusual treatment or punishment, the evidence found to be factually and responsively correct led the Court to conclude that the decision to institute and the institution of double-bunking did not breach the provisions of section 12 of the Charter: the defendants did not subject the plaintiffs to any cruel and unusual treatment or punishment.

The application was dismissed.

Frank Robert Piché and al. v. Solicitor General of Canada and al.

This is an Appeal of a decision delivered on November 2, 1984 by Mr. Justice Nitikman on behalf of the Federal Court of Canada. In his judgment, Mr. Justice Nitikman decided that the practice of double-bunking at Stony Mountain Institution did not violate the Charter nor the duty to act fairly. The inmates appealed that decision.

Facts:

On or about June 3, 1982, CSC decided to resort to double-bunking in order to accommodate an overall inmate population in excess of available facilities. On or about August 11, 1982, the Warden of Stony Mountain Institution decided to implement the use of double-bunking in certain general population cells in the institution. Double-bunking was planned for newcomers to the institution, on a compulsory basis, but double-bunked inmates were to move to single cells on a seniority basis as space became available. Installation of double-bunks began in general population cells at Stony Mountain on August 12, 1982. The inmates sought a declaration that the implementation and continuation of double-bunking at Stony Mountain constituted a breach of fairness, natural justice and fundamental justice. They sought a declaration that double-bunking constituted a breach of subsection 5(1) and section 37 of the Penitentiary Service Regulations and violated the inmates' rights to privacy as well as section 7 of the Charter. Furthermore, the inmates sought a permanent injunction restraining and adjourning the Defendant from the use of double-bunking at Stony Mountain. The Federal Court of Canada rejected the inmates' application ruling that the double-bunking did not violate any constitutional right. The inmates appealed that decision to the Federal Court of Appeal of Canada alleging that the practice of double-bunking violates their right to privacy and dignity encompassed in section 7 of the Charter. They further argued that the decision of double-bunking at Stony Mountain had not been taken in conformity with the Duty to Act Fairly.

Issues:

(1) Does section 7 of the Charter protect a right to privacy or dignity? If so, did the practice of double-bunking at Stony Mountain violate section 7 of the Charter?

(2) Had the decision of the Warden to proceed with double-bunking at Stony Mountain Institution to be made accordingly to the duty to act fairly? If yes, was that so done?

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Decision:

(1) For the sake of the inmates' argument, the Court was prepared to assume, without deciding, that section 7 does protect the right of basic privacy and personal dignity. The Court further stated that to be able to successfully argue that the right to privacy and personal dignity was infringed in their case, the inmates would have had to establish that the lowest common denominator, as it were, of privacy and dignity in our society included a one-person - one-room component. The Court found that one-person - one-room is a deep-rooted aspiration of our society but beyond that, without sociological evidence, it could not go. The Court therefore rejected that argument.

(2) The Court found that the decision of double-bunking was a purely policy decision not subject to the duty to act fairly.

The appeal was dismissed.

Allan George Pierce v. The Commissioner of Corrections

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable M. Justice Collier on July 22, 1987.

This is an application for a writ of certiorari quashing a decision of the Commissioner of Corrections to refer the applicant's case to the National Parole Board pursuant to paragraph 15.3(3) of the Parole Act.

FACTS : The applicant was serving a sentence of 18 years and 8 months; his date for release on mandatory supervision was September 24, 1987.

On April 10, 1987, a case conference was held to review the applicant's file to determine whether he should be referred to the National Parole Board pursuant to subsection 15.3(2) of the Parole Act. It was decided not to recommend such referral.

On April 29, 1987, the Institutional Psychologist met with the applicant; he filed a report on May 4, 1987, in which he recommended the referral of the applicant's case to the National Parole Board. In the psychologist's view, his report constituted "new" information since the applicant had always refused psychological and psychiatric assessment prior to April 29. He therefore believed that the said information justified a Commissioner's referral pursuant to subsection 15.3(3)(a) of the Act.

On May 14, 1987, the Regional Director Operations wrote to the Deputy Commissioner of the Pacific Region and recommended a Commissioner's referral of the applicant's case. The Deputy Commissioner then wrote the Commissioner and made the same recommendation, based on the information obtained on April 29, 1987.

The Commissioner referred the applicant's case to the National Parole Board on June 4, 1987.

ISSUE : Whether the Commissioner's referral of the applicant's case to the National Parole Board was valid.

DECISION: The Parole Act provides that referrals for detention review by the National Parole Board can be made either by the Service or by the Commissioner when certain conditions are met. In both cases, such referral must be made not later than six months before the presumptive release date of the inmate. However, that six months period does not apply to Commissioner's referrals, if the decision to refer an inmate's case is based on information obtained after the deadline in question.

It is not for the Court to substitute its opinion for that of the Commissioner as to the existence or non existence of the information on which he based his referral before the six months deadline. The Court could interfere by way of certiorari if there was no evidence at all to support the Commissioner's conclusion that the information was obtained after the expiration of the six months period. In this case however, the psychologist's report constitutes evidence that the information he elicited was not obtained before such deadline.

The application was dismissed.

Obiter: The Court expressed doubts as to the procedure taken by the Service in this case. Referrals by the Service pursuant to subsection 15.3(2) have to be made earlier than in the six months preceeding the presumptive release date. In this case, such presumptive release date being September 24, 1987, the deadline for referral was March 23, 1987. Nevertheless, the case conference was held on April 10, after the prescribed deadline. The Service had no authority to commence a review at that time and a Service referral in these circumstances would have been subject to successful attack. A procedure of the type carried out here should not be used as an alternative route to try and obtain a Commissioner's referral inside the six months period.

Emile Joseph Phillips v. Disciplinary Board of Millhaven Institution (unreported)

This is a judgment of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Jerome, on January 20, 1984 in Toronto.

The applicant seeks relief in the nature of certiorari to quash the decision of the respondents.

FACTS

The applicant is an inmate of Millhaven Institution and was charged on June 26, 1982 with a disciplinary offence contrary to section 39(1) of the Penitentiary Service Regulations. He appeared before the disciplinary court where he entered a plea of not guilty. The hearing was reconvened on July 14, 1982, when the Applicant again raised the matter of his foot infection. (The fact that he could not have been outside in the area when the offence occurred due to a severe infection in his foot).

On the final day of the proceedings, the inmate was convicted of doing an act with intent to escape, contrary to paragraph 39(1) of the Penitentiary Service Regulations

He argues that the disciplinary tribunal failed to act fairly in providing him with a full opportunity to answer and defend himself against the charge.

HELD

The court is of opinion that since the tape of the proceedings which is normally available was blank to some extent and since there was no information available to determine whether the inmate was offered the opportunity to call witnesses in the circumstances, the court is not satisfied that the duty to act fairly towards the inmate had been fulfilled. Therefore the conviction is quashed, and the matter returned to the Disciplinary Board for a new hearing.

Pilon v. Yeomans, The Commissioner of Corrections

This was a judgment of the Federal Court of Canada, Trial Division, rendered by Mr. Justice McNair on April 30, 1984.

The applicants, Marcel Pilon and Donald Tyler brought a motion under section 18 of the Federal Court Act for a writ of certiorari to quash their transfer from Collins Bay Institution to Millhaven Institution, and for a writ of mandamus to compel their return to Collins Bay Institution.

FACTS — Applicants were transfered from Collins Bay Institution a medium security institution to Millhaven Institution, a maximum security penitentiary. The applicants were informed verbally of the reason for their transfer on September 6, 1983 and on September 8, 1983 were given written reasons for the final decision to transfer in keeping with the procedure set out in the Commissioner's Directive in respect of the transfer of inmates. No hearing was held prior to the decision to transfer being made nor was one requested. The applicants contended that the principles of natural justice demanded that in the case of a transfer that the inmates be given a reason for the transfer with enough precision to permit him to respond and that an opportunity to be heard be given prior to the decision being made.

ISSUES — Whether as a matter of fairness and natural justice the applicants were entitled to a hearing prior to being transfered to Millhaven Institution.

Whether the decision to transfer the applicants from a medium security institution to a maximum security institution resulted in some deprivation of liberty and security of the person as well as amounting to arbitrary detention or imprisonment this violating sections 7 and 9 of the **Canadian Charter of Rights and Freedoms.**

HELD — 1) That the decision to transfer an inmate from one institution to another is an administrative one not requiring that a hearing be held in order that the duty to act fairly be complied with.

That the statutory framework in respect of the transfer of inmates does not require that a full scale hearing be held prior to the decision to transfer an inmate.

That the Commissioner's Directive on the transfer of inmates provides a procedural code that was complied with and does not require that a hearing be held.

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2) That the administrative decision to transfer the applicants to a maximum security institution did not amount to a deprivation of the right to life, liberty and security of the person under Section 7 of the **Charter**. Nor was their transfer arbitrary detention within the meaning of section 9 of the **Charter**. That their incarceration brought with it necessarily reasonable limitation on their rights previously enjoyed in a free and democratic society in order to ensure security of the institution. That the guaranteed rights and freedoms under the **Charter** must not be interpreted in an absolute sense dissassociated from section 1 thereof.

ORDER Motion Dismissed.

Arsène Poirier v. The Federal Training Centre

Disciplinary Board et al.

This is an application in which the inmate is requesting that his administrative segregation be ended, and that the decision to transfer him to the Archambault Institution be overturned.

Facts

The applicant, who was serving a first prison term of nine years, was admitted to the Federal Centre under the kitchen program, on April 6, 1988. The kitchen program is advantageous for inmates who have just been incarcerated in the federal prison system, allowing the inmates chosen to serve their sentences in a lower security institution and live in a special unit, in addition to benefiting from special privileges directly related to the program, such as community visits. Inmates who would otherwise have been placed in a higher security institution may be accepted into this program because the participants are closely monitored. After convincing the appropriate selection committee of his interest in the kitchen program and his desire to take part, the applicant was hired for a twenty-four month period, with the understanding that he was to expect to be closely monitored, and that he would remain subject to transfer to an appropriate institution if his performance was not deemed satisfactory.

Because his work performance was considered very disappointing and his institutional behaviour unsatisfactory, given a disciplinary record showing three offenses, including one relating to the consumption of drugs, on November 15, 1988, the applicant received a notice of recommendation for transfer to the Cowansville institution, another medium-security penitentiary. On November 16, 1988, the applicant also received another document, entitled Summary Progress Report, which included the management team's recommendation that the applicant be transferred to the Cowansville Institution. Although the applicant refused to sign the acknowledgment for each of the documents, he wrote to the Regional Director of Transfers on November 16, 1988, to give his reasons against the proposed transfer to Cowansville and express his desire to remain in the regular population at the Federal Training Centre. However, it appears that the regional selection committee was not informed of this letter before its decision of November 22, 1988, to transfer the applicant to the Archambault Institution, a maximum-security penitentiary, for a three-month period. This decision was communicated to the applicant on November 24, 1988.

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Since this involved a transfer from a medium-security institution to a maximum-security institution, the applicant was then put in administrative segregation pending his effective transfer.

Decision

The transfer must be overturned because the duty to act fairly was not respected in the present case. The applicant was misled and was not offered the opportunity to express his views in relation to what was for him truly and reasonably foreseeable. He was informed that he was to be transferred into a medium-security institution, whereas it was actually a transfer to a maximum-security institution that was being considered. The applicant should have been given the opportunity to express his point of view with regard to the transfer from the Federal Training Centre to Archambault. The duty to act fairly simply required that the applicant be clearly informed of the reasons for his possible transfer to the Archambault maximum-security penitentiary prior to the final decision on the matter, and that he be given the opportunity to state in writing his reasons opposing this transfer. This was not done. Instead, the applicant was invited to express his views regarding a transfer other than the one decided upon. The decision regarding the transfer to Archambault must therefore be cancelled, subject to the right of the appropriate authority, if it sees fit, to decide again on the question of transferring the applicant. This time, however, he must be given the requisite prior notice.

The application was granted.

Rolland Poirier v. National Parole Board

This is a decision of the Honourable James K. Hugessen, Associate Chief Justice of the Superior Court of Quebec, rendered on December 18, 1981.

Facts:

The applicant, Poirier, benefitted from parole. His parole officer was invited by the police to listen to certain telephone conversations of Poirier, obtained by a wiretap, which had been authorized under section 178.13 of the Code.

Acting on these conversations, the parole officer formed the opinion that Poirier was involved in criminal activities, made a report to that effect to his superior, an Office Director of the National Parole Service, who signed a suspension warrant.

The parole officer then informed Poirier of the reasons for the suspension. Poirier requested a hearing before the Board. The officer prepared a second report, more detailed than that which he had made to his immediate superior, the Office Director. At the hearing, the Board examined both reports, questioned Poirier on their contents and decided to revoke his parole.

Issues:

Poirier ~~seeked~~ sought to obtain redress by way of a writ of habeas corpus. The writ was first issued, but on its return, it was cancelled and the application was dismissed on the merits. Poirier invoked three gounds for his application:

- The lack of authority of the Office Director to sign the suspension warrant.
- The intercepted conversations were inadmissible evidence to the Board.
- The Board did not respect its duty to act fairly in that:

  a) It did not inform Poirier of the facts which it relied upon to justify the revocation of his parole, and therefore he was not able to respond adequately to the things said against him.

b) It was not justified in relying on the report of the parole officer and it should have conducted its own inquiries and listened to the intercepted conversations.

Held:

1. The Court held that since the revocation was undoubtedly valid, it did not have to decide on the question of the validity of the suspension warrant signed by the Office Director. Since suspension is not a condition precedent to revocation, it follows that the authority of the person who decided the first is no longer relevant once the second is decreed.

However, Mr. Justice Hugessen expressed doubts as to the validity of the suspension warrant, these doubts being based essentially on the questionable delegation to the director of the authority to suspend parole. Section 16 of the *Parole Act* permits the Chairman of the Board to designate persons having authority to suspend parole. In fact, what happened was that the Board purported to designate, by virtue of section 16, all the "Directors of Office of the National Parole Service", without specifying the name of any director personally.

2. The applicant alleges that disclosure of the communications to the parole officer is not covered by one of the exceptions to the principle set out in 178.20 Cr.C. that intercepted communications may not be disclosed. It is not necessary to make a ruling on this question as the non-disclosure rule set out at section 178.20 of the Code carries its own sanction (imprisonment) and that it does not involve the question of admissibility to the Board of the (wiretap) evidence disclosed to it.

3. (a) As a matter of law, it is now well established that the nature of the duty to act fairly varies according to the circumstances of each case.

Although Poirier never received copies of the two reports prepared by the parole officer, he was advised of their substance both before and during the hearing. The Board members listened to him and decided to revoke his parole. In the Court's opinion, the Board did not fail its duty.

3. (b) According to section 16(4) of the Act, it is the Board's duty to "review and cause to be conducted all inquiries relevant to it as it considers necessary". In the present case, the Board relied on the report of the parole officer, in whom it had confidence; the Board asked him questions on its contents and gave Poirier a chance to respond. It is not required to go further.

It should be noted that Mr. Justice Hugessen said, in passing, that it is extremely regrettable that the Board has not decided to record its hearings. In the absence of such a recording, the Court is forced to base its judgement on its evaluation of the evidence of witnesses, which could very well be contradictory, and there is always the chance of a mistake.

Daniel Pruneau v. Pierre Goulem, in his capacity as Director of the Special Handling Unit, et al.

Judgment by the Honourable Mr. Justice Bergeron of the Criminal Chambers of the Superior Court of Quebec, rendered on November 14, 1986.

It involves an application for a Writ of Habeas Corpus and ancillary Certiorari to overturn the applicant's transfer from Archambault Institution to Ste-Anne-des-Plaines Institution's Special Handling Unit.

The reasons given in the decision handed down the same day in the case of Claude Dubois apply to this case, with adaptation of circumstances.

Daniel Pruneau v. Pierre Goulem et al.

Judgment of the Criminal Chambers of the Superior Court of Québec, rendered by the Honourable Mr. Justice Pinard on October 28, 1987.

This is an application for a writ of habeas corpus and ancillary certiorari to quash the decision to transfer the applicant to New Brunswick, hold his detention in administrative segregation to be unlawful and order his return to the regular population.

FACTS : The applicant has been in custody since June 1981, when he was sentenced to twenty-two years' imprisonment for robbery. In autumn 1987 he was convicted of further offences.

On October 20, 1987, he was placed in administrative segregation at the Regional Reception Centre in Ste-Anne-des-Plaines, for the sake of the good order of the institution, pending the decision of the Regional Selection Board on whether or not to transfer him to a maximum-security institution.

The following day, the applicant was notified of his transfer to Renous, New-Brunswick. The reasons given for the decision were his implication in the strike at Archambault Institution in September and October 1986 and the conditions in maximum-security institutions in Québec.

The applicant is contesting, on one hand, the decision to keep him in administrative segregation and, on the other, the decision to transfer him to New-Brunswick.

ISSUE : Whether these two decisons are invalid and reviewable by means of habeas corpus.

DECISION: As for the decision to keep him in administrative segregation, the applicant alleges that the Director of the institution acted in bad faith. It appears from the Penitentiary Service Regulations that the Director has a duty, when receiving an inmate, to classify him in accordance

with the danger risk criteria evident from his file. There is nothing in the applicant's affidavit that would lead one to conclude that that decision was unlawful, malicious or unreasonable. Furthermore, the applicant did not take the opportunity offered to him to explain his views on the decision. The principles of natural justice have been served and since the applicant's detention in administrative segregation does not appear to be either unlawful or illegal, there is no call to issue the writ sought with regards to that decision.

The decision to transfer the applicant to New Brunswick will not be implemented until the case has been reviewed by the Classification Board, at which time the applicant can make his views known. Apprehension about a transfer does not constitute a form of detention. Habeas corpus is an extraordinary remedy, applicable only in instances of actual detention, hence not for reviewing the second decision contested by the applicant.

The application was dismissed.

DANIEL PRUNEAU v. PIERRE GOULEM ET AL.

Judgment of the Trial Division of the Federal Court of Canada rendered by The Honourable Mr. Justice Pinard on March 9, 1988.

This case concerns an application for the issuance of a writ of certiorari with a view to quashing the decision to transfer the applicant from the Quebec Regional Reception Centre to a maximum-security penitentiary in New Brunswick.

FACTS: The applicant had been confined since June 1981 after being sentenced to twenty years in penitentiary for robbery. In the fall of 1987, he was further sentenced for other offences. On October 20, 1987, the applicant was transferred from the maximum-security penitentiary in Edmonton to the Regional Reception Centre, another maximum-security institution in Quebec.

On October 21, 1987, the applicant received a notification of his recommended transfer to a maximum-security penitentiary in New Brunswick. Subsequently, the applicant received his summary case progress report, and later the same day, he sent his letter contesting the recommended transfer to the Director of the Centre. The Director decided to uphold the recommendation and notified the applicant thereof by letter. The applicant acknowledged receipt of this letter and indicated his disagreement.

The Director sent the whole record to the Deputy Commissioner of the Quebec Region so that he could study it in order to determine whether, in his opinion, the applicant ought to be transferred outside the Quebec Region. After consulting with the Directors of the other two maximum-security institutions in Quebec, the Acting Regional Deputy Commissioner decided to order the interregional transfer. The reasons for the Acting Deputy Commissioner's decision were set out in a letter sent to the applicant.

DECISION: The decision attacked by the applicant is a purely administrative one and there is no doubt that a decision of this nature is fully subject to judicial review, its validity in law depending on jurisdictional as well as procedural conditions. Before considering these conditions as they pertain to this case, it is important to bear in mind that in a penitentiary context, there must be a serious injustice to justify the intervention of the Court against an administrative decision.

From the jurisdictional standpoint, the question to be considered is whether the decision is made by a duly empowered authority who is acting without abusing his power, ie in good faith, with objectivity, for the considerations and according to the provisions that the law may have defined. In this case, these conditions were met. The Acting Director was the duly empowered authority to decide pursuant to section 13 of the Penitentiary Act. It can be deduced on reading this section that the power to order an interregional transfer may be exercised by any officer acting under the orders of the Commissioner of Penitentiaries. These orders of the Commissioner are found in paragraph 4 of Commissioner's Directive #540 which provides that the power to authorize interregional transfers is delegated notably to the Deputy Commissioner of a region. In addition, although the Deputy Commissioner was only in an acting capacity, section 13 of the Interpretation Act provides that "Words directing or empowering any other public officer to do any act or thing, or otherwise applying to him by his name of office, include his successors in the office and his or their deputy". The Acting Deputy Commissioner was therefore empowered to order the transfer.

Moreover, the said decision was not arbitrary. The case management officers expressed the opinion that there was no appropriate maximum-security penitentiary in Quebec to receive the applicant. According to them, the Archambault and Donnacona Penitentiaries were not acceptable because of the major role the applicant had played in the inmates' strike in 1986, because other participants in the strike were in these institutions and because the guards had a negative attitude toward the applicant.

Furthermore, from the procedural standpoint, the administrative authority discharged his duty to act fairly. Lastly, there was no injury to the applicant's rights and interests guaranteed in sections 9 and 12 of the Canadian Charter of Rights and Freedoms.

THE APPLICATION WAS DISMISSED.

Raby, Desrochers, Lauzon and Gauvreau v. Her Majesty the Queen

This is a judgement of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Marceau on May 29, 1981 in Ottawa.

This is an action in damages against the Crown by the plaintiffs.

Facts

The plaintiffs, Raby, Desrochers, Lauzon and Gauvreau, were teachers under contract working at Archambault Penitentiary, a maximum security institution where high school level classes were given to the inmates who wished to attend.

On July 20, 1978, the plaintiffs were the victims of a hostage-taking by two inmates who were not students of the class. They brought an action for damages under the *Crown Liability Act* alleging negligence against the Head of the penitentiary for failing to provide adequate security measures.

Issue

The question to be determined was whether or not they had established the defendant's negligence which is an essential element of a finding of liability.

Even though a report had been submitted by an internal committee to the Director, after the hostage-taking, recommending improvements to the security system, the court felt that it did not mean that the security measures on July 20, 1978 were deficient, unreasonable or imprudent. Furthermore, it was the opinion of the court that the committee's recommendations could not have prevented the unfortunate incident.

And because the plaintiffs failed to prove any negligence on the part of the Head of the Institution, the action was dismissed.

Reddekopp v. the Queen

This is a judgement of the Ontario Supreme Court, rendered by Mr, Justice Henry, on May 27, 1983.

This is an application for bail during the course of an application for habeas corpus ad subjiciendum.

FACTS: Accused was granted a conditional pardon in respect of a sentence of life imprisonment and was subsequently arrested on the grounds that due to breaches of conditions, the pardon had terminated. There was an application for habeas corpus. The writ was issued and the case was adjourned for argument on the main issue. The accused applied for release on bail pending the determination of the issue.

ISSUE: After a writ of habeas corpus is issued, but before the determination of the lawfulness of detention, does the court have jurisdiction to grant bail to the accused.

HELD: Application granted.
If in the course of determining the main issue on a writ of habeas corpus it is necessary to adjourn the proceedings, the Court may, in its inherent jurisdiction (having now assumed charge of the accused until the main issue is determined) permit the accused to be released on bail pending the hearing. The alleged breach of conditions involve neither violence nor threat of harm to any person, nor a disposition to escape. The onus is on the Crown to show that the accused ought not to be at liberty. That onus was not satisfied in this case. The fact that the Crown believes the accused has breached the terms of his pardon is a matter which has yet to be proved at the hearing of the main issue.

NOTE: Reddekopp was released on habeas corpus on June 30, 1983 subject to his original conditional pardon. Mr. Justice Henry, in a decision with written reasons to follow (reasons which have not yet been received) ruled that Reddekopp had not violated the conditions of his pardon and his detention must therefore cease.

Reynolds v. Attorney-General of British Columbia

Judgment of the Supreme Court of British Columbia rendered by Mr. Justice MacDonell, on December 23, 1982.

This is an application by the petitioner for a declaration that section 3(1)(b) of the *Election Act*, R.S.B.C. 1979, c. 103, is invalid on the ground that it is inconsistent with the *Canadian Charter of Rights and Freedoms*.

Facts

The petitioner, on indictment, was convicted of causing bodily harm with intent to wound. On September 8th, 1980, he was sentenced to 18 months' imprisonment, plus 2 years' probation following that imprisonment. He served his term of imprisonment and at the time the petition was brought he was on probation. The petitioner wanted to vote and run as a candidate in the next provincial election, but he was advised by the Vancouver Registrar of Voters that because he had been convicted of an indictable offence and was presently on probation, he was disqualified from voting by virtue of section 3(1)(b) of the *Election Act*. The petitioner contends that section 3(1)(b) is invalid because it violates his democratic rights guaranteed under section 3 of the *Canadian Charter of Rights and Freedoms*.

Issue

Is section 3(1)(b) of the *Election Act* invalid because it violates the petitioner's rights guaranteed under section 3 of the Charter?

Held

The prohibition against the petitioner's voting in section 3(1)(b) is in conflict with the Charter. The Attorney-General had not demonstrated that there was any public benefit for prohibiting a person not in custody, but while on probation, from being registered as a voter or from voting in a provincial election. The court compared the *Election Act* with provisions in other provinces and in the applicable federal act and found that persons on probation in the other jurisdictions were permitted to vote.

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Comments

Mr. Justice MacDonell further stated that prohibitions against prisoners voting were reasonable and justified in a free and democratic society. He pointed out that all other jurisdictions in Canada, with the exception of Quebec, prohibited prisoners from voting.

DECLARATIONS

1. The petitioner is not disqualified from voting because he has been convicted of an indictable offence and is presently on probation.

2. Section 3(1)(b) of the *Election Act*, R.S.B.C. 1979, c.103, is inconsistent with the provisions of the Charter and is, to the extent that it prohibits persons serving a term of probation from voting, of no force or effect.

PETER ROBERT RIBARIC v. NATIONAL PAROLE BOARD ET AL.

Judgment of the Saskatchewan Court of the Queen's Bench, rendered by the Honourable M. Justice Halvorson on September 24, 1986.

This was an application for a writ of habeas corpus challenging the decision to transfer the applicant from the Correctional Centre for Men at Saskatoon to Drumheller Institution pending his trial, and alleging deprivation of his right to counsel.

FACTS

On April 26, 1986, the applicant was granted release on mandatory supervision with regards to sentences imposed in 1982.

On July 17, 1986, he was arrested and charged with various offences. The applicant contends that after having been remanded to the Correctional Centre for Men in Saskatoon, he was brought, without benefit of legal counsel, before a Magistrate of the Saskatchewan Provincial Court who ordered, at the request of the Crown Prosecutor present, that he be remanded in custody to Drumheller Institution. The affidavit filed on behalf of the respondents points out that the applicant was conveyed to Drumheller Institution after the execution of the Warrant of Apprehension.

In any event, the applicant alleges that his removal to Drumheller Institution was improper and contrary to the Canadian Charter of Rights and Freedoms.

ISSUE

As presented by the applicant, the issue involves the deprivation of his constitutional right to instruct counsel. However, the true issue before the Court became one of jurisdiction to grant the application.

DECISION

The decision of transferring the applicant to the Drumheller Institution is an administrative act. Administrative decisions of this nature are to be attacked in the Federal Court of Canada by way of mandamus. An exception to this is that habeas corpus is available in a Provincial Court of the Queen's Bench where the act of the officer deprives the subject of his liberty. This exception does not apply to this case, since the complaint does not regard deprivation of liberty but rather deprivation of his right to instruct counsel. Accordingly, the Court has no jurisdiction to grant the application.

The application was dismissed.

Rideout v. Minor Offence Court of Joyceville Institution and Al.

(unreported)

This is an order by the Federal Court of Canada, Trial Division, upon the application that a writ of certiorari be issued quashing the decision of the Respondents, and upon the consent of both the applicant and the respondent.

The order was rendered on June 14, 1984.

FACTS — The applicant is an inmate at Joyceville Institution. On June 6, 1983, he was found guilty by the respondent of the disciplinary offence of being indecent or disrespectful in his language towards another person, contrary to section 39 (g) of the Penitentiary Service Regulations and was awarded punishment in the form of a loss of privileges for a period of ten days.

Applicant alleges that during the disciplinary hearing, he was not afforded an opportunity to call witnesses, that the respondent did not fairly listen to both sides and did not adequately consider his arguments and that therefore, the respondents breached their duty to act fairly.

HELD — The respondents breached the duty to act fairly to which they were subject, in that they did not afford to the applicant the opportunity to call witnesses during the hearing.

Application granted and decision quashed.

It should be noted that the second and third grounds raised by the applicant were not considered.

Roach v. National Parole Board and Director of Mission Institution

This is a judgement of Mr. Justice Fawcus of the Supreme Court of British Columbia. Judgement rendered November 27, 1981.

Petitioner sought released from Mission Institution by way of a writ of habeas corpus.

Facts:

Petitioner was released on mandatory supervision. A warrant of apprehension and suspension of mandatory supervision was executed on July 8, 1981.

The Parole Board failed to comply with paragraph 20(2) of the *Parole Regulations*. This paragraph requires that the Board inform the inmate of the date of the post-suspension hearing at least 14 days before the hearing.

Issue:

What is the effect of the Board's failure to comply with paragraph 29(2)(b) of the *Parole Regulations?*

Held:

Paragraph 20(2)(b) is mandatory. Compliance with this section is a condition precedent to the Board having jurisdiction to decide the issue of revocation. The Board, having failed to satisfy the condition precedent, was without jurisdiction to make a revocation order. Therefore, the order is a nullity. Furthermore, the warrant of apprehension and suspension lapsed, when the Board purported to deal with the petitioner pursuant to sections 16 and 20 of the *Parole Act*. The revocation of mandatory supervision was a nullity and the suspension of mandatory supervision had lapsed. Therefore, the inmate was entitled to be released on mandatory supervision.

A notice of appeal was filed in this matter on December 10, 1981.

James Morton Roach v. The Director of Kent Institution

This is a judgement of the Honourable Mr. Justice Spencer (in chambers) of the Supreme Court of British Columbia rendered on November 4th, 1982.

An inmate brought a petition for habeas corpus with certiorari in aid in order to obtain his release from incarceration at Kent Institution.

FACTS: On June 24, 1977 the petitioner plead guilty and was convicted on three offences, the first of armed robbery and the second and third of trafficking heroin. On the first offence he was given a suspended sentence for 2 years. On the second and third offences he was given one day's imprisonment for each offence to be served concurrently.

The Crown appealed and on January 5, 1978 the above sentences were varied. The first sentence was increased to 5 years' imprisonment and the second and third were both increased to 2 years' imprisonment, all three sentences to be served concurrently.

ISSUE: Should the petitioner obtain credit against the five year sentence for the time he spent on probation on the first offence between June 24th, 1977 and January 5th, 1978 ?

HELD: Petition dismissed.

(1) Section 601 of the *Criminal Code* includes "suspended sentence" within the definition of "sentence" for the purposes of Part XVIII so that there is provision for appeal from it. It is not included in the definition for purposes of Part XX in which section 649(3) lies. As a result the petitioner was not in custody under "suspended sentence" for the purposes of section 649(3) on June 24th, 1977. Section 649(3) provides that where imprisonment is imposed by the court appealed to, it commences when the convicted person is "arrested and taken into custody under the sentence". In this case the petitioner was not taken into custody until January 5th, 1978.

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(2) Also a prisoner is not entitled to credit for time spent in custody unless pursuant to some enactment that permits it (eg. the *Parole Act*) . In this case there is no such applicable enactment.

(3) Petitioner is to be given credit for the one day he spent in custody on the other two convictions on June 24th, 1977. The sentence is to be treated as one which "shall be deemed to be resumed" when the petitioner was taken into custody on January 5th, 1978.

James Morton Roach v. The Director of Kent Institution

Judgement of the British Columbia Court of Appeal rendered by the Honourable Chief Justice Nemetz, the Honourable Mr. Justice Seaton and the Honourable Mr. Justice Craig on February 28th, 1983.

The appellant appealed from the dismissal of his application for habeas corpus with certiorari in aid by Berger, J.

Facts:

The appellant, an inmate at Kent Institution, was convicted of armed robbery and two charges of trafficking heroin on June 24th, 1977, and was given a two year suspended sentence on the former charge and a one day concurrent sentence on each of the latter charges. On January 5th, 1978, the Crown's appeal was allowed and the appellant was given a 4 year sentence on the armed robbery charge and the sentence on the two drug charges was increased to 2 years. The sentences were to be served concurrently. On November 28th, 1981 the appellant was released on mandatory supervision, which was suspended on April 28th, 1982 pursuant to s. 16(1) of the *Parole Act*. On July 6, 1982, the appellant's mandatory supervision was revoked by the National Parole Board pursuant to s. 10(1)(e) of the Act. The appellant was apprehended pursuant to a warrant under s. 18 of the Act on October 18th, 1982.

Issues:

(1) Is strict compliance with the review procedure in s. 16 (3) of the *Parole Act* a condition precedent to the exercise of the Parole Board's jurisdiction to revoke parole under s. 10(1)(e) ?

(2) Was the suspension made on April 28, 1982, invalid because of a failure to hold a review within 14 days as provided for in s. 16(3)?

Held:

(1) (Craig & Nemetz)

Strict compliance with the review procedure under s. 16(3) is not a condition precedent to the Board's exercising jurisdiction under s. 10(1)(e).

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(Seaton)

As the appellant's sentence had not expired when his parole was revoked, the proceedings under s. 16 were not necessary to the Board's power. The Board could therefore exercise the power given to it in the first part of s. 10(1)(e) to revoke the parole of any paroled inmate. However, where a person's sentence has expired, under the second part of s. 10(1)(e) that person's parole can only be revoked pursuant to a s. 16 warrant and therefore s. 16 must be complied with.

(2) (Craig, Nemetz)

The suspension made on April 28th, 1982 was not invalid under s. 16(3). The 14 days, provided for in s. 16(3) run from the date of recommitment which is the date that the paroled inmate is returned to custody pursuant to a warrant of suspension.

ORDER

APPEAL DISMISSED

William Faulder Robertson v. Donald Yeomans & John Dowsett and the Canadian Correctional Service

Judgement of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Collier on August 20, 1980 in Vancouver, B.C.

Plaintiff seeks relief by a motion for an interlocutory injunction restraining defendants from searching the body of the plaintiff except in accordance with s. 41(12)(c) of the *Penitentiary Service Regulations*.

Order:

1- The motion is dismissed

2- The plaintiff has leave to apply to the Court, on twenty-four hour notice to the defendants, for directions in respect of setting a timetable for the completion of pre-trial proceedings in this action, and the obtaining of an early trial date.

REF: Gunn

ROBERTSON v. YEOMANS AND DOWSETT

Judgement of the Federal Court of Canada (Trial Division) rendered by Mr. Justice Gibson on March 6, 1981.

The plaintiff claims:

a) A declaration that any C.D.'s or other subordinate orders inconsistent with the provisions of section 41(2) of the *Penitentiary Service Regulations* are unlawful to the extent of such inconsistency.

b) A declaration that any searches of his person on or before June 19, 1980 were unlawful to the extent that they were not in compliance with section 41(2) in force up to that time.

c) A declaration that section 41(2)(c) that came into force on June 19, 1980 continues to require a member, before searching, to have reason to believe that the plaintiff is in possession of contraband in order for such action to be reasonable to detect the presence of contraband, or reason to believe that it is necessary to conduct such a search in the circumstances of each case in relation to the plaintiff for the good order of the institution.

d) A declaration that any searches of the plaintiff's person or orders requiring searches of the plaintiff's person since June 19, 1980 are or were lawful to the extent that such searches were conducted or ordered to be conducted on a regular, routine and arbitrary basis in the absence of specific reasons therefor in relation to the plaintiff as an individual.

e) A permanent injunction restraining the defendants, their servants, agents or employees from conducting, by order or otherwise, any further searches of the plaintiff's person except in accordance with section 41(2)(c) of the *Penitentiary Service Regulations*.

FACTS: The Warden of Kent Institution caused Standing Orders to be issued and directed that there be skin frisks of inmates after open visits. The Warden testified that in his opinion, after open visits there is always reasonable and probable grounds for believing that contraband will enter an institution such as Kent Institution unless some preventive measures such as skin frisks are taken, and that it is impossible to be selective as to which inmates should be skin frisked. Therefore, skin frisks are done on a routine basis after all open visits.

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ISSUES: Are those routine skin frisks lawful?

Yes, since June 20, 1980. There is no basis for the submission that section 41(2) is *ultra vires* based on the point of lack of reasonable and probable grounds for believing, on the part of the member of the Penitentiary Services at the time skin frisks are ordered, that such skin searches are necessary to detect the presence of contraband or to maintain the good order of Kent Institution.

Were the skin frisks conducted prior to June 20, 1980 unlawful?

Any declaration in respect of what took place prior to June 20, 1980 would be of no material importance.

RE: Gunn v. Yeomans; trial division
Gunn v. Yeomans; appeal
Robertson v. Yeomans; interlocutory injunction

WILLIAM FAULDER ROBERTSON v. THE QUEEN
AND THE DIRECTOR OF KENT INSTITUTION

Judgement of the Supreme Court of British Columbia rendered by Mr. Justice Hinds on May 27, 1982.

This is an application for habeas corpus, without certiorari in aid.

Facts:

The petitioner and nine others were convicted on the 30th day of May, 1979, of conspiring at Vancouver to traffic in cocaine. The appeal of the petitioner was dismissed by the British Columbia Court of Appeal on June 19, 1980. Leave to appeal was refused by the Supreme Court of Canada.

The application is founded upon an allegation challenging the jurisdiction of the learned trial judge. Approximately 66 days into the trial, the presiding judge ruled that certain allegations made by the Crown Counsel in his opening speech to the jury were essential elements of the indictment and he charged the jury in accordance with that ruling thus expanding the original indictment. It was therefore argued that the applicant was not tried and convicted on the original indictment, but on one expanded to include what the learned trial judge had ruled essential elements, and that as in R. v. Bengert (one of the co-accused) the presiding judge had erred in treating allegations contained in the opening address of Crown Counsel as essential elements of the indictment.

Issues:

A) On an application for habeas corpus, without certiorari in aid thereof, can a Court look at the evidence, by way of affidavit or otherwise, to ascertain what transpired at the hearing or trial which resulted in the detention of the subject?

   1. Where habeas corpus is sought with respect to an order of a superior court and the application is based upon the validity of the process on its face, affidavit evidence cannot be considered in determining whether or not relief in the nature of habeas corpus may be granted;

   2. Where habeas corpus is sought with respect to an order of a superior court and the application is based upon a total absence of initial jurisdiction of the superior court to have made the order which resulted in the

detention of the applicant, affidavit evidence may be considered on the application for habeas corpus and, in such circumstances, relief in the nature of habeas corpus may be granted;

3. Where habeas corpus is sought with respect to an order of a superior court and the application is based upon a loss of jurisdiction, or a subsequent lack of jurisdiction, of a court which had initial jurisdiction to make the order which resulted in the detention of the applicant, affidavit evidence cannot be considered on the application for habeas corpus and, unless the process is invalid on its face, relief in the nature of habeas corpus cannot be granted.

This application falls into the third category set forth above. The petition does not allege invalidity appearing on the face of the process; it does not allege total absence of initial jurisdiction. It alleges loss of jurisdiction, or absence of jurisdiction, during the course of the trial. Accordingly, I am unable to consider the content of the affidavit filed in support of the application, and I am unable to grant the application and the relief sought therein.

B) By expanding the indictment as aforesaid, did the trial court lose jurisdiction or did it exceed its jurisdiction during the course of the proceedings?

It cannot be questioned that the Court had initial jurisdiction to try the applicant and the other co-accused on the indictment of conspirary to traffic cocaine. Once a court has jurisdiction over the offence and the person charged, an error committed during the course of the trial such as on a ruling on the admissibility of evidence or on the content of a charge to the jury, does not normally affect the jurisdiction of the Court to complete the trial. In my view, the error found by the British Columbia Court of Appeal to have been committed by the learned trial judge in the lengthy trial of the applicant and the co-accused was an error made by him in the course of the trial which did not affect his jurisdiction to complete the trial.

Application dismissed.

Rondeau v. Québec Parole Board & Attorney General of Québec

Judgment of the Superior Court of Québec rendered by the Honourable Mr. Justice Carrier Fortin on November 13, 1979 in Bedford.

This is an application for a writ of Habeas Corpus with evocation in aid.

Facts:

On June 11, 1969, applicant was convicted to a term of 6 months of imprisonment.
On August 30, 1979, he was granted parole.

On September 10, 1979, the Québec Court of Appeal increased his sentence to two years.

On October 4, 1979, he was advised that his parole had been revoked.

On October 19, 1979, he applied to have his case revised.

On October 2, 1979, a warrant of committal ordered his incarceration in a penitentiary for a period of two years.

Issues:

Did the Québec Parole Board have the right to suspend and revoke the plaintiff's parole for the reason that his sentence had been increased pursuant to an appeal procedure?

The judgment of the Court of Appeal, increasing the sentence, replaces the Superior Court decision. It is this judgment that we must consider to see if the Board had jurisdiction to revoke the parole or not.

Since the plaintiff, after the appeal, was no longer entitled to Parole, the Board did not have to have any other reason but the Court of Appeal judgment, to revoke the parole. The appeal decision gave it jurisdiction.

The application is dismissed.

Russell and Semmens v. Radley

This was a decision of the Federal Court of Canada - Trial Division rendered by the Honourable Mr. Justice Muldoon on January 23, 1984.

The Applicants sought an order in the nature of prohibition restraining Peter Radley, the Chairman of the Disciplinary Court at Collins Bay Institution, from continuing with the hearings or either of them, pending before him in regard to each of the Applicants.

FACTS: The charges against the Applicant Russell were: possession of contraband (ss. 39(i) of the PSR's) and that he did an act calculated to prejudice the good order of the institution (ss. 39(k) of the said Regulations). The charges against Applicant Semmens were: that he failed to work to the best of his ability (ss. 39(c) of the PSR's); and that he did an act calculated to prejudice the discipline and good order of the institution (ss. 39(k) of the said Regulations).

Russell appeared before the Disciplinary Court on June 15, 1983, and he was granted an adjournment so that he could consult a lawyer. On July 6, 1983 Russell appeared before the Court and pled not guilty to the charge under ss. 39(i), but raised the question of the Chairman's independence and impartiality. The Chairman adjourned the proceedings on the basis that there was a pending application before the Federal Court of Canada with regard to the independence of Roy B. Conacher, another Chairman.

On July 27, 1983 Russell appeared again with regard to the charge under ss. 39(k). These proceedings were also adjourned because of the pending application concerning Conacher.

On August 24, 1983 Semmens appeared before the Disciplinary Court and was granted an adjournment so that he could seek legal advice. On September 7, 1983 Semmens again appeared before the Court and his case was adjourned pending the resolution of the application concerning Conacher, because he also raised the issue of the Chairman's independence. When Semmens' name appeared on the list on September 28, 1983 his case was adjourned for the same reason. Semmens' name also appeared on the list on October 19, 1983, but as the Chairman had been served with the Federal Court of Canada documents that morning, he did not hear Semmens' case.

The application concerning the independence of Conacher was withdrawn by the Attorney General of Canada on August 10, 1983, but the Chairman stated that he was not informed of the withdrawal until approximately the middle of September, 1983.

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ISSUES:

1. Was s. 11 of the Charter engaged by the circumstances and issues of law raised by these proceedings?

2. Was the Chairman an independent and impartial tribunal within the meaning of ss.11(d) of the Charter?

3. If the proceedings were allowed to proceed would the Applicants, or either of them, be deprived of the right to liberty or the right to security of the person in accordance with the principles of fundamental justice as set out in s. 7 of the Charter?

4. By delaying the Applicants' hearings as regards to each of the four charges, did the Chairman deny the Applicants the right to be tried within a reasonable time, pursuant to ss.11(b) of the Charter, or in the alternative, did the said delay constitute a breach of the common law duty of fairness?

HELD:

1. Was section 11 of the Charter engaged by the circumstances and issues of law raised in these proceedings?

Section 11 is not limited in application to only offences which are dealt with by a court with jurisdiction to hear an indictable or summary conviction offence. "Offence" in s. 11 means conduct defined and prohibited by law, which, if found beyond a reasonable doubt to have been committed in fact, is punishable by fine, imprisonment or other penalty imposed according to law upon the offender. By this standard, a disciplinary offence defined in the Penitentiary Service Regulations is an offence within the meaning of s.11 of the Charter.

2. Was the Chairman an independent and impartial tribunal within the meaning of ss.11(d) of the Charter?

(a) The hearing must be fair, but it does not need to be public because it is held in a prison setting from which the public is normally excluded.

(b) The fact that ss.38.1(2)(b) of the Penitentiary Service Regulations obliges the Chairman to consult, in the presence of the accused inmate, with two officers designated by the institutional head does not make the composition of the disciplinary tribunal inherently unfair. The two officers do not make the determination of guilt or otherwise. The Charter requirement of a fair hearing is therefore not contravened by ss.38.1(2)(b).

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(c) The Chairman must be found to be impartial because the Applicants made no allegations that he was partial or had any personal bias.

(d) As the Chairman is an independent member of the Bar and is not associated with the Correctional Service of Canada, he is independent within the meaning of ss.11(d) of the Charter. As the disciplinary court is an administrative tribunal, performing an administrative function, it is not required by any standard to evince the plenitude of independence possessed by the courts.

(e) As constituted, this administrative tribunal raised no reasonable apprehension in the minds of informed persons, viewing the matter realistically and practically, having thought it through, about the independence of the Chairman, and others in his position. The Chairman was therefore independent and impartial.

3. Applicability of s.7 of the Charter.

Having been convicted of the offences for which they were sentenced, the Applicants had already and justifiably forfeited their rights to liberty guaranteed by s.7. However, they are not to be deprived of such liberty as is accorded to the general inmate population, except in accordance with the principles of fundamental justice, unless such deprivation can be demonstrably justified in a free and democratic society. The proper, unbiased conduct of the prison disciplinary process evinces nothing inherently in conflict with the principles of fundamental justice.

4. Were the Applicants denied their rights to be tried within a reasonable time, as protected by ss.11(b) of the Charter, because their hearings were delayed?

A reasonable time in regard to the trial of disciplinary offences will inevitably be of short duration in most instances because everyone essential to the proceedings, except the Chairman of the disciplinary court, either works at the institution or is imprisoned there. In the special circumstances of this case the Applicants were not tried within a reasonable time and by adjourning their hearings sine die the Chairman unintentionally made it impossible to do so.

DECISION: Pursuant to ss.24(1) of the Charter the Applicants were granted orders in the nature of prohibition to prevent the Chairman and any other person authorized by law to conduct a hearing on the charges against the Applicants, from conducting hearings on those charges.

Robert Walter Sango v. The National Parole Board

Judgment of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Muldoon on October 11, 1983.

The applicant seeks an order prohibiting the respondent from continuing a hearing for the purpose of deciding whether or not to revoke his mandatory supervision, and an order prohibiting revocation of his mandatory supervision without a hearing.

FACTS: The applicant is an inmate in Stoney Mountain Institution. He was released on mandatory supervision during which period he committed additional offences which led to the suspension of his mandatory supervision. Subsequently, the suspension was cancelled. The applicant then pleaded guilty to the above referred offences and a consecutive sentence of imprisonment was imposed. He was then told his mandatory supervision would probably be revoked and he now claims that pursuant to subsection 15(4) of the *Parole Act* the Board has no jurisdiction to deal with or revoke his mandatory supervision which must resume only after his consecutive sentence has been served.

ISSUE: Whether the respondent has jurisdiction to purport to deal with and revoke the applicant's mandatory supervision.

HELD: The Court refers to Greenberg v. NPB. Section 10 (1)(e) gives the Board power to revoke parole while section 16 gives it the power to suspend parole, and after such suspension to consider possible revocation. An order to revoke parole is not void for the sole reason that it was not preceded by a valid suspension. Furthermore, when the Board decides to suspend or revoke parole, it exercises a purely administrative function and is therefore not prevented from reconsidering its decision as judicial and quasi-judicial authorities are.

No actual or apprehended acting without or in excess of jurisdiction in purporting to deal with the applicant's mandatory supervision nor any lack of jurisdiction to revoke it lies here; the application is denied.

Richard Sauvé v. The Attorney General of Canada et al

This is a case where the Plaintiff sought a declaration from the Supreme Court of Ontario to the effect that paragraph 14(4)(e) of the Canada Elections Act was unconstitutional. The case was heard before the Supreme Court of Ontario during the week of September 12, 1988.

Facts:

The inmate Sauvé who was incarcerated in a penitentiary challenged the provision of paragraph 14(4)(e) of the Canada Elections Act which prevents a person undergoing punishment as an inmate in a penal institution for the commission of an offence from voting.

Issues:

1. Does paragraph 14(4)(e) of the Canada Elections Act violate section 3 of the Canadian Charter of Rights and Freedoms?

2. If paragraph 14(4)(e) of the Canada Elections Act contravenes the Charter, does that constitute a reasonable limit prescribed by law which is justified in a free and democratic society?

Decision:

Mme Justice Van Camp on November 7, 1988 held that "the disqualification of inmates in any penal institution contravened section 3 of the Charter but was constitutional because it was a reasonable limit, demonstrably justified in a free and democratic society."

The action was rejected.

SAVARD v. MORRISSON ET AL.

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable Justice Reed. (An order was rendered from the bench on March 20, 1986, while written reasons were issued on March 25.)

This is an application for a writ of prohibition preventing the respondents from proceeding with a charge against the applicant under subsection 39(h) of the Penitentiary Service Regulations unless he is permitted to be represented by counsel.

FACTS — On a day when a riot took place at Edmonton Institution, the applicant was allegedly not present for a stand-to-count. Acccording to the Commissioner's Directive, the offence is classified as a serious one. Other inmates having been charged for the same offence arising on the same day have been given an average 7 days dissociation period suspended for 90 days.

ISSUE — Whether the circumstances in this case, in light of the Howard decision, required that the applicant be represented by counsel to allow him an opportunity to adequately present his case.

DECISION — The particular circumstances of an individual case must be considered as well as theoritical consequences which could flow from charges generally of the type in question. In this particular case, according to analogous cases, there was no actual possibility of either a loss of remission or of a $500 fine, even though the charge was labelled as serious in the notification given to the inmate. Furthermore, the charge was not a complex one, and revolved primarily around the determination of facts; there was no indication that the inmate lacked the ability to present his case, nor that procedural difficulties were involved. The denial of representation by counsel did not constitute, in this case, an infringement of section 7 of the Canadian Charter of Rights and Freedoms.

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The Honourable Judge further interpreted the Howard case as meaning that in the first instance of any given case, the presiding officer must decide whether in his or her opinion the circumstances of a case are such that representation by counsel is necessary to comply with the principles of fundamental justice; he also approved of the presumption that there is a right to counsel when a loss of remission is in issue.

The application was dismissed.

Case brief

Scotland v. Rousseau, Director of Institut Leclerc et al. (1984) (Quebec Superior Court)

FACTS

27 April /79 -Applicant sentenced to term of imprisonment of 4 years and 6 months

28 Oct. /80 -Applicant received full parole

15 Oct. /82 -parole suspended (failure to report to parole officer)

30 Dec. /82 -parole revoked

21 Nov. /83 -Warrant of execution executed and applicant taken into custody

-Applicant received notification of recalculation of sentence which fixed his release date as 29 July, 1984.

-Applicant alleges that the calculation is incorrect, and claims that his continued detention is unlawful.

ISSUE Should the calculation of sentence include as time served, the period between suspension and revocation of his parole?

HELD Petition for writ of habeas corpus dismissed

REASONS 1. When sentence is being calculated, the period between the suspension and the revocation of parole is not considered "time served"

2. In its oral judgment, the court relied on the provisions of subs. 20(2) of the **Parole Act**

20(1) Upon revocation of his parole, an inmate shall be recommitted to the place of confinement from which he was allowed to go and remain at large at the time parole was granted to him or to the corresponding place of confinement for the territorial division within which he was apprehended.

(2) Subject to subsection (3), when any parole is revoked, the paroled inmate shall, notwithstanding that he was sentenced or granted parole prior to the coming into force of this subsection, serve the portion of his term of imprisonment that remained unexpired at the time he was granted parole, including any statutory and earned remission, less

(a) any time spent on parole after the coming into force of this sub-section;

(b) any time during which his parole was suspended and he was in custody;

(c) any remission earned after the coming into force of this subsection and applicable to a period during which his parole was suspended and he was in custody; and

(d) any earned remission that stood to his credit upon the coming into force of this subsection.

(3) Subject to the regulations, the Board may recredit the whole or any part of the statutory and earned remission that stood to the credit of an inmate at the time he was granted parole.

3. Because the applicant was not in custody at the time his parole was suspended, he cannot rely on subs. 20(2)(b).

Scott v. Her Majesty the Queen

This is a decision from the Federal Court of Canada, Trial Division, rendered by Rouleau, J., January 30, 1985.

ACTION The plaintiff brought an action for damages alleging that the defendant prison authorities had breached their duty of care which they owe to prisoners to take reasonable care of their safety.

FACTS Following the riot which erupted at the Matsqui Prison on June 02, 1981 during which the cell block that housed the inmates was destroyed, a tent city was constructed on the playing field of the institution. This temporary accomodation prevailed until October, 1981. The plaintiff, while asleep in his tent was struck by a blunt instrument near the left temple. The plaintiff underwent surgery but remains with some permanent brain damage.

HELD The plaintiff's action was dismissed with costs to the defendant.

The court did assess damages at $135,000. so that in the event of a successful appeal by the plaintiff, the matter would not have to go back to trial for such an assessment.

REASONS The court concluded that there is a duty on prison officials to take reasonable care but that one must consider the circumstances surrounding the incident.

The court concluded that there was absolutely no evidence to support the contention that there were other institutions that could have accepted the overflow - these were extremely dangerous inmates and only maximum security institutions could have received these transfers. Furthermore, contrary to the plaintiff's allegations, the evidence would indicate that the ring leaders who had a reputation for violence had been dispersed.

The court accepted the evidence of the defendant guards to the effect that there was adequate vision in the compound. Although they could not see within the tents, they were placed strategically all around the exterior perimeter.

The evidence reveals that if any one sought the protection of the authorities this was immediately granted. There was nothing in the evidence to suggest that Scott ever sought protective custody or that he had ever been threatened.

The court found that one could foresee such injuries but that they occur in normal times. Alcohol and weapons have always been a problem within penitentiaries.

The onus on the Warden to maintain discipline is not of a strict and absolute nature. The duty implies reasonableness in the circumstances. The court concluded that the actions, decisions and resulting events were the only ones open or available to the authorities with the result that the prison authorities, because they performed reasonably under difficult conditions, discharged their duty.

The court assessed Scott's non-pecuniary damages at $100,000. and his pecuniary damages at $35,000. In assessing the pecuniary damages the court took into account Scott's past history and his abuse of alcohol and drugs, and indicated that his chances for rehabilitation and adapting himself as a responsible citizen in the work place are almost nil.

Peter John Seymour v. R D McGregor in his capacity as Regional Director, Operations, Pacific Region, Correctional Service Canda

Judgement of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Collier on December 21, 1987.

This is an application for certiorari or relief of that nature quashing the decision to transfer the applicant from Matsqui to Kent Institution.

FACTS The applicant had been sentenced on June 18, 1987 to Matsqui Institution, to an aggregate sentence of seven years for robbery.

On October 19, 1987 the applicant was placed under administrative segregation. He was notified in writing the next day that this action had been taken pending completion of an internal security inquiry based on allegations that he had assaulted another inmate.

On October 29, the applicant was notified in writing that his involuntary transfer to Kent Institution would be recommended because reasonable and probable grounds were available to the effect that he had assaulted another inmate.

On October 30, in reply to the above-mentioned notification of recommendation for involuntary transfer, the applicant requested that he be informed of the reasonable and probable grounds which the authorities claimed to have for believing that he had assaulted the said inmate. Following the request, the Warden upheld his decision to recommend the transfer on the grounds that the applicant had been duly informed during an interview with a Preventive Security officer.

On November 9, 1987 the decision to transfer the applicant was taken. The applicant's response to the decision was essentially the same as that mede to the notification of recommandation for his involuntary transfer.

ISSUE Had the applicant been duly informed of the grounds for recommending his transfer?

DECISION Counsels for the parties agreed that the applicant had not been provided with adequate written information as to the reasons for the proposed involuntary transfer. Correctional authorities indicated sufficient oral information had been given to the applicant on the day of the assault by a Preventive Security officer.

On the morning of the assault an informant told Preventive Security personnel that the applicant had blood on his running shoes. A Preventive Security officer went to the applicant's cell and noticed that the applicant's running shoes had just been washed and were still wet. Furthermore, the applicant had fresh abrasions and scrapes on his hands. The officer questioned the applicant on the scrapes but received neither an answer nor an excuse. Citing this interview, the authorities argued that the applicant had been duly informed of the allegations against him and the reasons for believing that he was responsible for the assault.

Notwithstanding his interview with the Preventive Security officer, the applicant had expressly requested the authorities to clarify the reasonable and probable grounds they had for believing that he was involved in this assault. There is no reason why the appellant was not given a written answer setting out the essentials of the allegations against him and the information which Preventive Security personnel had apparently provided.

In the case before me I do not find it necessary to decide whether the oral information given to the applicant by the Preventive Security officer was sufficient to comply with the duty of fairness. Given the applicant's specific request for some detail in writing, the authorities did not elaborate upon their stated reasons to justify the recommendation to transfer the applicant. Consequently, in the particular circumstances here, the authorities failed to act fairly.

The application was allowed.

Martin Lorne Shaver v. Her Majesty the Queen

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable M. Justice McNair on June 23, 1987.

This is an application for an order of mandamus or a declaratory relief directed at the National Parole Board to calculate the basis for parole of the applicant as if the sentence imposed by Judge Enns, of the Manitoba Provincial Court, had been a lawful sentence.

FACTS : On August 5, 1986, and August 14, 1986, the applicant pleaded guilty to a number of charges, one of which was a charge of conspiracy to commit the indictable offence of theft. The subject matter of such charge allegedly involved approximately $900.00.

On August 14, 1986, the applicant was sentenced on these charges by the Honourable Judge Enns, of the Manitoba Provincial Court, Criminal Division. With respect to the charge of conspiracy to commit the indictable offence of theft, the Honourable Judge sentenced the applicant to four years incarceration, to be served concurrently with his other sentences, which totalled three years incarceration.

The applicant contends that the Criminal Code limits the sentence on a charge of conspiracy to commit theft under $1000.00 to two years imprisonment. He therefore states that the National Parole Board should calculate his parole without taking into account the alleged unlawful portion of the imposed sentence.

ISSUE : Whether the basis for parole of the applicant should be calculated on the grounds of a three years imprisonment sentence rather than on the grounds of a four years imprisonment sentence, as appears on the Warrant of Committal.

DECISION: The Court has no jurisdiction to entertain the application. First, the application names Her Majesty the Queen as a defendant instead of the National Parole Board, which was the tribunal cited

in this case. The fact that the wrong defendant has been named is one valid objection to any finding of jurisdiction of the Court to entertain the application.

Furthermore, the applicant claims the wrong relief. He stated several times that the sole issue of the present case was the Warrant of Committal, and if that is so, certiorari is the proper remedy, rather than mandamus.

Finally, even if the court had jurisdiction and even if mandamus was the appropriate remedy, the application should still fail because what is being sought is to compel the National Parole Board, even though not properly named as a party to the proceedings, to exercise its jurisdiction in a particular manner, which would be the calculation of the basis of the applicant's parole as if the sentence imposed by the Provincial Court Judge was a lawful sentence, rather than, as is submitted here, an illegal sentence.

For all these reasons, the Court is totally without jurisdiction to grant the application.

The application was dismissed.

Augustine Shea v. The Queen

This was a judgement of the Federal Court of Canada - Trial Division, rendered by Walsh, J. on February 22nd, 1983.

The plaintiff sought an order that the computation of his sentences result in a warrant expiry date of September 3rd, 1983.

Facts:

The plaintiff was sentenced on June 12th, 1980 to a total to two months' imprisonment, but the Crown appealed this decision. On October 3rd, 1980 the Nova Scotia Supreme Court, Appeal Division, sentenced the plaintiff to a total of three years' imprisonment to be served consecutive to the expiration of any "sentence or sentences which the plaintiff is now serving". On September 17th, 1980 the plaintiff was sentenced to two years' imprisonment for another breaking and entering charge. As a result of the decision of the N.S.S.C., Appeal Division, the plaintiff was to serve the three-year sentence imposed on the first charge consecutive to the two-year sentence imposed on the second charge making a total of five years' imprisonment.

Issue:

Did the N.S.S.C., Appeal Division, have the authority to direct that the plaintiff serve the respective terms of imprisonment consecutively ?

Held:

The Appeal Division did not give full effect to the words used in s. 645(4)(a) of the *Criminal Code*. The three-year sentence imposed by the Appeal Division had retroactive effect to the date of the initial sentence (June 12th, 1980). As a result at the time of the conviction for the first offence the plaintiff was not under sentence for the second offence which wasn't imposed until September 17th, 1980. Following the Supreme Court of Canada in R. v. Paul there is no general power to sentence consecutively. Such power must be found in some federal enactment. Therefore

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the Appeal Division did not have the power to impose consecutive sentences in this case, and the plaintiff should only have been required to serve a concurrent three-year sentence. The plaintiff should have been released on mandatory supervision on September 19th, 1982.

ORDER

The plaintiff's action was maintained and it was ordered that he be released forthwith on mandatory supervision, his warrant expiry date to be September 16, 1983.

Shiminousky v. Robinson, et al

This is a judgement of Mr. Justice Esson of the Supreme Court of British Columbia, rendered November 16, 1981.

Facts:

Inmate was serving a sentence of 18 months in a provincial institution. He was then sentenced to one year, consecutive to any sentence, then being served, for a further offence. By virtue of section 659(5) of the *Criminal Code*, if the total of the unexpired portions of the sentences is two years or more, he would serve the time in a federal instituion. If the total is less than two years, the time would be served in a provincial institution.

Issue:

When calculating the unexpired portion of a sentence under section 659(5), is the "earned remission" obtained pursuant to section 6 of the *Prisons and Reformatories Act* which is applicable to the earlier sentence, taken into account ?

Held:

Once earned remission is credited, it is a real and immediate entitlement, subject to forfeiture only on the conditions expressly stated in the legislation. When considering the unexpired portion of the term, credit for remission which has not then been revoked must be taken into account. In this case, if earned remission is deducted, the unexpired portion of the first term is less than one year and the total term is less than two years.

NOTE - The judge refused to make a declaration that the sentence is to be served in a provincial instutition due to the possible existence of other factors that may affect the place where the sentence is to be served. The judge's decision is limited to a declaration that unrevoked earned remission is to be taken into account when calculating the unexpired portion of the sentence under section 659(2) of the *Criminal Code*.

REGINA V. SHUBLEY

Judgment of the Supreme Court of Ontario, Appeal Division, rendered by Justices Howland, Zuber and Robins on January 25, 1988.

FACTS:

On April 18, 1985 the accused-respondent, an inmate at the Metropolitan Toronto West Detention Centre, allegedly assaulted another inmate. A report was immediately filed with the superintendent and a penalty ensued of five days in segregation with a special diet.

Subsequent to this punishment, the accused was charged with assault causing bodily harm contrary to section 245.2(b) of the Criminal Code.

The trial judge on the assault charge ruled that section 11(h) of the Charter did not allow for a second trial for the same criminal offence and accordingly ruled for a stay in the proceedings.

ISSUE:

Can the proceedings by the superintendent against the respondent be judged to be of a criminal or quasi-criminal nature that could give rise to penal consequences, thereby precluding the accused's conviction on the assault charge?

HELD:

The appeal should be allowed and the stay of proceedings set aside.

The Supreme Court of Canada first established in R v. Wigglesworth (37 C.C.C. (3d) 385), and has reiterated many times since, that the words "charged with an offence" refer only to criminal or quasi-criminal proceedings which give rise to penal consequences.

Disciplinary offences are excluded from this category. They are determined by looking at the purpose and character of the offence. Because the focus of this rule is on the inmates and not the general public, it is deemed to be a disciplinary offence. In addition, there must be true penal consequences. In this case it is only a withdrawal of privileges since the accused's prison term remains the same.

The superintendent's proceedings and penalty are deemed only to involve the internal disciplinary interests of the institution. They are not of a nature sufficient to suspend criminal proceedings.

NB Under appeal to S.C.C.

R. V. SHUBLEY, ON APPEAL FROM THE ONTARIO COURT OF APPEAL

Summary of Supreme Court of Canada Decision - January 18, 1990

FACTS

Appelant was an inmate in a penal institution and allegedly assaulted another inmate. The superintendent of the institution placed him in solitary confinement and on a restrictive diet. Subsequently he was charged with assault causing bodily harm contrary to section 245.1(1)(b) of the Criminal Code.

ISSUE

Was there a violation here of section 11(h) of the Canadian Charter of Rights and Freedoms (protection against double jeopardy) as a result of the two proceedings for the same offence.

DECISION

There was no violation of the Charter protection against double jeopardy. In order to be an "offence" within the meaning of section 11(h) of the Charter, the proceedings must, by their very nature, be criminal proceedings, or the punishment must be a true penal consequence. Here, the prison proceedings were not criminal, in the sense of redressing a wrong against society at large, but were limited to maintaining discipline within the prison. There can be more than one consequence flowing from the same crime. In this instance the appellant is answerable to the State for his crime, to the victim for the injury, and to the prison officials for breach of discipline.

DISSENT

Per Wilson and Cory JJ: solitary confinement is such a serious measure as to constitute a true penal consequence and more than mere internal prison discipline.

Daniel Silver v. Her Majesty the Queen in Right of Canada

Decision on a motion to strike rendered by the Senior Prothonotary of the Federal Court of Canada, Trial Division, Mr. Jacques Lefebvre, on January 14, 1987.

This was a motion by Her Majesty the Queen to strike a statement filed on September 26, 1986, in which the plaintiff alleged he was the victim of unlawful detention.

FACTS: Between July 5, 1971, and December 16, 1976, the plaintiff was found guilty of and sentenced for various offences. He contends that he should have been granted release on mandatory supervision as of December 6, 1980, whereas he was not in fact released until October 2, 1982. He therefore alleges that he was the victim of unlawful detention during that time. In the motion to strike, the defendant alleges that the plaintiff's action is statute-barred.

DECISION: The plaintiff claims damages for what he considers was a fault on the part of the defendant acting through her servants. Accordingly, under paragraph 2262(2) of the Civil Code of Lower Canada, his action is subject to a prescription of two years; pursuant to article 2183 of the Code, his application is precluded if he has not preferred his claim within that time limit. Further, the limitation begins to run from the date on which the damage begins to occur, which in this particular case was December 6, 1980, the date on which the plaintiff contends he was entitled to be released, but remained incarcerated. The plaintiff could have verified his sentence calculation while he was in detention; in Scott v. The Queen it was established that incarceration of a person does not constitute an impediment in fact or in law to action.* Accordingly, the action is barred because the plaintiff did not act within the time limit of two years imposed on him by law.

The motion was granted, and the statement was struck out.

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* Translator's note: This is a translation, since the case cited could not be located for reference.

ALBERT SINOBERT v. R.

This is the summary of a judgment of the Ontario Supreme Court rendered, on consent, by Mr. Justice Hollingworth.

Inmate Sinobert applied for a writ of habeas corpus with certiorari in aid.

Facts

The applicant escaped from penitentiary and while at large committed another offence. He was convicted and received the following sentences:

November 25, 1980	18 months consecutive (for the "other" offence)
February 16, 1981	6 months "consecutive to any sentence now being served" (for the U.A.L.)

Issue

Is the escape sentence consecutive to the portion of the term of imprisonment the inmate had not served at the time of his being UAL or is it consecutive to the sentence he was serving at the time he was sentenced for being UAL?

Held

Basing himself mainly upon the written submissions of the Deputy Attorney General of Canada, Mr. Justice Hollingworth ruled that section 137 of the Criminal Code only allows the escape sentence to be consecutive to the term which the prisoner was serving at the time he escaped and not to any sentence which was imposed after the escape.

Gary George Smith v. Solicitor General of Canada
and the Director of Matsqui Institution

Judgement of the Supreme Court of British Columbia rendered by Mr. Justice Bouck on December 20th, 1982 in Vancouver, B.C.

Petitioner, a prisoner at Matsqui Institution, seeks his release by way of an application for an order in the nature of habeas corpus on the grounds that he has served his sentence and should be released.

Facts:

On January 18th, 1971 the petitioner pleaded guilty to the crime of manslaughter and was sentenced to 10 years in prison. His normal release date was January 20, 1981. Although the crime was committed in B.C. the petitioner served his sentence at Collins Bay Institution in Ontario. On October 11th, 1974 the petitioner was released on day parole, which was terminated on February 18th, 1975. An information was sworn charging the petitioner with the commission of an indictable offence pursuant to s. 133(1) of the *Criminal Code* (Escape and Being at Large without Excuse). He was not found until September 3rd, 1982, when he was finally arrested and returned to Matsqui Institution. Following his incarceration the petitioner signed a document in which he stated that he wished to plead guilty to the charge or being unlawfully at large. The proceedings on this charge have not yet been completed. Upon being returned to the penitentiary the sentence expiry date for the manslaughter conviction was extended to April 21st, 1985.

Issue:

Did the petitioner's sentence expire on January 20th, 1981 because his day parole was "terminated" and not "revoked" as per s. 13 of the *Parole Act* with the result that he is being unlawfully detained?

Held:

The submission does not have to be analyzed because the petitioner is also being held pursuant to the warrant of arrest issued on February 18th, 1975 for escaping and being unlawfully at large. If he is convicted of the escape offence, then by operation of s. 137 of the *Criminal Code* he may be ordered to serve the sentence

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imposed under this section consecutively with the sentence he was serving for manslaughter. That may result in the requirement that he serve the remainder of the term while he was unlawfully at large plus the sentence imposed under s. 135 and s. 137 of the *Criminal Code*.

ORDER:

Application dismissed as it is premature.

Smoke v. the Commissioner of Corrections and the National Parole Board

Judgement of the Federal Court of Canada, Trial Division, rendered by the Honourable Madame Justice Reed, on June 26, 1985.

This is an application for a writ of certiorari quashing the decision of the respondents to transfer the applicant from Stony Mountain Penitentiary to any maximum security institution.

FACTS On August 10, 1982, the applicant was convicted of assault causing bodily harm and of robbery, sentenced to three years imprisonment, and placed in Stony Mountain Institution.

In October 1983, his security classification was reassessed to S-6 and he was transferred to Edmonton Institution. On June 26, 1984, on his request, he was transferred back to Stony Mountain in contemplation of his release on Mandatory Supervision.

He was released on August 15, 1984 but was re-arrested four days later on charges of theft over $200.00, impaired driving, and driving without a license.

On August 27, the applicant was interviewed by a parole services officer, following which his security classification was assessed to S-6.

The applicant was then moved to the Edmonton Institution to serve the rest of his sentence from the 1982 conviction, as well as the sentence arising out of his subsequent one.

ISSUE Whether the last move of the applicant to the Edmonton Institution was a transfer or an initial penitentiary placement and whether the rules of natural justice applied and were met in this case.

DECISION it is not necessary to focus on the question of the nature of the applicant's last move to the Edmonton Institution, and as to whether the rules of natural justice should be followed to an initial penitentiary placement, since the rules of fairness were not breached in this case.

The first alleged breach of fairness is that there was no evidence on which the decision to send the applicant to a maximum security prison could reasonably be based. This is not an area in which the courts will interfere lightly; furthemore, this is no a case in which it could be said that there was no reason for the inmate to be classified at an S-6 level, because of the existence of preventive security information regarding the applicant's involvement in unrest and disturbances at the Stony Mountain Institution.

The second argument of the applicant regarding breach of fairness relates to the lack of notice of the case against him, and his unhability to respond. The parole services officer based mostly his decision on information pertaining to the applicant's activities which led to his transfer to Edmonton Institution in October 1983. At that time, the applicant had neither questioned the transfer nor challenged the reasons for it. At the time of the August 1984 interview, even if he may have been unaware of the details of the preventive security file, the applicant had a general knowledge about his probable security classification and impending removal to Edmonton.

The application was dismissed.

SOENEN v. DIRECTOR OF EDMONTON REMAND CENTRE ET AL.

Alberta Queen's Bench - D. C. McDonald, J. - August 23, 1983

CHARTER OF RIGHTS - ss. 1, 7, 8, 11(d) and 12

EUROPEAN CONVENTION - INHUMAN OR DEGRADING TREATMENT - WHETHER APPLICABLE TO NON PENAL TREATMENT

U. S. CONSTITUTION - CRUEL AND UNUSUAL PUNISHMENT - WHETHER JUDICIAL INTERPRETATION OF EIGHTH AMENDMENT RELEVANT TO ASSESSMENT OF CANADIAN CHARTER RIGHT

U. S. CONSTITUTION - LIMITATION ON GUARANTEED RIGHTS - ABSENCE OF EXPRESS LIMITATION - BALANCING PROCESS

CHARTER INTERPRETATION - INFRINGEMENT OF RIGHTS - WHETHER DETERMINATION OF PRIMA FACIE INFRINGEMENT INVOLVES BALANCING PROCESS - WHETHER BALANCING APPROPRIATE ONLY TO ASSESSMENT OF REASONABLE LIMITS

RIGHT NOT TO BE SUBJECTED TO CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT - NATURE OF RIGHT - FACTORS FOR DETERMINING INFRINGEMENT

PRESUMPTION OF INNOCENCE - PRE TRIAL DETENTION - WHETHER PRESUMPTION RELEVANT TO INQUIRY INTO CONDITIONS OF PRE TRIAL CONFINEMENT

SEARCH AND SEIZURE - SEARCH OF THE PERSON - PRISONS - WHETHER VISUAL RECTAL SEARCH OF INMATE UNREASONABLE

PRINCIPLES OF FUNDAMENTAL JUSTICE - PRISONS - RULES GOVERNING INMATE CONDUCT - WHETHER PRISON AUTHORITIES BOUND BY FUNDAMENTAL JUSTICE IN PROMULGATING RULES OF CONDUCT

The applicant was a prisoner awaiting trial on a variety of charges, including attempted murder and armed robbery. He was classified by the authorities of the Edmonton Remand Centre as a maximum security prisoner. He took exception to the treatment afforded him while an inmate at the Remand Centre and launched an application to the Court of Queen's Bench for relief pursuant to s.24(1) of the Charter. His principal complaints were that:

(a) administrative directives restricting the number of "open visits" (i.e., without physical barriers) between maximum security inmates and outsiders were promulgated in contravention of the principles of fundamental justice and resulted in cruel and unusual treatment or punishment;

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(b) the excessive amount of time during which inmates were confined to their cells constituted cruel and unusual treatment or punishment; and

(c) occasional visual rectal examinations of inmates for concealed objects were degrading and a serious intrusion upon privacy.

Held, dismissing the application:

(1) Agreeing with the views expressed in Maltby v. A.G. Sask., (1983) 2 C.C.C. (3d) 153 (Sask. Q.B.), the Charter does not empower this Court to substitute its views for those of prison and detention centre authorities as to the proper management of such institutions. Courts do not sit to superintend the administration of the jail and penitentiary systems, and it is only when there is a proven violation of a right accorded to prisoners under the Charter that the Court may grant relief (p. 3);

(2) Decisions under the Canadian Bill of Rights and the Eighth Amendment to the U.S. Constitution dealing with cruel and unusual punishment have recognized that a "balancing process" must be carried out in order to determine whether the right has been infringed. Those decisions are not of assistance in interpreting s.12 of the Charter. The Eighth Amendment does not provide protection in respect of "treatment" and the U.S. Constitution does not have a limitation clause similar to s.1 of the Charter. Thus, American Courts have been required to limit the guaranteed rights by judicial construction, which has involved the balancing of individual interests against legitimate government objectives in order to determine whether a right has been infringed (pp. 4-8, 12-13);

(3) The presence of s.1 in our Charter dictates a different procedure. As stated in Re Federal Republic of Germany and Rauca, (1983) 41 O.R. (2d) 225 (C.A.), an issue under the Charter has to be approached in two steps: first, it has to be determined whether a guaranteed right has been infringed; if so, it must then be determined whether the denial is a reasonable one which is demonstrably justifiable. Consequently, the "balancing process" is only appropriate to the second stage, and the "telescoped" inquiry by American Courts cannot really assist at the first stage. Nevertheless, some "relativeness" may creep in at the first stage, as rights will have different

applications in different circumstances, and the absoluteness of certain rights has been modified by the addition of words such as "cruel and unusual", "arbitrary", "unreasonable", etc., to which meaning must be given by the Courts (pp. 11-16);

(4) "Treatment" is not limited in its breadth by the word "punishment". The ejusdem generis rule of statutory construction is inapplicable because "treatment" precedes "punishment" and is a more general word. There is no apparent common denominator between the two (p. 5);

(5) Article 3 of the European Convention provides protection against "inhuman or degrading treatment or punishment", and was held to be applicable to techniques of pre-trial interrogation of I.R.A. suspects in Ireland v. U.K., (1978) 2 E.H.R.R. 25. From this, it appears that s.12 of the Charter may be interpreted as empowering the Court to scrutinize "treatment" other than penal treatment (p. 6);

(7) While American jurisprudence arises under a narrower conceptual framework and considers only "punishment", cases such as Bell v. Wolfisch. (1979) 441 U.S. 520 have recognized that conditions of confinement of pre-trial detainees may be examined under the "due process" guarantee of the Fifth Amendment. What an American Court says may be apt when the same issue arises under s.12 of the Charter. Thus, there is relevance to the Bell v.Wolfisch holdings that disabilities imposed as a result of pre-trial detention do not necessarily invoke constitutional consideration, and that the "presumption of innocence" (repeatedly emphasized by the applicant in the present case) does not apply in the assessment of the situation (pp. 6-11);

(8) The issue in the present case is "treatment" not "punishment", and the word is commonly understood as meaning "conduct, behaviour, action or behaviour towards a person", which would ordinarily encompass what a pre-trial detainee complains of. The factors referred to in R. v. Miller and Cockriell, (1975) 24 C.C.C. (2d) 401 (B.C.C.A.), at p. 468, for the determination of whether "punishment" is cruel and unusual or also relevant to "treatment": (1) Is it in accord with public standards of decency and propriety? (2) Is it unnecessary because of the existence of adequate alternatives? (3) Can it be applied upon a rational basis in accordance with ascertainable standards? (pp. 11-19);

(9) Whether the words "cruel and unusual" are read disjunctively, conjunctively or as "interacting expressions", the applicant's complaints do not fall within their meaning. So far as the objection to the restriction upon "open visits" is concerned, the measure was obviously taken to reduce the possibility of smuggling weapons and contraband into the institution. Although the applicant suggests that other means would achieve the same result, the Court will not second-guess the authorities as to the means by which the fertile imagination of inmates is to be combatted (pp. 20-22);

(10) The principles of natural justice, and those of fundamental justice, do not impose procedural standards upon a director of an institution, in which pre-trial or post-conviction prisoners are held, when, pursuant to his statutory authority, he decides what the rules governing institution shall be (p. 22);

(11) The limitation upon open-air exercise is not cruel treatment, even if maximum security prisoners in some other institutions may be permitted open-air exercise for longer and more frequent periods (p. 23);

(12) Visual rectal searches are neither cruel treatment nor an unreasonable search within s.8 of the Charter. Such a search made post-arrest without reasonable and probable cause might be unreasonable and a violation of a reasonable expectation of privacy, but the same is not true with respect to a pre-trial detainee in an institution, provided the search is conducted bona fide for weapons or contraband and not for punishment (pp. 24-25);

(13) The complaint about the indiscriminate use of pesticides is trivial. In such circumstances, the Court is entitled to deal with the motion, at least when the applicant is unrepresented by counsel, solely on the basis of the applicant's written submission, and without the applicant having the right to be present personally in chambers to argue the motion. An order requiring the Director of the institution to transport the prisoner to the Court ought not to be made in such circumstances (pp. 25-26);

(14) While it is unnecessary to consider s.1 of the Charter, the Court would hesitate to support

a contention that any limitation on guaranteed rights is "demonstrably justified" unless counsel for the government is prepared to inform the Court as to the practices in other Canadian jurisdictions and, in an appropriate case, in other free and democratic jurisdictions, when the detention of prisoners before or after trial is the subject matter of the application. No such information was offered by the Crown in this case (p. 27).

Solosky v. The Queen

Judgement of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Eddy, Heald, Urie and Mackay on November 19, 1976 in Ottawa.

The plaintiff, an inmate of Millhaven institution, sues for a declaration that all items of correspondence properly identified as directed to or received from his solicitor be regarded as privileged communications and be forwarded unopened by the prison authorities.

Facts:

The director of Millhaven Institution ordered that all of plaintiff's mail be opened and read.

Issues:

1- Does the director of the institution have the right to order censorship of correspondence of an inmate ?

According to directive 219 of the Commissioner of Penitentiaries and to s. 2.18 of the *Penitentiary Service Regulations*, it is clear that the director of an institution has the legal right to order censorhip of correspondence.

S. 43 of the *Post Office Act* prohibiting mail censorship only applies to mail while on delivery. Once the mail has reached the institution, it is no longer in delivery, therefore s. 43 does not apply to it.

2- Does the opening of mail between an inmate and his solicitor constitute a breach of a common law privilege ?

A prisoner does not enjoy all common law rights and privileges but even if he still enjoys the right to communicate privately with his solicitor, his right, as a prisoner, cannot be higher than the one enjoyed by any other citizen. A communication between a solicitor and his client is not

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> presumed to be confidential, in other words the mere relationship solicitor-client does not make all of their communications confidential. In order to know whether it is the type that should be confidential, it must be opened and read.
>
> There is no justification for correspondence appearing to emanate from or to be addressed to a solicitor, to enjoy any special protection. It would be too easy to endanger the security of the institution.
>
> Therefore, unless there is no doubt as to the confidential character of the letter, which is almost impossible to establish, it is not a breach of a common law right to open and read a communication between a solicitor and his client.

Obiter:

> It would be illegal for any person charged with the duty to censor a prisoner's mail, to inform any person of the contents of a privileged communication.

The action is dismissed.

REF: Solosky v. Her Majesty the Queen; Supreme Court of Canada.

SOLOSKY v HER MAJESTY THE QUEEN

Judgment of the Supreme Court of Canada rendered by the Honourable Mr. Chief Justice and Martland, Ritchie, Pigeon, Dickson, Beety, Estey, Pratte and McIntyre in Ottawa.

FACTS: The case concerns the censorship of prisoners' mail and the right of an inmate of a federal penitentiary to communicate in confidence with his solicitor. The appellant, imprisoned at Millhaven Institution, commenced an action in the Federal Court for a declaration that "properly identified items of correspondence directed to and received from his solicitor shall henceworth be regarded as privileged correspondence and shall be forwarded to their respective destinations unopened".

ISSUES: 1. Does the solicitor-client privilege, recognized by the Canadian courts, apply to the appellant's case?

In order to invoke the solicitor-client privilege, appellant must establish that the authorities are using mail censorship to obtain evidence to be used in a judicial proceeding. Without this connection, the appellant cannot invoke the privilege. In this case, appellant's mail is opened and read by reason of the exigences of institutional security and not to be used in a proceeding.

The court recognizes the common law solicitor-client privilege but the appellant is seeking something beyond the limits of the privilege.

2. Is appellant's right to retain and instruct counsel incompatible with the right of prison authorities to prevent threat to the security of the institution?

Penitentiary Service Regulation 2.18 and Directive 219 preserve a limited right of censorship by penitentiary authorities which is no greater than is necessary to support the security interest. Therefore there is no incompatibility with appellant to talk to his legal adviser.

3. What is the minimum extent of the authority of the institutional head to decide what should be the subject of solicitor-client privilege?

The contents of an envelope may be inspected for contraband in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between

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solicitor and client written for the purpose of seeking or giving legal advice. The letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the bona fides of the communication. The authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication.

The appellant has failed to establish entitlement to a declaration. The appeal must be dismissed.

RE: Solosky v. The Queen, Federal Court of Canada

Lawrence Theodore Sowa v. Her Majesty the Queen

Judgement of the Court of Appeal for Saskatchewan rendered by Mr.Justice Culleton on November 9, 1979 in Regina.

Applicant applied for a writ of Habeas Corpus with certiorari in aid.

Facts:

On October 4, 1971, he was sentenced to four years imprisonment.

On February 8, 1972, he was sentenced to seven years consecutive.

On September 26, 1972 he escaped and remained at large until November 6, 1972.

On May 15, 1973, he was sentenced to six month imprisonment consecutive to sentence "now serving", for his escape.

On August 20, 1973, he was sentenced to four months on each of three counts concurrent to one another but consecutive to sentence "now serving".

Established date of release is April 20, 1983 with a mandatory supervision date of February 5, 1980.

Issue:

Were the penitentiary authorities right in law in the calculation of the sentence to be served by the appellant following his conviction for escape on May 15, 1973 ?

Did the penitentiary authorities properly interpret and apply s. 137 of the *Criminal Code* ?

According to s. 137 of the *Criminal Code* as it applied in 1973, the sentence for escape must be served starting on sentencing day, before the remanet of his sentence. According to s. 14(1) of the *Parole Act*, when two or more sentences are imposed to an inmate, they constitute one single sentence which begins on the day the first sentence was imposed. S. 137 sets out the manner in which the sentence imposed is to be served

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> and calculated. Therefore the escape sentence, starts on May 15, 1973, then the remanet of his sentence must be served including all statutory remission as it is provided in s. 137 of the *Criminal Code*.
>
> There appears to be a contradiction between s. 33(4) of the *Penitentiary Act* which provides for loss of three-quarters of statutory remission upon escape, and s. 137(1) of the *Criminal Code* which provides for loss of all statutory remission. S. 137(1) of the *Code* has prospective effect and as of July 15, 1972, upon conviction, an inmate loses all of his statutory remission.

Therefore, the penitentiary authorities properly interpreted and applied the law.

The appeal is dismissed.

REF: Ex parte Langlois

Her Majesty the Queen v. Lawrence Theodore Sowa

Judgement of the Saskatchewan Court of Appeal, rendered on June 3, 1985, by the Honourable Mr. Justice Hall.

This is an application asking for an order of certiorari removing into the Court the records for the determination of the release date of the applicant from the Saskatchewan Penitentiary, along with an application for an order of mandamus to have the applicant credited with the remission time which he feels he is entitled to.

DECISION Section 18 of the Federal Court Act gives the Trial Division exclusive jurisdiction to issue writs of certiorari and mandamus, among other things, against "any federal board, commission, or other tribunal".

It is patent from the review of the decisions discussing that section that this Court has no jurisdiction in the present matter. The proper forum for the applicant to seek relief is the Trial Division of the Federal Court.

The application was dismissed.

Spearman v. Gobeil & Commissioner of Penitentiaries

Judgement rendered by Dubé J. of the Federal Court Trial Division on June 27, 1986.

The applicant sought certiorari quashing a decision to transfer him on December 12, 1985 from Joyceville Penitentiary to Millhaven Penitentiary and mandamus requiring the respondents to return him to Joyceville or an institution with a comparable level of security.

FACTS

The applicant, in his capacity as range representative, vocally opposed the additional double bunking in cells which the institution was required to implement. The applicant refused to move his belongings from his cell to allow the double bunking to proceed. The applicant was notified that he would be transferred in a memorandum which stated "by your actions you have attempted to incite the inmates into a disturbance over double bunking". He was notified that he could present written reasons contesting the reasons for his transfer within 48 hours upon his arrival at Millhaven. The applicant filled out an Inmate Complaint form upon his arrival there.

The Assistant Warden reviewed the inmate's complaint and denied it. The gist of his reply to the applicant was that the applicant incited other inmates to cause a disturbance. This decision was upheld by the Director of Joyceville and by the Deputy Commissioner. On January 7, 1986 the Regional Transfer Board ratified the transfer without the benefit of the written objections of the inmate.

ISSUE

Was the applicant made aware of the case against him and was he given an adequate opportunity to respond?

DECISION

The applicant was made aware of the "gist" of the case against him, firstly in the Memorandum notifying him of his transfer, then in the reasons given by the Assistant Warden for denying his complaint. The applicant was given the opportunity on three occasions to reply in writing. The grievance route followed by the applicant was the one of his choice and consideration at each level was given to his complaint.

Under the circumstances the opportunity given to the applicant after the "fait accompli" of his transfer meets the test of the duty to act fairly. The applicant had until the day after his transfer to submit a complaint. It is not for the Courts to administer penal institutions. The authorities on the "front line" have to make quick and difficult decisions as they balance as best they can the individual rights of the inmates and the overall security of the institution.

The application was dismissed.

Brian Reuben Starr v. The National Parole Board

Judgement of the Federal Court - Trial Division rendered by Nitikman, D.J. on December 2nd, 1982.

This was an application to quash the Board's order, in which it purported to revoke the mandatory supervision of the applicant.

Facts:

On March 4, 1982, the applicant was granted an unescorted temporary absence permit by the Saskatchewan Penitentiary, to take effect on March 5th, 1982. The applicant's mandatory supervision release day fell on March 7th, 1982, which was a Sunday. The normal procedure is to issue an unescorted temporary absence permit when the inmate's mandatory supervision falls on a weekend or a statutory holiday.

Within hours of his release on March 5th, 1982, the applicant became involved in new criminal offences and on the same day he was arrested and charged with the offence of trespassing. The applicant was detained in custody and on March 19, 1982, he was sentenced to 15 days' incarceration after pleading guilty. Before his release the applicant was charged with having, on March 6th, 1982, committed two offences of breaking and entering, and was sentenced to a term of one year in the Saskatchewan Penitentiary.

Because of the applicant's reinvolvement in criminal activity his case was referred to the Board to determine whether or not his mandatory supervision should be revoked, and if so, whether remission lost, should be recredited. On July 8th, 1982, the decision was made to revoke the applicant's mandatory supervision with no recredit of remission.

Issue:

Did the Board have jurisdiction to revoke the applicant's mandatory supervision ?

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Held:

The Board, in ordering the applicant's mandatory supervision revoked with no recredit of remission acted without jurisdiction. The applicant committed the offences in question while he was on an unescorted temporary absence permit. He did not breach his mandatory supervision when the offences were committed. He was also not on parole. As a result there was no mandatory supervision to revoke as the applicant was at no time on mandatory supervision.

ORDER:

Certiorari issued to remove the decision of the Parole Board ordering the applicant's mandatory supervision revoked with no recreditation of remission into the Court and the decision and orders or warrants based thereon were quashed.

Application granted.

Warden of Mountain Institution v. Theodore Steele

This is a decision of the Supreme Court of Canada rendered on November 8, 1990.

Facts:

In 1953, Steele pled guilty to a charge of attempted rape and in November 1953 he was declared to be a criminal sexual psychopath and sentenced to five years imprisonment for the attempted rape and an indeterminate sentence of preventive detention thereafter. Steele has been granted parole and temporary absence releases which were revoked and he was returned to custody by reason of committing further offenses or breaches of release conditions, including alcohol abstention.

Steele's case has been reviewed annually by the National Parole Board in accordance with section 761(2) of the Criminal Code and section 16 of the Parole Act to determine whether he should be granted parole and, if so, on what conditions.

In December 1988, Steele had applied to B.C. Supreme Court seeking release under habeas corpus on the grounds that his continued detention under preventive detention constituted cruel and unusual treatment or punishment contrary to section 12 of the Charter. The petition was granted by the Supreme Court of B.C. and an appeal to the B.C. Court of Appeal was dismissed.

Issue:

Does Mr. Steele's continued detention amount to a cruel and unusual punishment under section 12 of the Charter of Rights and Freedoms?

Decision:

The Supreme Court of Canada's decision held that Steele's lengthy incarceration was cruel and unusual punishment contrary to section 12 of the Charter. The infringement was caused by errors committed by the National Parole Board and not by any structural flaw in the dangerous offender provisions. The Court stated that Mr. Steele's imprisonment has long ago reached the point at which he had derived from the maximum benefit from imprisonment. The National Parole Board erred in its application of the criteria for release set out in paragraph 16(1)(a) of the Parole Act. The parole review process accordingly failed to ensure that the respondent's sentence was tailored to fit his circumstances and the inordinate length of his incarceration has long since become grossly disproportionate to the circumstances of his case.

Mr. Steele was therefore released.

James Robert Stevens v. National Parole Board

Judgement of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Mahoney on February 28, 1978 in Ottawa.

Applicant applied for the issuance of a writ of Mandamus.

Facts:

In March 1978, applicant was released on mandatory supervision.

On January 31, 1979 he was convicted of theft, his mandatory supervision was suspended and he was recommitted to custody.

On February 12, 1979, the case was referred to the respondent pursuant to s. 16(3) of the *Parole Act*.

Respondent has referred to the deal with the matter until expiration of the 15 days provided by ss. 20(1) of the *Regulations*.

Applicant has waived the hearing to which he is entitled under ss. 20(2) of the *Regulations*.

Whether respondent cancels the suspension of his mandatory supervision or revokes his parole, applicant must be released.

Issues:

Is subsection 20(1) of the *Parole Regulations* to be interpreted as requiring the respondent to wait 15 days from the date of the referral under ss. 16(3) of the Act before deciding to revoke a parole and if so, is it intra-vires?

Regulation 20(1) does not fall within the power delegated by the *Parole Act*.

"In my view, subsection 20(1) of the *Parole Regulations* is ultra-vires the power delegated to the Governor in Council to make regulations and is further ultra-vires as it is contrary to the express requirement of the Act.

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RONALD TENEYCKE v. MATSQUI INSTITUTION DISCIPLINARY COURT

Decision of Addy J. of the Federal Court (Trial Division) on an application for certiorari rendered January 22, 1990.

FACTS

The inmate was convicted by the Independent Chairperson of behaving towards another person in an indecent, disrespectful, threatening or defamatory manner. Evidence at the hearing was to the effect that through the window of his cell the inmate indecently exposed himself to the charging officer. The defence argued that it was impossible for him to have done so because of the height of the window above the floor of the cell. In an effort to resolve the credibility question, the Independent Chairperson, in the presence of two CSC officers, conducted a view of the cell where the alleged action occurred. The inmate was never advised of the decision to carry out the view nor was he or his counsel present. During the view the Chairperson measured the cell, moved furniture and spoke to the accompanying officers. The inmate was only advised of the view prior to the submissions for sentencing.

ISSUE

Was the Chairperson legally entitled to take an independent view of the cell in the absence of the inmate?

DECISION

Views may only be conducted for the very restricted purpose of allowing the tribunal to better understand the evidence. The purpose can never be to allow the gathering of evidence at the scene by the tribunal. The parties must always be present when a view is taken. In no event is a person presiding over a hearing or trial entitled to actively gather evidence or to decide matters on the basis of his own observation of material facts which have not been established in evidence. By taking measurements in the cell and moving furniture about, the Chairperson automatically and irrevocably lost jurisdiction. His subsequent conviction was a nullity and must be quashed.

Pierre Thériault v. the Disciplinary Board of the Federal Training Centre et al.

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable M. Justice Denault on February 18, 1987.

This is an application for a Writ of Certiorari to quash two disciplinary offence convictions against the applicant made by the Disciplinary Board.

FACTS: On December 11, 1985, as a result of a search conducted the day before, the applicant was accused of having had contraband in his possession, in violation of subsection 39(i) of the Penitentiary Service Regulations; the applicant was advised that the hearing would be held on December 13. The applicant had attempted to retain the services of his lawyer the day before, but his lawyer was advised that he could not represent his client because the offence involved was classified as a intermediate one.

On December 12, the applicant was issued a Warrant of Transfer to Archambault Institution; the reasons cited for this transfer involved drug trafficking.

The hearing on the disciplinary offences was held on December 13, and the applicant was found guilty. During the hearing, the applicant claimed the right to representation by counsel, but this request was denied on the grounds of the classification of the disciplinary offence involved.

ISSUE: Under the circumstances, was the applicant entitled to representation by counsel?

DECISION: The respondents claim that since the Howard case it has been established that an inmate is not entitled to representation by counsel if he is accused of an offence that is not classified as major or serious. The applicant claims that the Howard decision did not limit the right to counsel in this way, and that, in any event, the Disciplinary Board did not properly examine his right to such counsel in this case.

The Trial Division of the Federal Court is empowered to issue a Writ of Certiorari if the

presiding officer of a disciplinary court has not acted fairly; it is therefore essential to consider the requirements of penitentiary discipline, just as it is essential to consider the requirements of the effective administration of penal justice. In the light of the Howard case, it appears that we must consider the refusal to allow representation by counsel in relation to the circumstances of the case, the nature, gravity and complexity of the matter, and the ability of the inmate to understand the case and present his defence.

In this case, the evidence shows that the period of dissociation imposed on the applicant obliged him to interrupt his attendance at the courses he was taking at the institution. In addition, the notion of contraband itself is particularly difficult to interpret at the Federal Training Centre. Furthermore, although there was no connection between the disciplinary charge involving contraband and the decision to transfer the inmate because of drug trafficking, the inmate might have been somewhat confused in this regard. Finally, it is clear from the transcript of the hearing that the applicant lacked the ability to present his defence.

Moreover, by simply denying the applicant the right to be represented by counsel because the disciplinary offence in question was classified as a intermediate one, and by requiring that the applicant provide legal reasons to justify the presence of his lawyer, the respondent acted in a peremptory manner without actually examining the question properly.

Application granted.

Patricia Toews v. John Stonoski

Judgment of the Court of Appeal of British Columbia rendered by Mr. Justice Taggart, Carrothers and Macdonald on February 1, 1980 in Vancouver.

The appelant appeals from a judgment dismissing her action against the respondent Stonoski, seeking damages for injuries she sustained in a motor vehicle accident. The driver was Joseph Warren.

Facts:

At the time of the accident Warren was an inmate. The respondent Stonoski was the warden of the institution. Warren was absent from the institution under temporary absence to work at a local garage. While under the influence of alcohol, he drove Mackenzie's automobile with the appellant. The vehicle left the road and the appellant was severely injured.

Issues:

1. Was the respondent acting within the limits of a discretion in granting temporary absences to Warren ?

   "In deciding to grant temporary absences to Warren, the respondent --- was exercising a discretion delegated to him by statute ... nothing done by him in the exercise of that discretion can form a basis for a finding that the respondent owed a duty of care to the appellant."

2. Was the respondent negligent in the implimentation of his decision to grant temporary absence to Warren ?

   According to Commissioner's directive No. 228, the respondent has a duty to inquire as to where Warren was going to work during his absence from the work camp and as to what his conduct was.

   The court agrees to say that even though he did not respect the policy or planning aspect of his duties it is not a basis upon which liability can rest.

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> If it was a basis to give rise to a duty of care, it would be important to know to whom this duty of care is owed. The duty is owed only to persons the respondent could reasonably foresee, in other words, persons living in the vicinity of the work camp. In the case at bar, it cannot be said that the respondent Stonoski could have reasonably foreseen that Warren would, by his negligent driving, injure the appellant who had placed herself in a relationship with Warren.

The appeal is dismissed.

Tonner v. The Director of Mountain Institution and al.

(unreported)

Decision of the Supreme Court of British Columbia rendered by the Honourable Mr. Justice MacKinnon on April 12, 1984.

This is a petition for an order for relief in the nature of habeas corpus and certiorari in aid by petitioner, an inmate of the Kent Institution.

FACTS Petitioner, an inmate, was charged with a disciplinary offence, in that he returned to the institution under the influence of an unknown substance after day parole. At the disciplinary hearing, the petitioner was found guilty and sentenced to 30 days punitive dissociation.

Petitioner seeks relief on the ground that the chairperson of the disciplinary hearing failed to exercise his discretion as to whether or not he should have legal counsel during his disciplinary proceedings. Petitioner also complains that he was denied the right to make full answer and defence to the charge against him contrary to s. 7 of the Charter of Rights, since the author of a written report was not produced for cross-examination during the hearing.

HELD There was no request by petitioner for legal counsel, therefore there was no occasion for the chairperson to exercise his discretion.

Disciplinary proceedings are not to be conducted in accordance with the Rules of the Court, however, they must be conducted fairly. The chairperson had a duty to be fair.

The chairperson would have failed in his duty had the petitioner taken issue with the contents of the filed report and requested the opportunity to cross-examine the author. However, in the circumstances, seeing petitioner did not take issue with the report and did not ask for the production of the author of that report, the chairperson was not being unfair and had acted fairly.

Petition dismissed.

Tremblay v. Presiding Officer, Inmate Disciplinary Court of Laval Institution

Decision of the Trial Division of the Federal Court of Canada handed down by the Honourable Mr. Justice Rouleau on April 9, 1987.

This decision concerns a request for the issuance of a writ of certiorari in order to quash a decision of the Inmate Disciplinary Court of Laval Institution rendered on 3 February 1986.

FACTS — The applicant was one of the inmates involved in an incident on 29 November 1986 at Laval Institution during which an inmate by the name of Bard was seriously injured. Tremblay was charged with possession of contraband (intermediate misconduct) and with aggravated assault (serious misconduct). These two charges were withdrawn, but they were replaced with a third: possession of contraband (a makeshift weapon) in violation of subsection 39(1) of the Penitentiary Service Regulations (intermediate misconduct). When called upon to appear before the Disciplinary Court, the inmate refused to plead and demanded that his lawyer be present, a request turned down by the Presiding Officer. Tremblay was sentenced to 30 days of punitive dissociation by the Court.

ISSUE — Did the inmate have the right to be represented by a lawyer while undergoing the disciplinary procedure?

DECISION — The court examined the criteria set out by Webster J. in Howard v. Presiding Officer, Inmate Disciplinary Court of Stony Mountain Institution to determine whether a lawyer needed to be present when the inmate appeared before the Disciplinary Court:

(i) the seriousness of the charge and the penalty that could be imposed;

(ii) the probability of questions of law being raised;

(iii) the inmate's ability to speak on his own behalf;

(iv) the difficulties in matters of procedure;

(v) the need to hand down a decision in a reasonably short time; and

(vi) the need for fairness between inmates, and between inmates and prison officials.

Having rewiewed the relevant decisions, in particular Bailey v. Dinsley, the Court went on to apply the criteria of the Howard decision to the case at hand.

With regard to the seriousness of the charge and the penalty that could ensue, the withdrawal of the first two charges did not diminish the seriousness of the third charge, even though it fell within the intermediate category. Although the Disciplinary Court could not sentence the inmate to forfeiture of his earned or statutory remission, the Earned Remission Board could have done so in view of the charge brought against him, and to the judge this represented an alternative method of imposing punishment.

Some questions of law could have been raised: the delay between the date of the incident and the date of the hearing before the Disciplinary Court; the multiple charges resulting from a single incident; and the plea of autrefois acquit. The applicant's lack of legal training prevented him from stating his views on these questions of law.

The Disciplinary Court's refusal to allow the applicant to be represented by a lawyer constituted a violation of section 7 of the Canadian Charter of Rights and Freedoms, and this provides grounds for issuing a writ of certiorari and quashing the decision handed down by the Presiding Officer of the Inmate Disciplinary Court on 3 February 1986.

The application was allowed.

Trudel, Jacques Andre v. H.M.Q. and David Thompson (ICP, Warkworth)
F.C.T.D. April 11, 1989

FACTS:

The applicant filed an application for certiorari to quash the convictions imposed by the Independent Chairperson, and to quash the decision to transfer him form Warkworth Institution to Kingston Penitentiary.

The inmate was charged with having contraband in his possession. The inmate claimed that he was wearing his cell mate's watch with that individual's permission.

The applicant was convicted of possession of contraband and other related charges. He filed this application alleging he was refused counsel at the hearing; that he should have been allowed to call his cell mate as a witness even though he had been transferred to another institution; that the charges should be dealt with as one offence and in imposing a penalty they were dealt with seperately.

ISSUES:

Was the failure to allow applicant counsel, and to call his witness a breach of the duty to act fairly?

ORDER:

Application dismissed.

DECISION:

No breach of duty to act fairly by Independent Chairperson. There is no right to counsel and that it falls to the Chairperson to determine whether an applicant requires counsel in the circumstance of each case. The calling of the witness was unreasonable in the circumstances. It was not unfair for the Independent Chairperson to affix a penalty to each charge as they were not alternative counts.

Truscott v. Director of Mountain Institution et al

Judgment of the British Columbia Court of Appeal rendered by Mr. Chief Justice Nemetz, dissenting, and Mr. Justice Seaton and Anderson on March 25, 1983.

Application by inmate for habeas corpus following suspension of his mandatory supervision immediately upon his release from the institution.

FACTS: The applicant, an inmate of a federal penitentiary, was due for release on mandatory supervision. Immediately upon his release from the institution and while still being escorted by correctional officers he was arrested pursuant to a warrant of apprehension and suspension of his mandatory supervision. The warrant stated that the grounds for suspension were to prevent a breach of a term or condition of mandatory supervision and to protect society. Habeas Corpus was granted and the Crown appealed.

ISSUE: Whether the National Parole Board is entitled to forfeit, in whole or in part, the period of earned remission immediately upon the release of an inmate who, as a result of earned remission, is entitled to be released from imprisonment under mandatory supervision for the period of such earned remission.

HELD: The procedure of "gating" whereby an inmate released on mandatory supervision by reason of earned remission is immediately apprehended is really a denial of remission. An inmate who is eligible for release as a result of earned remission pursuant to the Penitentiary Act, is entitled to be released in a real sense under mandatory supervision. His release must not be a charade or a sham. The power to suspend or revoke such mandatory supervision cannot be invoked by the NPB by reason only of pre-release conduct of the inmate. The Board has no power to decide whether or not an inmate is to be released on mandatory supervision.

PETER TO KAN TSANG AND THE CHAIRPERSON OF KENT INSTITUTION DISCIPLINARY COURT

Decision by the Federal Court of Canada, Trial Division, rendered by Madame Justice Reed on September 8, 1988.

FACTS:

The Applicant sought a Writ of Prohibition to prevent the Kent Institution Disciplinary Court from ruling on a charge him.

The applicant made a Notice of Motion contesting the disciplinary court did not hear his charge on the day specified and in so doing lost jurisdiction over hearing his charge.

ISSUE:

Are penitentiary disciplinary courts subject to the same procedural rules as criminal courts?

HELD:

The applicant's motion for prohibition was dismissed.

The factual reason for the postponement of the hearing was a "lockdown" which required the services of most institutional personnel.

Furthermore, the proceedings of a penitentiary disciplinary court are not bound by the same statutory provisions as a criminal court. Cases supporting criminal courts losing jurisdiction through procedural errors are of no legal value to this case. The penitentiary disciplinary court must only comply with its own rules of procedure.

Even if the disciplinary court had failed to comply with a procedural guideline, it would still have to be determined if the error was severe enough to cause a loss of jurisdiction. The breech which occurred did not prejudice the applicant at all and is therefore not enough to cause the court from losing jurisdiction.

UNRAU V. WARDEN OF SASKATOON CORRECTIONAL CENTRE ET AL.

Fiat issued by Noble J. of Saskatchewan Court of Queen's Bench on January 22, 1990 on an application for habeas corpus with certiorari in aid.

FACTS:

The applicant was serving a five year sentence for various offences. He was placed immediately upon conviction in a Saskatchewan correctional facility pursuant to the Canada-Saskatchewan Exchange of Services Agreement. After receiving information of a possible escape attempt by Unrau, Saskatchewan transferred him to the federal institution in Prince Albert. The applicant was notified of the transfer and the reasons therefore.

ISSUE:

Should habeas corpus issue in respect of the transfer?

DECISION:

Since Unrau brought a habeas corpus application in 1988 on the same matter, the issue was res judicata (already decided) and Noble J. had no jurisdiction to hear the case. Even if he was wrong on this point, he did not believe that habeas corpus should issue here. There was no evidence that the transfer to Saskatchewan Penitentiary resulted in a loss of residual liberty, as is the case in a transfer to the Special Handling Unit or to segregation. There was no evidence of a change in conditions of confinement which warranted the issuance of habeas corpus because there was no essential change in the applicant's deprivation of liberty and nothing about the transfer was illegal.

R. v. RENÉ VAILLANCOURT

Court of Appeal of Ontario

Judgment rendered by The Honourable Mr. Justice Brooke and concurred in by The Honourable Mr. Justice Grange and The Honourable Mr. Justice McKinlay on June 16, 1989.

FACTS:

On October 1, 1973, the respondent was convicted of capital murder and sentenced to death. This sentence was commuted to imprisonment for life by the operation of subsection 25(1) of the Criminal Law Amendment Act (No. 2), 1976. Pursuant to this enactment, Mr. Vaillancourt was to serve a term of life imprisonment without eligibility for parole until twenty-five years had elapsed from his sentence. Furthermore, the said enactment provided for a review of the ineligibility period set out in section 745 (formerly section 672) of the Criminal Code. In proceedings pursuant to section 745 of the Code, a jury had determined that the period of imprisonment which Mr. Vaillancourt would have to serve before becoming eligible for parole should not be reduced below the statutory minimum of twenty-five years and they had declined to specify a date or time when he might reapply. Mr. Vaillancourt appealed from the determination of this jury. The Crown applied for an order quashing Mr. Vaillancourt's appeal.

ISSUE:

The Court was to determine whether an appeal lies, upon any ground, to the Court of Appeal, from the determination of a jury in proceedings pursuant to section 745 of the Code.

HELD:

The Court held that no appeal lies from the determination of the jury under section 745 of the Code given that the Court of Appeal is a statutory court that has no inherent jurisdiction to entertain appeals notwithstanding that the liberty of the subject may be involved. Moreover, the Court of Appeal's jurisdiction is circumscribed by the provisions of the Code relating to appeals from sentences of indictable offences. Firstly, no specific provision provides for an appeal from the jury's determination in proceedings such as these. Secondly, the general provisions of paragraph 675(1)(b) (formerly paragraph 603(1)(b)) of the Code providing for appeals from sentence in indictable offences clearly do not encompass the review proceedings provided for under section 745 of the Code.

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Although Mr. Vaillancourt's liberty interests depended upon the determination in the proceedings pursuant to section 745 of the Code, the guarantee of fundamental justice in section 7 of the Charter did not necessarily require access to a remedy by way of appeal. Pursuant to subsection 24(1) of the Charter, a court of competent jurisdiction may grant such a remedy as the court considers appropriate and just in the circumstances where guaranteed rights and freedoms have been infringed. In this case, the Court of Appeal indicated that the High Court was a court of competent jurisdiction. The Court of Appeal then opined that subsection 24(1) of the Charter does not create a right of appeal from a decision as to the constitutional validity of the rules of practice promulgated with respect to applications pursuant to section 745 of the Code. Furthermore, subsection 24(1) does not create a right of appeal to the Court of Appeal from the determination of a jury pursuant to section 745 proceedings. The Court reiterated its judgment in R. v. Morgentaler et al (1984), 16 C.C.C. (3d) 1 where it had concluded that subsection 24(1) does not create a right of appeal or bestow appellate powers on courts. Rather, it permits those courts which have statutory appellate jurisdiction, independent of the Charter, to exercise the remedial power in subsection 24(1) in appropriate cases when disposing of appeals.

Hence, the Court of Appeal of Ontario held that the proceedings pursuant to section 745 cannot be said to be a part of the sentencing process so as to provide a right of appeal within paragraph 603(1)(b). The procedure under section 745 is a special procedure before members of the community in which the conviction occurred in order to determine if and/or when the normal release process would be available to the convicted person. The Court of Appeal has no power to order a new hearing and to judge on parole eligibility. Finally, the Court added that the respondent may have a right to apply for leave to appeal to the Supreme Court of Canada as the determination by the jury in a section 745 proceeding may constitute a final or other judgment of a final court within the meaning of subsection 40(1) (formerly subsection 41(1) of the Supreme Court of Canada Act. However, the Supreme Court's jurisdiction was for it to decide.

The appeal was quashed.

Veysey v. The commissioner of the Correctional Service of Canada

This is a decision of the Federal Court of Canada rendered on behalf of the Court by the Honorable Mr. Justice Dubé on November 3, 1989.

The Applicant challenged the decision of the Commissioner of Corrections rejecting his grievance at the third level. By this grievance, the Applicant requested to have access to the Private Family Visiting Program with his partner of the same sex.

Facts:

The Applicant was incarcerated at Kingston Penitentiary when he first requested the accessibility to the Private Family Visiting Program with his partner of the same sex. His request was rejected through the grievance process. At the third level, the Commissioner rejected the Applicant's grievance while mentioning that since the Applicant had raised an important issue, that the CSC policy on Private Family Visiting would be reviewed in the near future. The Applicant's file indicated that the relationship that he had with his partner of the same sex was a long standing relationship (6 years). The Applicant challenged the Commissioner's decision arguing that it was contrary to section 15 (right to equality) of the Canadian Charter of Rights and Freedoms.

Issues:

(1) Is the Applicant's partner, the common-law partner of the Applicant?

(2) Is the Private Family Visiting Program of CSC discriminatory in that it excludes partners of the same sex?

Decision:

(1) The Court did not decide that the Applicant's partner was his common-law partner. In fact, the Applicant recognized that his partner was not his common-law partner.

(2) The Court found that sexual orientation was a ground of discrimination covered by section 15 of the Charter. The Court further found that the CSC policy on Private Family Visit was discriminatory in excluding partners of the same sex from the program. The Court found that CSC did not show that the Applicant's right was restricted by a reasonable limit prescribed by law which was justified in a free and democratic society.

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The Court consequently quashed the Commissioner's decision denying the Applicant's grievance and ordered that the Commissioner reconsider the Applicant's grievance in accordance with the provisions of section 15 of the Canadian Charter of Rights and Freedoms.

The Application was upheld. The Attorney General of Canada has filed an appeal.

Veysey v. The Queen

This is a decision rendered by the Federal Court of Appeal on May 31, 1990.

Facts:

The applicant was incarcerated at Kingston Penitentiary when he first requested the accessibility to the private family visiting program with his partner of the same sex. At the third level, the Commissioner rejected the applicant's grievance while mentioning that since the applicant had raised an important issue, that the CSC policy on private family visiting would be reviewed in the near future. The applicant challenged the Commissioner's decision arguing that it was contrary to section 15 (right to equality) of the Canadian Charter of Rights and Freedoms.

On November 3, 1989, the Federal Court, Trial Division, decided that the Private Family Visiting Program contravened section 15 (right of equality) of the Charter and that the Commissioner had to reconsider his decision in light of section 15 of the Charter. An appeal was filed by the Attorney General of Canada. The Federal Court of Appeal rendered its decision on May 31, 1990.

Decision:

The Federal Court of Appeal gave a legal interpretation to paragraph 19 of the Commissioner's Directive No. 770 on Visiting. Paragraph 19 establishes a list of eligible visitors. In combining the expressions "common law partners" and "relatives" and in looking at the purpose of the program, the Court came to the conclusion that the Commissioner could have exercised his discretion aan granted the visit to the same sex partners. The Court concluded that the Commissioner unlawfully refused to exercise his discretion.

The Court did not rule on the application of section 15 of the Charter to the facts of the case. The Court further refrained from deciding whether same sex partners could be considered common law spouses.

VILON V. R. (F.C.T.D.) JANUARY 20, 1989

FACTS

The plaintiff, who was serving a sentence at Donnacona Penitentiary, was charged with possession of contraband under s. 39.(i) of the Penitentiary Service Regulations and ordered to segregation. The plaintiff refused to obey the lawful order of the officers, an offence under s.39.(a). He appeared before a disciplinary court on April 22 and pleaded guilty to this second offence, receiving no new time in segregation in consideration of the time he had spent there since March 24. He pleaded not guilty to the contraband charge and was put back in segregation until the date of the trial. Although he had engaged a lawyer, the plaintiff appeared alone before the disciplinary court on April 28 and was found guilty of the contraband charge and sentenced to 15 days of punitive segregation to end on May 12.

The plaintiff's lawyer subsequently asked for a new hearing at the disciplinary court to argue under s.38.(13) of the Regulations for suspension of his client's sentence for contraband. The hearing proceeded on May 5 but the court gave no written decision since the president was unsure of his jurisdiction to suspend a sentence he had given previously . However, the director of the plaintiff's institution was notified that the sentence had been suspended by the disciplinary court. The director decided to put the sentence into effect nonetheless.

The plaintiff claimed that his detention after the date of the May 5 hearing was illegal. He sought damages, under the Crown Liability Act (R.S.C. 1985, c. C-50), for loss of wages and of enjoyment of prison privileges along with violation of his Constitutional rights flowing from his wrongful detention by a servant of the Crown.

ISSUE

Did the president of the disciplinary court have jurisdiction to suspend a sentence he had given at a previous hearing?

HELD

Nothing in the Penitentiary Service Regulations authorized the president to revise his own decision. The power to revise a decision and thereby suspend a sentence resides only in the head of the institution and is the subject of section 38.(15) of the Regulations. The director of the institution was therefore justified in carrying the sentence into effect and the plaintiff was not wrongfully detained.

ORDER

The action was dismissed.

William Vigue v. The Director, Mission Medium Security Institution and Fred Boyle

Jugement of the Supreme Court of British Columbia rendered by the Honourable Mr. Justice Lysyk on January 21st, 1983.

The application is for an order in the nature of habeas corpus ad subjiciendum for the release of the petitioner from punitive dissociation into the general population of the Mission Medium Security Institution.

Facts:

The applicant was charged with five (5) disciplinary offences arising out of certain occurrences on December 30th, 1982. He was convicted of four (4) offences and sentenced by the Disciplinary Court to four (4) consecutive periods of dissociation, totalling 95 days, running from the date of the hearing. The four (4) convictions were for offences under s. 39 of the *Penitentiary Service Regulations.*

Issue:

Does a Disciplinary Court lack the jurisdiction to impose sentences to run consecutively because such authority is not expressly conferred either by the *Penitentiary Act* or its *Regulations?*

Decision:

Held that the Disciplinary Court has the jurisdiction to impose consecutive sentences. Despite the fact that a Disciplinary Court is an administrative tribunal and not a court within the definition of that term employed in the *Criminal Code,* the same principle with regard to the imposition of consecutive sentences applies. That principle is that it would be anomalous if a person convicted of a number of separate offences could not be treated differently from a person who committed only one of those offences. Parliament cannot have intended for this anomaly to exist.

ORDER: Application Dismissed.

NOTE: The court in this case followed the decision of Dubé, J. in re. Davidson v. The Queen (1982), 67 C.C.C.(2d) 244 (F.C.T.D.)

Regina v. Bonita Walford

Judgment of the British Columbia Court of Appeal rendered by the Honourable Mr. Justice McFarlane on March 8th, 1983.

The applicant sought an order that she remain in the Province of British Columbia to enable her to retain and instruct counsel for the purposes of an appeal.

FACTS

The applicant pleaded guilty to a charge of second degree murder. Upon conviction a sentence of life imprisonment with a direction that the applicant not be eligible for parole for a period of twenty years was imposed. Pursuant to section 603(1.1) of the *Criminal Code* the applicant appealed the sentence imposed. Provincial officials holding the applicant at Lakeview Institution planned to immediately transfer the applicant to Kingston Penitentiary. In this application the applicant challenged the transfer decision on the basis of section 615 of the *Criminal Code*, sections 10 and 24 of the *Charter* and the inherent jurisdiction of the Court to insure that the applicant is given a reasonable opportunity to select and instruct counsel should legal aid be granted.

ISSUE

Does the Court have the jurisdiction to order that the applicant remain in British Columbia to enable her to instruct and retain counsel for the purposes of her appeal?

HELD

Neither section 615 of the *Criminal Code*, nor sections 10 and 24 of the *Charter*, nor the inherent jurisdiction of the Court required or justified making the order sought by the applicant. Parliament has vested the authority to make such an order in the Commissioner of Corrections by virtue of subsection 16(2) of the *Penitentiary Act*. It is therefore the Commissioner that has the jurisdiction to make the order and not the Court.

DECISION

Application dismissed.

WALKER v. THE DISCIPLINARY BOARD OF KINGSTON PENITENTIARY ET AL.

Judgment of the Federal Court of Canada, Trial Division, rendered by the Honourable Mr. Justice Strayer on April 21, 1986.

The applicant seeks a writ of certiorari quashing his conviction for a disciplinary offence.

FACTS — On April 25, 1985, the applicant was proceeding towards an open door which a Correctional Officer thought he should not pass through. The Correctional Officer touched the applicant in some way and swung the barred door shut.

The applicant reacted vocally, using strong language, threatening to do violence to the Officer if the latter touched him again which gave rise to a disciplinary charge of being threatening in his language.

ISSUE — Whether the applicant, having been refused counsel at his disciplinary hearing, was treated fairly in view of section 7 of the Canadian Charter of Rights and Freedoms.

DECISION — There is no serious dispute as to whether section 7 is potentially applicable in a situation like this one. Given the potential penalty of dissociation, a liberty interest was involved here. According to the case law relative to this matter, particularly the Howard case, the representation by counsel must be seen as a matter of right when the circumstances are such that it is necessary in order to give the accused inmate the opportunity to present his case adequately.

In the present case, however, there was only one charge against the applicant, and it was clearly in respect of the one brief event which took place on April 25, 1985. That charge involved no subtilities or ambiguities which the inmate might have been thought incapable of understanding. The contentious questions, such as the exact tenor of the inmate's remarks and the degree of provocation by the officer, were questions of evidence, and did not require any legal analysis. Furthermore, the inmate must have been familiar with the procedure having been charged with three disciplinary offences preceding the offence at stake here.

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The penalties involved here were a maximum of 30 days dissociation and loss of privileges, which is much smaller than in other cases, such as the Howard case, where the right to counsel was recognized. In Howard, the judges recognized that the gravity or seriousness of the offence is a relevant factor to be considered.

As for the possible unreasonability of the conduct of the Chairperson of the Disciplinary Court in assessing that the inmate was capable of representing his own interests, the judge found that the evidence in this case showed that the Chairperson was in a position to make an appropriate judgment regarding that question.

The application was dismissed.

David Warriner v. the Disciplinary Tribunal of Kingston Penitentiary

Inmate Warriner filed an application for certiorari before the Federal Court of Canada to have the decision of a disciplinary court set aside. The Federal Court of Canada has rendered its decision on December 7, 1990.

Facts

On December 14, 1987, Warriner, after a "contact visit" with his wife, was subjected to two strip searches by CSC officers. During the searches, he was ordered to bend over and touch his toes with his hands so that a visual check of his rectum could be carried out. He refused to do this, claiming that this order was unlawful. He therefore appeared before the disciplinary court, which found him guilty of disobeying a lawful order of an officer (section 39(a) of the Penitentiary Service Regulations). This is the decision that the inmate tried to have quashed by the Court.

Decision

The applicant's action did not put in issue the strip searching of inmates in general, or even following contact visits. It raised only the issue of the validity of the order to "bend over" as part of the process of a strip search, and only insofar as that related to the validity of the Independent Chairperson's decision. The following issues were raised by the applicant:

a) Did the Independent Chairperson err by refusing to consider the application of the Charter in determining whether the order was lawful?

Mr. Justice MacKay stated that the Chairperson did not err in refusing to consider the Charter, since the inmate never contested the constitutional validity of section 41(2)(c) before the Independent Chairperson.

b) Was the order to "bend over" authorized by law?

The Commissioner, as the person responsible for administering the Correctional Service of Canada is free to establish definitions and procedures for searches for the general purposes described at section 41(2)(c) of the Penitentiary Service Regulations.

The order to "bend over" was made pursuant to institutional Standing Orders and the Commissioner's Directive, which though they are not law, are within the scope of section 41(2)(c) of the Regulations.

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c) Was the order contrary to sections 7 and/or 8 of the Charter and therefore unlawful?

Section 7 (right of life, liberty and security of the person) of the Charter does not apply in this case considering that there is a specific section of the Charter dealing with searches, namely section 8 of the Charter.

The order to bend over to permit visual inspection of the anal cavity area, as a part of a strip search, instituted as a matter of routine following an open contact visit of an inmate, does not constitute an unreasonable search prohibited by section 8 of the Charter. The reasonable expectation of privacy that an inmate of a maximum security institution may have is very different from that of a person outside prison. Searches of various kinds and inspection of individual inmates is the order of the day within maximum security institutions, for safety of inmates and staff and for good order of the institution and the control of contraband within the prison setting.

The inmate has appealed this decision to the Federal Court of Appeal.

Weatherall v. Canada (Attorney General); Conway v. R.; Spearman v. Disciplinary Tribunal of Collins Bay Penitentiary, namely Peter Radley and Attorney General of Canada.

Judgment of the Federal Court of Canada, Trial Division, rendered by Mr. Justice Strayer on June 9, 1987.

Weatherall sought a declaration that paragraph 41(2)(c) of the Penitentiary Service Regulations (authorizing female guards to search male inmates) and paragraph 14 of the Commissioner's Directive 800-2-07.1 (authorizing strip searches of male inmates by female guards in emergencies) are invalid in that they are inconsistent with the rights guaranteed in sections 7, 8, 12 and 15 of the Charter.

Conway sought declarations that frisk searching by female guards on male inmates was unlawful and that for female guards to patrol living areas of male prisoners was unlawful.

Spearman, an applicant for certiorari, sought to quash his conviction by a disciplinary court for refusing to obey a prison rule (submitting to a frisk search by a female guard) on the grounds that the court erred in failing to consider: whether the rule violated was a lawful one; the defence of the right to privacy; and the defence of the right not to be discriminated against by reason of sex under the Canadian Bill of Rights.

ISSUES

1) Is cross-gender strip searching in non-emergency situations in contravention of the Charter?

2) Is cross-gender frisk searching in non-emergency situations in contravention of the Charter?

3) Is patrolling of male living quarters by female guards in contravention of the Charter?

4) Do the right to privacy and the right not to be discriminated against on the grounds of sex under the Canadian Bill of Rights provide defenses against refusing to submit to a cross-gender frisk search?

DECISION

1) Cross-gender strip searching in non-emergency situations violates s.8 of the Charter which protects against unreasonable search and seizure. PSR 41(2)(c) must therefore be declared invalid as not sufficiently protecting inmates against these unreasonable searches. Paragraph 14 of the Commissioner's Directive is not law

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and therefore can neither save PSR 41(2)(c) nor be declared invalid. Further, PSR 41(2)(c), when read in conjunction with PSR 41(3) (stating that female inmates shall only be searched by female guards), violates s.15(1) of the Charter by discriminating on its face between male and female inmates. Finally, the presence of female officers during a strip search of a male inmate in a non-emergency situation contravenes s.12 of the Charter because it is cruel and unusual treatment. PSR 41(2)(c) and 41(3) were therefore declared invalid insofar as they relate to strip searching.

2) Cross-gender frisk searching is not unreasonable within the meaning of s.8 of the Charter given the inevitable loss of privacy in the prison situation, security requirements, the relatively minor intrusion on personal integrity and the benefit of providing employment opportunities for women.

3) In the context of Collins Bay Penitentiary, due to the construction of the cells, s.8 of the Charter protects inmates while in their cells from unexpected cross-gender viewing for security reasons. It is not necessary either for security or for effective employment of female guards that they view inmates in their cells where such viewing is neither scheduled nor preceded by at least a minimal warning. The same result flows from s.15 of the Charter: it is not reasonably necessary for female officers to make such unannounced visual searches of the cells of male inmates except in emergencies. S.28 of the Charter reinforces this finding of invalidity. A declaration was therefore issued that at Collins Bay Penitentiary, it is unlawful except in emergency situations for female officers to view male inmates in their cells when such viewing is unscheduled or unannounced.

4) The defenses of the right to privacy and the right not to be discriminated against under the Canadian Bill of Rights have no validity in respect of frisk searches because any intrusion on privacy or any inequality as between the sexes resulting from frisk searches are trivial. The application for certiorari was denied.

Note: Weatherall v. Canada (Attorney General) was appealed by the Crown to the Federal Court of Appeal which rendered its judgment in the case on June 28, 1988. The Crown also appealed the decision on Conway's claim to the Federal Court of Appeal: the judgment of R. v. Conway was issued on July 13, 1990.

Weatherall v. Canada (Attorney General)

Judgment of the Federal Court of Appeal rendered on June 28, 1988.

The Crown sought an appeal from a Federal Court of Canada, Trial Division judgment declaring paragraph 41(2)(c) of the Penitentiary Service Regulations (authorizing female guards to search male inmates) inoperative. The trial judge held that PSR 41(2)(c) was inconsistent with s.8 of the Charter, in so far as it authorized any strip searching of inmates, because it failed to set down specific criteria for searching inmates. He also held that what is now paragraph 10 of Commissioner's Directive 571 (restricting strip searches of male inmates by female guards to emergency situations) did not have the force of law and therefore could not save PSR 41(2)(c).

ISSUES: 1) Did the trial judge err in that the issue raised by the pleadings was limited to the strip search of a male inmate by or in the presence of a female guard?

2) Did the trial judge err in concluding that the Commissioner's Directive did not have the force of law?

3) Did the trial judge err in concluding that paragraph 14 was not a "reasonable" limit prescribed by law within s.1 of the Charter.

4) Did the trial judge err in concluding that PSR 41(2)(c) when read together with paragraph 14 of the Commissioner's Directive were inconsistent with s.8 of the Charter?

DECISION: 1)T he pleadings only put in issue the validity of the impugned paragraphs to the extent that they authorized strip searching of male inmates in the presence of a female guard. The appellant was clearly prejudiced by the judge's ruling on strip searching of inmates in general which went beyond the issue raised in the pleadings.

2) The trial judge did not err in concluding that the Commissioner's Directive did not have the force of law, as stated by the Supreme Court in Martineau v. Matsqui Institution Inmate Disciplinary Board.

3) The trial judge did not err in concluding that the Commissioner's Directive was not a "reasonable" limit prescribed by law within s.1 of the Charter because the Directive is an administrative, not a legislative, enactment and therefore is not law in the sense that could prescribe a limit authorized by s.1.

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4) While the Commissioner's Directive does not therefore save PSR 41(2)(c) from being in contravention of the Charter, the trial judge's disposition was too broad. The peculiarities of prison life and the special problems they present to prison administrators discharging their responsibility for safety and security of the institution must not be overlooked. The authority contained in the PSR is limited to situations where a member considers that the action is reasonable. Such searches must also be bona fide.

The trial judgment is therefore varied to render paragraph 41(2)(c) of the Penitentiary Service Regulations inconsistent with s.8 of the Charter only insofar as it purports to authorize the strip searching of male penitentiary inmates by or in the presence of a female correctional officer in a non-emergency situation. PSR 41(2)(c) is therefore declared inoperative and of no force and effect only for the purpose of authorizing such searches.

Robert Witherspoon v. National Parole Board and Director of Mountain Institution

This is a decision of McKay, J., of the British Columbia Supreme Court, rendered on December 3, 1981 in Vancouver.

Facts:

> Witherspoon's mandatory supervision was suspended pursuant to a warrant in which the designated person stated that he had "reasonable and probable grounds to believe that the inmate should be apprehended to prevent a breach or a term or a condition of mandatory supervision". The mandatory supervision was subsequently revoked.

Held:

The Court was satisfied that the warrant of apprehension and suspension was a proper one and used the precise wording of the relative portion of section 16 of the *Parole Act*, and it seemed to Justice McKay, as he had said in Hunchak, that he was bound by In Re Lewis.

Stanley Wittaker v. The Queen

Judgement of the Court of Appeal for Saskatchewan rendered by the Honourable Chief Justice Culleton, Mr. Justice Woods and Brownridge on March 12, 1971 in Regina.

Inmate appeals his sentence for the reason that the effect of the sentence imposed was to increase his period of imprisonment by an additional four years.

Facts: On November 25, 1970, appellant unlawfully escaped Saskatchewan penitentiary and while at large, stole a car.
On December 3, 1970, he was sentenced to two years imprisonment for escape to be served before the remanet of his sentence, by virtue of s. 129 of the *Criminal Code*. On December 16,1970, he was sentenced to two years imprisonment to be served consecutively to the sentence then being served.

Issues:

Was the two-year sentence imposed for the car theft to be served concurrently or consecutively to the remanet of the sentence at the time of the escape ?

Under S. 129(1) of the *Criminal Code*, the sentence imposed for escape must be served first, before the remanet of his sentence.

While undergoing sentence of escape, a sentence imposed to be served consecutively to sentence "now serving" must be served after the escape sentence.

The remanet of the sentence still existing at the time of the escape must also be served after the escape sentence, therefore it is concurrent to the one imposed while undergoing the escape sentence.

Therefore, the effect of the sentence imposed on December 3 and December 16, 1970 was to add two years and not four to inmate's sentence.

The appeal is dismissed.

Up-dating: S. 129 has been changed to s. 137 of the *Criminal Code*.

Clarence Zwarich v. The Attorney General of Canada

This is a judgment of the Federal Court, Appeal Division, rendered by Mr. Justice Pratte on June 17, 1987.

This is an application under section 28 of the Federal Court Act.

FACTS — The applicant lost his employment as a result of a decision by his employer to lock-out his employees during the negotiation of a collective agreement. He applied for unemployment insurance benefits. The Unemployment Insurance Commission rejected his application by virtue of section 44(1) of the Unemployment Insurance Act, 1971. The applicant appealed from that decision to a board of referees. His appeal was dismissed. He then appealed to an umpire and invoked that section 44(1) of the Act violates section 7 and 15 of the Charter and is for that reason invalid. The umpire did not pronounce on that argument that he was of the view that neither he nor the board of referees were courts having the jurisdiction under subsection 24(1) of the Charter to determine whether subsection 44(1) of the Act violates the Charter. For that reason, the umpire dismissed the appeal.

ISSUE — Whether the umpire erred in failing to consider the applicant's argument that subsection 44(1) of the Unemployment Insurance Act, 1971 contravenes section 7 and 15 of the Charter.

DECISION — Neither a board of referees nor an umpire have the right to pronounce declarations as to the constitutional validity of statutes and regulations. However, they must apply the law. Therefore, they must determine what the law is. This implies that they must not only construe the relevant statutes and regulations but also find whether they have been validly enacted. If they reach the conclusion that a relevant statutory provision violates the Charter, they must decide the case that is before them as if that provision had never been enacted (Re Schewchuck and Ricard).

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The umpire erred in failing to consider the applicant's argument that subsection 44(1) of the Unemployment Insurance Act, 1971 contravenes sections 7 and 15 of the Charter. However, the error does not vitiate his decision because there is no merit in the applicant's Charter argument. The rule that is found in subsection 44(1) of the Act is not fundamentally unjust nor unreasonable.

The application is dismissed.

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