Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

T-2579-96

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Between:

MONTGOMERY FRANCIS RYAN,
MATTHEW CARTER AND
WILFRED CLARENCE KERR,

Applicants,

- and -

CLIVE L. RIPPON, IN HIS CAPACITY AS
INDEPENDENT CHAIRPERSON OF THE
DISCIPLINARY COURT OF
WILLIAM HEAD INSTITUTION,

Respondent.

REASONS FOR ORDER

REED, J.

The applicants seek to have a decision of the Disciplinary Court of William Head Institution set aside. That decision found the applicants guilty of an offence under subsection 40(i) of the *Corrections and Conditional Release Act*, possession of a contraband - home brew.

William Head Institution, unlike many other penal institutions, has facilities in which inmates can live together in a duplex accommodation. These living units have common living room and kitchen areas. The three applicants, and two other inmates, were housed in Unit C-2. That unit was off limits to all but the five inmates.

The Daily Occurrence Books (D.O.B.) in which the observations of penitentiary officers are recorded showed that at 02:54 hours, on August 2, 1996, Unit C-2 seemed to have a strong brew-like odour. At 22:30, on the same day, it was reported that all occupants were up and seemed to be louder than usual. The living area of the unit was searched but no contraband was found.

The following morning, around 08:25, a penitentiary officer, Shannon Needle, found home brew in an ice cream container in the freezer compartment of the refrigerator located in the kitchen area of the unit. At the time, the only inmate, who was an occupant of Unit C-2, who was in that building was Mr. Fisher. He was unwell and was in his bedroom on the second floor.

All five occupants of Unit C-2 were charged with possession of a contraband. By the time the charges were heard Mr. Fisher had been transferred to Mission Institution. Another inmate, Mr. Rawle, had been released on day parole. The charges against these two were stayed. The Chairperson of the Disciplinary Court found the three applicants guilty of possession of home brew and fined each $30.00.

It is agreed that the burden of proof in this case is the same as that applying in a criminal proceeding. Subsection 43(3) of the *Corrections and Conditional Release Act* provides:

> 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.

The Chairman of the Disciplinary Court demonstrated, in his comments during the hearing, that he was well aware that he was dealing with a case in which the issue was constructive possession, that control and knowledge by the accused had to be proven. He referred to *R. v. Escoffery* (1996), 47 C.R. (4th) 40, (Ont. C.A.). In that case an accused had been convicted of possession of crack

cocaine found in his girlfriend's apartment, which apartment he visited regularly. There was no direct evidence that the accused had knowledge of the cocaine and the Court of Appeal found the evidence insufficient to support an inference that the accused had knowledge. At page 46, the Court commented:

> I would not prescribe a firm rule for inferring knowledge from occupancy: *R. v. Lepage* (1995), 36 C.R. (4th) 145 (S.C.C.). In the present case no other evidence [other than occupancy] connected the appellant to the drugs, there was no direct evidence of knowledge, the drugs were hidden, the apartment was rented by the co-accused, other persons frequented the apartment, and the appellant was not a permanent occupant. The circumstantial evidence does not therefore support a finding that the appellant had knowledge of the crack cocaine. Accordingly, the finding that the Crown had proved possession was unreasonable.

In the present case, the Chairperson had before him evidence that: (1) the applicants lived in a house that was out of bounds to everyone but the five inmates; (2) the brew was in open view in the freezer compartment of the refrigerator, an area used on an everyday basis for food and drink; (3) the premises had smelled of brew approximately 30 hours before the brew was found; (4) all occupants of the unit had been up late the previous night and had been louder than usual. The Chairperson also commented that as occupants of the house the five individuals lived in a closely associated manner.

The tests to be applied in reviewing a decision of a federal board or tribunal, pursuant to section 18.1 of the *Federal Court Act,* when the challenge is based on an erroneous application of the law to the facts, are to ask whether the decision maker: (1) erred in law in making the decision, whether or not the error appears on the face of the record; (2) based his decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard for the material before him.

I cannot find that the Chairperson's decision fits within either of those categories. The inference he drew about the applicants' knowledge was reasonably open to him on the facts. The Chairperson clearly understood and applied the correct law. Accordingly, the application will be dismissed.

(Sgd.) "B. Reed"

Judge

Vancouver, B.C.
September 11, 1997

NAMES OF COUNSEL AND SOLICITORS OF RECORD

STYLE OF CAUSE:	MONTGOMERY FRANCIS RYAN MATTHEW CARTER AND WILFRED CLARENCE KERR - and - CLIVE L. RIPPON IN HIS CAPACITY AS INDEPENDANT CHAIRPERSON OF THE DISCIPLINARY COURT OF WILLIAM HEAD INSTITUTION
COURT NO.:	T-2579-96
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	September 5, 1996

REASONS FOR ORDER OF REED, J.
dated September 11, 1997

APPEARANCES:

Mr. Vaughan Barrett	for Applicant
Mr. Steven Albin	for Respondent

SOLICITORS OF RECORD:

The Law Centre Victoria, BC	for Applicant
George Thomson Deputy Attorney General of Canada	for Respondent

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