

CANADA / JUDGMENT

Hiebert v. Canada (Attorney general)

2002 FCT 1086

COURT

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Ottawa, Ontario, Thursday the 17th day of October 2002

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

KURT ALEXANDER HIEBERT

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

DAWSON J.

- [1] Mr. Hiebert brings this application for judicial review from the decision of the Independent Chairperson, Bath Institution Disciplinary Court which found Mr. Hiebert guilty of a disciplinary offense under paragraph 40(1)(l) of the Corrections and Conditional Release Act, S.C. 1992, c. 20 ("Act"). Mr. Hiebert was charged with failing to provide a urine sample demanded as part of the prescribed random selection urinalysis program.
- [2] Mr. Hiebert does not challenge the reasonableness of the decision. Rather, he says the disciplinary hearing was vitiated due to the presence at the hearing of Mr. Niles. Mr. Niles was at the relevant time the Acting Coordinator of Corrections and also the Urinalysis Program Coordinator at Bath Institution. Mr. Niles also attended the disciplinary hearing as the member designated to assist in the hearing process as contemplated by sections 19 to 22 of the Commissioner's Directive 580 ("CD 580") entitled "Discipline of Inmates".
- [3] Specifically Mr. Hiebert says that:
1. The presence of a Correctional Service staff member who acts as a designated member at a disciplinary hearing is contrary to law.
 2. The Independent Chairperson breached the principles of natural justice in allowing the hearing to proceed with Mr. Niles as the designated member because Mr. Niles was directly involved in the relevant incident.
 3. The Independent Chairperson breached the principles of natural justice in allowing the hearing to proceed with Mr. Niles as the designated member because Mr. Niles performed overlapping roles in the disciplinary process, thus creating a reasonable apprehension of institutional bias.
- [4] These are my reasons for rejecting those submissions and dismissing this application for judicial review.
- (i) The nature of the disciplinary proceedings
- [5] The concept of fairness is neither abstract nor absolute. It is therefore necessary to consider the nature of the proceeding at issue in order to situate the duty of fairness and to consider the arguments advanced by Mr. Hiebert.
- [6] In *Re Therrien*, [2001] 2 S.C.R. 3 at paragraph 81 the Supreme Court observed that since *Nicholson v. Haldimand-Norfolk Reg. Police Commrs.*, [1979] 1 S.C.R. 311 the requirement of compliance with the rules of natural justice has been extended to all administrative bodies which act under statutory authority. In this context the rules of natural justice are expressed to be the rules of procedural fairness, or the duty to act fairly. The duty of fairness is triggered by the fact that a decision is administrative and affects the rights, privileges or

interests of an individual. See also: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

- [7] The nature and extent of the duty of fairness "is eminently variable and its content is to be decided in the specific context of each case". See: *Baker*, *supra* at paragraph 21.
- [8] In the context of the inmate discipline, in *Boudreau v. Canada (Attorney General)*, [2000] F.C.J. No. 2016 (T. D.) Justice Dubé wrote as follows at paragraph 7:

The jurisprudence has established general principles regarding the nature of the disciplinary proceedings conducted by an Independent Chairperson of a disciplinary court. These hearings are neither judicial nor quasi-judicial in character. They are merely administrative proceedings. There is no requirement to conform to any particular procedure or to abide by the rules of evidence. However, there is an overall duty to act fairly in the sense that the prisoner must be aware of the allegations and the evidence against him and be afforded a reasonable opportunity to respond. These hearings are not conducted in an adversary manner but in an inquisitorial one, in the sense that the Chairperson must examine both sides of the question. It is not for a court to review the evidence as a court might do in a case of a judicial tribunal or a review of a decision of a quasi-judicial tribunal, but the court must limit itself to consider whether there has been a breach of the general duty to act fairly. Finally, the judicial discretion in relation to disciplinary matters must be exercised sparingly and a remedy ought to be granted only in cases of serious injustice. [Footnote omitted and underlining added]

- [9] These principles were recently restated by Justice Kelen in *Forrest v. Canada (Attorney General)*, 2002 FCT 539.

(ii) The presence of a member of the Correctional Service as a designated member at the hearing

- [10] Turning to the first ground of complaint, Mr. Hiebert argues that there is nothing in either the Act or the regulations promulgated under the Act (Corrections and Conditional Release Regulations, SOR/92-620 ("Regulations")) which permits a designated member of the Correctional Service to assist the Independent Chairperson at a disciplinary hearing. Because the Act provides in section 39 that inmates shall not be disciplined otherwise than in accordance with sections 40 to 44 of the Act and the Regulations, the presence of the designated member is said not to be authorized by law.
- [11] I see no merit in this submission. While it is true that neither the Act nor the Regulations provides for the presence of a designated member it is equally true that nothing in the Act or Regulations prohibits the presence of a designated member.
- [12] The intent of section 39 of the Act is to ensure that disciplinary hearings are conducted in accordance with the Act and Regulations. Together they establish basic procedures which must be complied with at disciplinary hearings. It does not logically follow that it is contrary to law to add anything to that process, so long as the duty of fairness is not breached.

(iii) The nature of Mr. Niles' involvement

[13] Sections 8, 9, 19 and 22 of CD 580 are relevant to this argument. They provide that:

DETERMINATION OF THE CATEGORY OF OFFENCE

8. The institutional head shall review each offence report and 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, specifying under which subsection of section 40 of the Corrections and Conditional Release Act the charge is laid. The institutional head may delegate this authority to a staff member designated, by name or position for that purpose, in institutional Standing Orders. As the implications of a disciplinary charge are serious, the institutional head should ensure that those designated are at a senior manager level. Normally, such delegation should not be below the level of Unit Manager. The person issuing the charge shall have no involvement in the incident which precipitated the offence report. The following guidelines shall be used in determining whether the offence is minor or serious:

Minor Offence

- a. where an inmate exhibits negative or non-productive behaviour towards institutional rules governing the conduct of inmates;

Serious Offence

- b. where an inmate commits a serious breach of security, exhibits violent behaviour, commits or attempts to commit an act that could generate such behaviour on the part of others, or could cause harmful consequences to staff members or inmates.
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.

[...]

MEMBER DESIGNATED TO ASSIST IN THE HEARING PROCESS

19. The institutional head shall designate a member, and an alternate member of the Service, at the correctional supervisor level or above, to provide continuity and to facilitate the disciplinary process. This member shall provide assistance and any details or documents requested by the chairperson in order to facilitate the hearing.

[...]

22. In the event the designated member is directly involved in an incident to be heard, the member shall not act in the aforementioned position for that case.

DÉTERMINATION DE LA CATÉGORIE D'INFRACTION

8. Le directeur du pénitencier doit étudier chaque rapport d'infraction et peut, selon la gravité de la faute et l'existence de circonstances atténuantes ou aggravantes, porter une accusation d'infraction disciplinaire mineure ou grave. Il doit préciser en vertu de quel paragraphe de l'article 40 de la Loi sur le système correctionnel et la mise en liberté sous condition, l'accusation est déposée. Le directeur peut déléguer ses pouvoirs à un agent désigné à cette fin, soit expressément, soit en fonction du poste qu'il occupe, dans des ordres permanents du pénitencier. En raison de la gravité des conséquences d'une accusation d'infraction disciplinaire, il incombe au directeur de s'assurer que l'agent désigné détient un poste de gestionnaire supérieur (d'ordinaire, un poste de gestionnaire d'unité ou plus élevé). La personne qui porte l'accusation ne doit pas avoir été impliquée dans l'incident ayant motivé le rapport d'infraction. La catégorie d'infraction doit être déterminée selon les lignes directrices suivantes :

Infraction mineure

- a. lorsqu'un détenu adopte une attitude négative envers les règles du pénitencier régissant la conduite des détenus;

Infraction grave

- b. lorsqu'un détenu commet une grave infraction à la sécurité, manifeste un comportement violent, commet ou tente de commettre un acte pouvant donner lieu à ce genre de comportement chez les autres détenus ou avoir des conséquences nuisibles pour les employés et les détenus.
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.

[...]

AGENT DÉSIGNÉ POUR FACILITER LA TENUE DE L'AUDIENCE

19. Le directeur de l'établissement doit désigner deux (2) agents du Service, dont un suppléant, pour veiller à la continuité du processus disciplinaire. Ces agents doivent être titulaires d'un poste de surveillant correctionnel ou plus élevé. L'agent désigné doit fournir de l'aide et tout renseignement ou document dont le président pourrait avoir besoin afin de faciliter la tenue de l'audience.

[...]

22. Advenant que l'agent désigné soit directement impliqué dans l'incident doit être entendu, il ne doit pas s'acquitter des fonctions mentionnées plus haut pour le cas en question.

- [14] Mr. Hiebert says that Mr. Niles was directly involved in the process as prohibited by section 8 and section 22 of CD 580, that Mr. Niles involvement went beyond the role contemplated in CD 580, and that in the circumstances the duty of fairness was breached.
- [15] This argument requires careful attention to the nature and extent of Mr. Niles' involvement in the hearing and the events leading to the hearing.
- [16] As the Bath Institution Urinalysis Program Coordinator, Mr. Niles received each month a random selection list of inmates whose urine was to be sampled in a given month. This list was generated by the National Headquarters of the Correctional Service of Canada. In conjunction with the urinalysis collector, Mr. Niles established dates on which urine would be collected from inmates named on the random list. Dates were assigned in the order of the names as they appeared on the list.
- [17] Mr. Niles was not involved in the actual collection of urine samples. Mr. Niles was not present when a sample was demanded of Mr. Hiebert, nor when the consequence of refusal was explained to Mr. Hiebert, nor when Mr. Hiebert refused to provide the sample, nor when Mr. Hiebert signed the requisite forms. There was no evidence of any personal dealing between Mr. Niles and Mr. Hiebert with respect to the events in question.
- [18] Mr. Niles did receive an offense report prepared by the urinalysis collector. As acting Coordinator of Correctional Operations, Mr. Niles was responsible for reviewing the offense report, deciding whether or not a charge was warranted, and categorizing the offense. Section 9 of CD 580 shows the limited discretion Mr. Niles exercised in characterizing an offense where the offense was refusing to provide a urine sample.
- [19] At the disciplinary proceeding, Mr. Niles assisted the independent chairperson as she requested and as contemplated by CD 580. After a careful review of the transcript of proceedings at that hearing, I think it can fairly be said that Mr. Niles responded to the objection made by Mr. Hiebert's counsel to Mr. Niles presence, answered questions put to him by Mr. Hiebert's counsel, answered questions put him by the chair and responded to the chair's request for submissions on penalty. Mr. Niles did not question Mr. Hiebert.
- [20] On those facts, I find that Mr. Niles was not "directly involved in an incident to be heard" as prohibited by section 22 of CD 580. The incident to be heard involved the demand of a sample and its refusal. Mr. Niles had no personal knowledge or involvement with those events.
- [21] While counsel for Mr. Hiebert indicated that an issue would be raised with respect to whether the random selection process followed was in compliance with the guidelines under Commissioner's Directive 572, a review of those guidelines together with the nature of the inquiries raised by counsel at the hearing satisfy me that Mr. Niles was only peripherally involved in the area of counsel's stated concern. The nub of counsel's concern was that by allowing Mr. Niles to decide whether a charge was warranted Mr. Niles was given a supervisory capacity over his own duties. In fact, the supervisory capacity was reposed in

the Independent Chair who heard the charge. Counsel did not pursue questions as to the randomness of the demand, and the list provided by National Headquarters was produced at the hearing. The urine collector testified as to how he went through the list.

- [22] Subject to the one comment below, I find nothing in Mr. Niles' conduct at the hearing which went beyond providing assistance requested by the chair in order to facilitate the hearing as contemplated by section 19 of CD 580.
- [23] No action on Mr. Niles' part, in my view, impaired the component of the duty of fairness which is the right to be heard.
- [24] In my view, the one questionable action on Mr. Niles' part was when, in response to the independent chair's question as to whether Mr. Niles had questions to put to Mr. Hiebert, Mr. Niles offered an unsolicited comment. Mr. Niles recounted conversing after the refusal with a nurse regarding the nature of Mr. Hiebert's medical condition. However, after this occurred Mr. Hiebert immediately volunteered "I am not debating that. They are correct about that". In that circumstance where the information provided was not controversial, where Mr. Hiebert's own counsel asked questions of Mr. Niles which elicited an expansion of Mr. Niles unsolicited comment, where the proceedings were administrative and inquisitorial in nature and where a reasonable opportunity to respond to Mr. Niles' comment was provided, I do not find a breach of the duty of fairness.
- [25] Further, the substance of the detail provided by Mr. Niles was elicited from him by the chair after Mr. Niles' initial general comment.
- [26] In summary on this point, I find on the evidence that Mr. Niles was not directly involved in the process as prohibited by sections 8 and 22 of CD 580. In substance, Mr. Niles' conduct fell within providing assistance to the independent chairperson as contemplated by section 19 of CD 580. On the facts of this case I am satisfied that Mr. Niles' conduct did not impair Mr. Hiebert's right to fully and fairly participate in the hearing.
- [27] The result might be different in another case on different facts. It goes without saying that it is preferable that a designated member be as far removed as possible from the factual matrix which is before a disciplinary hearing.

(iv) The right to an impartial hearing

- [28] The second component of the duty to act fairly is the right to an impartial hearing. Where, as in the present case, an institutional bias is asserted the test to be applied is whether an informed person viewing the matter realistically and practically, and having thought the matter through, would have a reasonable apprehension of bias in a large number of cases? See, for example, *Re Therrien*, supra at paragraphs 82 and 102.

[29] In the present case, Mr. Hiebert argues that a reasonable apprehension of bias was raised because "the institutional characteristics of the disciplinary process were capable of affecting" the Independent Chairperson's state of mind and because Mr. Niles performed multiple overlapping roles within the hearing and in the process leading up to the hearing.

[30] Particular reliance was placed upon the remarks of Justice Gonthier for the majority of the Supreme Court of Canada in 2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool), [1996] 3 S.C.R. 919 at that portion of paragraph 60 where Justice Gonthier wrote:

The fact that the Régie, as an institution, participates in the process of investigation, summoning and adjudication is not in itself problematic. However, the possibility that a particular director could, following the investigation, decide to hold a hearing and could then participate in the decision-making process would cause an informed person to have a reasonable apprehension of bias in a substantial number of cases. It seems to me that, as with the Régie's jurists, a form of separation among the directors involved in the various stages of the process is necessary to counter that apprehension of bias.

[31] In my respectful view, Mr. Hiebert's submission overlooks the fact that the right to a fair hearing flows from the *nemo iudex in sua causa* rule. A party to a proceeding has a right to expect that an impartial adjudicator will deal with his or her case. Thus, cases on institutional bias arise in situations where there is an overlap in investigative and adjudicative functions.

[32] The Supreme Court of Canada in Régie des permis d'alcool at paragraph 44 explained that in considering the existence of institutional bias, while all factors must be considered "the guarantees provided for in the legislation to counter the prejudicial effects of certain institutional characteristics must be given special attention".

[33] In the present case, the Act provides in section 39 that inmates shall not be disciplined otherwise than in accordance with sections 40 to 44 of the Act and Regulations.

Subsections 43(1) and 43(3) of the Act provide:

43. (1) A charge of a disciplinary offence shall be dealt with in accordance with the prescribed procedure, including a hearing conducted in the prescribed manner.

[...]

43. (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.

43. (1) L'accusation d'infraction disciplinaire est instruite conformément à la procédure réglementaire et doit notamment faire l'objet d'une audition conforme aux règlements.

[...]

43. (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.

[34] Sections 24, 31 and subsections 27(2) and 33(1) of the Regulations are also relevant. They provide:

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; and
- (b) a senior independent chairperson for each region from among the independent chairpersons of that region.

(2) A senior independent chairperson shall

- (a) advise and, in conjunction with the Service, train the independent chairpersons in the senior independent chairperson's region;
 - (b) promote the principle among the independent chairpersons in the senior independent chairperson's region that similar sanctions should be imposed for similar disciplinary offences committed in similar circumstances; and
 - (c) exchange information with the senior independent chairpersons of other regions.
- (3) A person appointed pursuant to subsection (1) shall hold office during good behaviour for a period of not more than five years, which period may be renewed by the Minister.(4) An independent chairperson shall be remunerated at a rate determined by the Treasury Board and given travel and living expenses in accordance with the Treasury Board Travel Directive for travel and living expenses related to
- (a) conducting a hearing of a disciplinary offence;
 - (b) participating in an information session;
 - (c) participating in an orientation and training session;
 - (d) participating in a consultation session with staff members or inmates; and
 - (e) performing related duties at the request of the Service.

[...]

27(2) A hearing of a serious disciplinary offence shall be conducted by an independent chairperson, except in extraordinary circumstances where the independent chairperson or another independent chairperson is not available within a reasonable period of time, in which case the institutional head may conduct the hearing.

[...]

31. (1) The person who conducts a hearing of a disciplinary offence shall give the inmate who is charged a reasonable opportunity at the hearing to
- (a) question witnesses through the person conducting the hearing, introduce evidence, call witnesses on the inmate's behalf and examine exhibits and documents to be considered in the taking of the decision; and
 - (b) make submissions during all phases of the hearing, including submissions respecting the appropriate sanction.
- (2) The Service shall ensure that an inmate who is charged with a serious disciplinary offence is given a reasonable opportunity to retain and instruct legal counsel for the hearing, and that the inmate's legal counsel is permitted to participate in the proceedings to the same extent as an inmate pursuant to subsection (1).

[...]

33. (1) The Service shall ensure that all hearings of disciplinary offences are recorded in such a manner as to make a full review of any hearing possible.
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;
 - b) pour chaque région, un premier président indépendant choisi parmi les présidents indépendants de la région.
- (2) Le premier président régional doit :
- a) conseiller les présidents indépendants de sa région et, de concert avec le Service, voir à leur formation;
 - b) promouvoir auprès des présidents indépendants de sa région le principe que pour des infractions disciplinaires semblables commises dans des circonstances semblables doivent être infligées des peines semblables;
 - c) procéder à des échanges de renseignements avec les autres premiers présidents régionaux.
- (3) Les personnes nommées conformément au paragraphe (1) occupent leur poste à titre inamovible pour un mandat qui ne dépasse pas cinq ans et qui peut être reconduit par le ministre.
- (4) Les présidents indépendants sont rémunérés aux taux fixés par le Conseil du Trésor et reçoivent des indemnités de séjour et de déplacement, selon les taux prévus dans la Directive du Conseil du Trésor sur les voyages, pour les dépenses liées à :

- a) la tenue d'une audition disciplinaire;
- b) leur participation à des séances d'information;
- c) leur participation à des séances d'initiation et de formation;
- d) leur participation à des séances de consultation avec des agents ou des détenus;
- e) l'accomplissement de tâches connexes à la demande du Service.

[...]

27(2) L'audition relative à une infraction disciplinaire grave doit être tenue par un président indépendant sauf que, dans les cas exceptionnels où le président indépendant ne peut tenir l'audition et ne peut être remplacé par un autre président indépendant dans un délai raisonnable, le directeur du pénitencier peut la tenir à sa place.

[...]

- 31. (1) Au cours de l'audition disciplinaire, la personne qui tient l'audition doit, dans des limites raisonnables, donner au détenu qui est accusé la possibilité :
 - a) d'interroger des témoins par l'intermédiaire de la personne qui tient l'audition, de présenter des éléments de preuve, d'appeler des témoins en sa faveur et d'examiner les pièces et les documents qui vont être pris en considération pour arriver à la décision;
 - b) de présenter ses observations durant chaque phase de l'audition, y compris quant à la peine qui s'impose.
- (2) Le Service doit veiller à ce que le détenu accusé d'une infraction disciplinaire grave ait, dans des limites raisonnables, la possibilité d'avoir recours à l'assistance d'un avocat et de lui donner des instructions en vue de l'audition disciplinaire et que cet avocat puisse prendre part aux procédures au même titre que le détenu selon le paragraphe (1).

[...]

- 33. (1) Le Service doit veiller à ce que toutes les auditions disciplinaires soient enregistrées de manière qu'elles puissent faire l'objet d'une révision complète.

[35] These provisions ensure that any disciplinary proceeding involving a serious disciplinary offense shall be conducted by a trained person, independent of the institution, who may only make a finding of guilt where the evidence presented at the hearing satisfies the adjudicator beyond a reasonable doubt. At that hearing, the inmate is given full participatory rights. The hearing is recorded to make a full review of the hearing possible. Prior to the hearing the inmate is afforded a reasonable opportunity to retain and instruct counsel.

[36] In the present case, no suggestion was made that these protections were not in place. There was no suggestion that Mr. Niles participated in any adjudicative capacity.

[37] Considering those facts and guarantees of protection, and considering the nature of the disciplinary proceedings, I conclude that a well-informed person, viewing the matter realistically and practically and having thought the matter through would not have a reasonable apprehension of bias in a substantial number of cases.

COSTS

[38] Costs normally follow the event and the Attorney General of Canada seeks the costs of this application in an unspecified amount. That request is opposed by Mr. Hiebert who says that direction is needed from the Court on the issues he raises.

[39] In my view, the legal principles applicable to the issues raised are well-settled. In the result, I have not been satisfied that costs should not follow the event. Mr. Hiebert therefore shall pay to the respondent costs which I fix in the amount of \$250.00.

ORDER

[40] THEREFORE, IT IS HEREBY ORDERED THAT:

1. The application for judicial review is dismissed.
2. The applicant shall pay to the respondent the costs of this proceeding fixed in the amount of \$250.00.

"Eleanor R. Dawson"

Judge

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: T-1050-01

STYLE OF CAUSE: KURT ALEXANDER HIEBERT V.

ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 24, 2002

REASONS FOR ORDER AND ORDER BY: THE HONOURABLE MADAM

JUSTICE DAWSON

DATED: October 17, 2002

APPEARANCES:

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Ms. Monika Lozinska FOR RESPONDENT

SOLICITORS OF RECORD:

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Kingston, Ontario

Mr. Morris Rosenberg FOR RESPONDENT

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