

CANADA / JUDGMENT

Faucher v. Canada (Attorney General)

2003 FCT 452

COURT

Federal Court

DECIDED

17 April 2003

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20030417 Docket: T-343-02 Citation: 2003 FCT 452 Montréal, Quebec, April 17, 2003 Present: The
Honourable Madam Justice Danièle Tremblay-Lamer BETWEEN: JEAN-JUDES FAUCHER
Applicant and THE ATTORNEY GENERAL OF CANADA Respondent REASONS FOR ORDER AND
ORDER

- [1] This is an application for judicial review of a decision of the Chairperson of the Disciplinary Court (the "chairperson") in which he found the applicant guilty of the disciplinary offence set forth in paragraph 40(l) of the Corrections and Conditional Release Act, S.C. 1992, c. 20 (the "Act").
- [2] The applicant is an inmate in the Archambault custodial facility.
- [3] On December 17, 2001, correctional officer Cloutier forced him to provide a urine sample. The applicant asked officer Cloutier for permission to call his lawyer to find out whether the urine sample might reveal DNA that could be used against him in other cases. Officer Cloutier refused his request.
- [4] A disciplinary hearing was held before the independent chairperson of the disciplinary court of Archambault Institution and the applicant was found guilty of the offence as charged.
- [5] The applicant argues that the disciplinary court erred in convicting him when he had proposed an informal resolution of the situation.
- [6] Notwithstanding the applicant's submissions, I am of the opinion that it is not the chairperson of the disciplinary court who must inquire into the merits of the decision to lay a disciplinary charge against an inmate but the head of the penitentiary, pursuant to the authority conferred on him by subsection 41(2) of the Act, which provides:
- 2) Where an informal resolution is not achieved, the institutional head may, depending on the seriousness of the alleged conduct and any aggravating or mitigating factors, issue a charge of a minor disciplinary offence or a serious disciplinary offence.

- (2) À défaut de règlement informel, le directeur peut porter une accusation d'infraction disciplinaire mineure ou grave, selon la gravité de la faute et l'existence de circonstances atténuantes ou aggravantes.
- [7] If the applicant thought there had been an informal resolution in this case and thus that the head could not make the decision to lay a disciplinary charge against him, he should have challenged this decision through the grievance procedure set out in sections 90 and 91 of the Act and sections 74 to 82 of the Corrections and Conditional Release Regulations, SOR/92-620.
- [8] The applicant did not avail himself of this procedure. He submits that the grievance procedure is not available when disciplinary offences are involved, since section 39 of the Act states that only sections 40 to 44 and the regulations are to be considered in disciplinary matters.
- [9] It is true that the Act expressly provides that an inmate may be convicted of a disciplinary offence only in accordance with sections 40 to 44 of the Act. The English version is especially clear in this regard: "Inmates shall not be disciplined otherwise than in accordance with sections 40 to 44 and the regulations."
- [10] This statutory requirement does not, in my view, exclude the possibility of challenging a decision prior to the hearing by the chairperson using the grievance procedure. Thus, it will be possible to dispute the head's decision to lay a disciplinary offence charge through the grievance procedure.
- [11] Commissioner's Directive 580 provides such a recourse in paragraph 55: Inmates may use the grievance procedure when they consider that: Un détenu peut présenter un grief lorsqu'il estime que:
- a. an institutional official who chaired the hearing failed to adhere to established procedures; or
 - a. Un agent de l'établissement qui a présidé l'audience n'a pas respecté les procédures établies; ou
 - b. institutional officials did not adhere to proper procedures prior to a hearing by the independent chairperson. (My emphasis).
 - b. Les agents de l'établissement n'ont pas suivi les procédures adéquates préalables à l'audition du cas par un président indépendant. (Je souligne).
- [12] However, paragraph 56 of Commissioner's Directive 580 states that decisions rendered by the independent chairperson cannot be grieved.

[13] The independent chairperson is appointed under paragraph 24(1)(a) of the Regulations which provides that the Minister shall appoint a person, other than a staff member or an offender, who has knowledge of the administrative decision-making process to be an independent chairperson for the purpose of conducting hearings of serious disciplinary offences:

24. (1) The Minister shall appoint

(a) a person, other than a staff member or an offender, who has knowledge of the administrative decision-making process to be an independent chairperson for the purpose of conducting hearings of serious disciplinary offences;

24. (1) Le ministre doit nommer :

a) à titre de président indépendant chargé de procéder à l'audition des accusations d'infraction disciplinaire grave, une personne qui connaît le processus de prise de décisions administratives et qui n'est pas un agent ou un délinquant;

[14] Paragraph 9 of Commissioner's Directive 580 states that the offence in paragraph 40(l) of the Act is a serious offence that will be heard by the independent chairperson:

9. If an inmate is charged under subsection 40 (k) or (l) of the Corrections and Conditional Release Act, this will normally be considered a major offence and will be heard by the independent chairperson.

9. Si un détenu est accusé en vertu du paragraphe 40 k) ou l) de la Loi sur le système correctionnel et la mise en liberté sous condition, il sera normalement réputé avoir commis une infraction grave et sera jugé par un président indépendant.

[15] Subsection 43(3) of the Act provides that the person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question:

3) The person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question.

(3) La personne chargée de l'audition ne peut prononcer la culpabilité que si elle est convaincue hors de tout doute raisonnable, sur la foi de la preuve présentée, que le détenu a bien commis l'infraction reprochée.

[16] Thus the role of the person conducting the hearing, in this case the chairperson, is to hold a hearing to determine whether the inmate is guilty beyond a reasonable doubt of the disciplinary offence for which he received a notice of offence, and not to determine whether the charge should have been laid. There is no express provision in the Act or the regulations under which the chairperson must substitute himself for the head in order to determine whether the circumstances were such as to allow an informal settlement to be reached.

[17] For these reasons, the application for judicial review is dismissed. ORDER THE COURT ORDERS that the application for judicial review be dismissed. "Danièle Tremblay-Lamer" J.F.C.C. Certified true translation Suzanne Gauthier, C. Tr., LL.L. FEDERAL COURT OF CANADA TRIAL DIVISION SOLICITORS OF RECORD DOCKET: T-343-02 STYLE: JEAN-JUDES FAUCHER Applicant and THE ATTORNEY GENERAL OF CANADA Respondent PLACE OF HEARING: Montréal, Quebec DATE OF HEARING: April 15, 2003 REASONS FOR ORDER AND ORDER: THE HONOURABLE MADAM JUSTICE TREMBLAY-LAMER DATED: April 17, 2003 APPEARANCES: Daniel Royer FOR THE APPLICANT Éric Lafrenière FOR THE RESPONDENT SOLICITORS OF RECORD: Labelle, Boudrault, Côté et associés FOR THE APPLICANT Montréal, Quebec Morris Rosenberg FOR THE RESPONDENT Deputy Attorney General of Canada Montréal, Quebec

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