Date: 20080211

Docket: T-412-07

Citation: 2008 FC 89

Ottawa, Ontario, the 11th day of February 2008

Present: the Honourable Mr. Justice Beaudry

BETWEEN:

DENIS BÉGIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, S.C. 1985, c. F-7, of a December 1, 2006 decision by the Correctional Service of Canada (CSC) regarding a third-level grievance procedure. The request to correct some of the information contained in the applicant's correctional record pursuant to section 24 of the *Corrections and Conditional Release Act*,, R.S. 1992, c. 20 (the Act) was dismissed, on the ground that the procedure followed by the CSC complied with the Act.

ISSUES

[2] Did the CSC Commissioner make an unreasonable error in concluding that the procedure followed and the refusal to make the requested corrections were in compliance with section 24 of the Act?

FACTUAL BACKGROUND

[3] The applicant has been incarcerated at La Macaza Institution since November 25, 1997.

[4] He was found guilty of the first-degree murder of Ricardo Gizzi. The Quebec Court of Appeal ordered a new trial following its ruling that the applicant's March 8, 1996 statement should be excluded because it was made with the hope of advantage, and was consequently non-voluntary (*R. v. Bégin*, [2002] J.Q. No 3546). During the investigation of the murder of Ricardo Gizzi, the applicant made another statement (March 11, 1996) in which he admitted having participated in another murder.

[5] At the new trial for the murder of Ricardo Gizzi, the applicant pled guilty to second degree murder, and he is currently serving a life sentence. No criminal proceedings were initiated following his admission regarding the second murder.

[6] In 1995, the applicant was the subject of a complaint to the police by his ex-spouse for battery, death threats and sexual assault. A request to institute proceedings was filed but no charges were brought.

[7] The March 11, 1996 sworn statement during the police investigation and the ex-spouse's complaint are included in the applicant's correctional record. The facts alleged in both documents are noted in other documents of his correctional record.

[8] The applicant filed three grievances. In the first grievance (#V30400021298), he sought to amend his Statistical Information on Recidivism (SIR) sheet. In the second one (#V30A0021378), he sought to strike from the record the information relating to the facts in his March 11, 1996 sworn statement as well as his ex-spouse's complaint contained in the case management document (SCCP-PU-042), the psychological report (SCCP-PU-076), and the preventive security report (SCCP-PU-065). In the third grievance (#V30A00021571), he sought to amend his Family Violence Risk Assessment (FVRA) sheet.

[9] In the first grievance regarding his SIR sheet, the applicant alleges that the parole officer (PO) in charge of his file harassed and intimidated him. He submits as evidence the fact that the PO relied on facts reported in his March 11, 1996 statement and in the complaint filed by his ex-spouse.

IMPUGNED DECISION

[10] The three grievance procedures progressed independently, that is, they were all filed on different dates. The responses to the first- and second-level grievances were also issued on different dates. In his memorandum, the applicant included a table corresponding to each of the grievances to illustrate the steps he followed and the decisions at each level (see pages 549 to 554). For purposes of this proceeding, suffice it to say that each grievance was dismissed at the first level. The

grievances were partly allowed at the second level to enable the PO to review the requests more closely.

[11] Following the second-level decisions, the three grievances were effectively consolidated on September 8, 2006.

[12] On September 21, 2006, the applicant sent a letter to the third-level decision-maker to dispute the PO's memoranda.

[13] On December 1, the three grievances were dismissed in a single decision. This judicial review is in reference to a decision rendered by the CSC Commissioner at the third level, on the following grounds:

(a) The Commissioner determined that the procedure followed by the La Macaza authorities in response to the applicant's requests for corrections was in compliance with section 24 of the Act.

(b) The Commissioner found that the inclusion of the disputed information in the applicant's record was in compliance with section 23 of the Act and section 17 of the *Corrections and Conditional Release Regulations*, SOR/92-620 (the Regulations).

(c) Emphasizing the administrative nature of the CSC, the Commissioner determined that criminal evidence rules are not applicable in correctional matters. The CSC is an administrative body subject to specific rules with different aims. Whether

charges are dismissed, stayed, withdrawn or outstanding, the CSC must ensure that the information is in all likelihood accurate.

(d) The Commissioner relied on *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75 to determine that traditional evidence rules in criminal trials do not apply to the National Parole Board and therefore do not apply to the decision-making process of the CSC. He concluded that the burden of proof applicable to this decision is the balance of probabilities. The Board (and consequently the CSC) must ensure that the information is reliable and persuasive, and that it would be just and proper to use it. The paramount concern is the protection of society.

(e) He also found that the PO's alleged actions did not amount to harassment.

RELEVANT PROVISIONS

[14] *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.	**3.** Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

23. (1) When a person is sentenced, committed or transferred to penitentiary, the Service shall take all reasonable steps to obtain, as soon as is practicable,

(a) relevant information about the offence;

(b) relevant information about the person's personal history, including the person's social, economic, criminal and young-offender history;

(c) any reasons and recommendations relating to the sentencing or committal that are given or made by
(i) the court that convicts, sentences or commits the person, and
(ii) any court that hears an appeal from the conviction, sentence or committal;

(d) any reports relevant to the conviction, sentence or committal that are submitted to a court mentioned in subparagraph (c)(i) or (ii); and

(e) any other information relevant to administering the sentence or committal, including existing information from the victim, the victim impact statement and the transcript of any comments made by the sentencing judge

23. (1) Le Service doit, dans les meilleurs délais après la condamnation ou le transfèrement d'une personne au pénitencier, prendre toutes mesures possibles pour obtenir :

a) les renseignements pertinents concernant l'infraction en cause;

b) les renseignements personnels pertinents, notamment les antécédents sociaux, économiques et criminels, y compris comme jeune contrevenant;

c) les motifs donnés par le tribunal ayant prononcé la condamnation, infligé la peine ou ordonné la détention — ou par le tribunal d'appel — en ce qui touche la peine ou la détention, ainsi que les recommandations afférentes en l'espèce;

d) les rapports remis au tribunal concernant la condamnation, la peine ou l'incarcération;

e) tous autres renseignements concernant l'exécution de la peine ou de la détention, notamment les renseignements obtenus de la victime, la déclaration de la victime quant aux conséquences de l'infraction et la transcription

regarding parole eligibility.	des observations du juge qui a prononcé la peine relativement à l'admissibilité à la libération conditionnelle.
24. (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.	24. (1) Le Service est tenu de veiller, dans la mesure du possible, à ce que les renseignements qu'il utilise concernant les délinquants soient à jour, exacts et complets.
(2) Where an offender who has been given access to information by the Service pursuant to subsection 23(2) believes that there is an error or omission therein, (a) the offender may request the Service to correct that information; and (b) where the request is refused, the Service shall attach to the information a notation indicating that the offender has requested a correction and setting out the correction requested.	(2) Le délinquant qui croit que les renseignements auxquels il a eu accès en vertu du paragraphe 23(2) sont erronés ou incomplets peut demander que le Service en effectue la correction; lorsque la demande est refusée, le Service doit faire mention des corrections qui ont été demandées mais non effectuées.

[15] *Corrections and Conditional Release Regulations*, SOR/92-620

17. The Service shall take the following factors into consideration in determining the security classification to be assigned to an inmate pursuant to section 30 of the Act:	17. Le Service détermine la cote de sécurité à assigner à chaque détenu conformément à l'article 30 de la Loi en tenant compte des facteurs suivants :

(a) the seriousness of the offence committed by the inmate;	a) la gravité de l'infraction commise par le détenu;
(b) any outstanding charges against the inmate;	b) toute accusation en instance contre lui;
(c) the inmate's performance and behaviour while under sentence;	c) son rendement et sa conduite pendant qu'il purge sa peine;
(d) the inmate's social, criminal and, where available, young-offender history;	d) ses antécédents sociaux et criminels, y compris ses antécédents comme jeune contrevenant s'ils sont disponibles;
(e) any physical or mental illness or disorder suffered by the inmate;	e) toute maladie physique ou mentale ou tout trouble mental dont il souffre;
(f) the inmate's potential for violent behaviour; and	f) sa propension à la violence;
(g) the inmate's continued involvement in criminal activities.	g) son implication continue dans des activités criminelles.

ANALYSIS

Standard of review

[16] Several judges have used the pragmatic and functional analysis approach to determine the standard of review applicable to CSC decisions. In *Ewert v. Canada (Attorney General)*, [2007] F.C.J. No. 31 (QL), 2007 FC 13, and *Mymryk v. Canada (Attorney General)*, [2007] F.C.J. No. 60 (QL), 2007 FC 32, I wrote that the applicable standard is the patent unreasonableness standard when issues of fact are involved. In *Tehrankari v. Canada (Correctional Services)*, [2000] F.C.J. No. 495 (QL), at paragraph 44, Lemieux J. stated as follows on the standard of review:

> To conclude on this point, I would apply a correctness standard if the question involved is the proper interpretation of section 24 of the Act; however, I would apply the standard of reasonableness *simpliciter* if the question involved is either the application of proper legal principles to the facts or whether the refusal decision to correct information on the offender's file was proper. The patently unreasonable standard applies to pure findings of fact. (Subsection 18.2(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.) [Emphasis added.]

[17] The application of subsection 24(2) in this case is a question of mixed fact and law. The Commissioner was required to apply the legal principles to the facts. In my view, the reasonableness *simpliciter* standard applies to the decision with respect to subsection 24(2).

[18] On the other hand, the interpretation of paragraph 23(1)(*b*) and of subsection 24(1) of the Act is a question of law. In making his decision, the Commissioner relied on *Mooring*, *supra*. Accordingly, the correctness standard is the applicable standard.

Did the CSC Commissioner make a reviewable error?

[19] With respect for the contrary view, I do not find that the Commissioner made any reviewable error in rendering his decision.

[20] Pursuant to subsection 24(2), the CSC is required to include all information in the offender's record. The CSC fulfilled its obligation in that regard. When a request for correction is made by an offender and the request is refused, the CSC must ensure that there is a notation that corrections were requested but not allowed. Such a notation appears in the applicant's record.

[21] The Supreme Court has indicated that, in order to satisfy the reasonableness *simpliciter* criteria, a somewhat probing examination of the reasons supporting the disputed decision should be undertaken (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at paragraph 47).

[22] Section 24 of the Act imposes a second obligation on the CSC. Subsection (1) requires that the CSC ensure that the information is accurate, up-to-date and complete. Paragraph 23(1)(*b*) requires that the CSC take every reasonable step to obtain all relevant information, including the offender's social, economic and criminal history. The inclusion of the sworn statement and of the ex-spouse's complaint is consistent with both provisions. I shall return to this later.

[23] The case law highlights the fact that the main factors in risk assessment concern the protection of society. All reliable and available information should be considered, provided it has not been obtained improperly. Societal interest overrides the protection of the right of the accused to a fair trial (*Mooring, supra*, at paragraph 27).

[24] The inclusion of the sworn statement and the ex-spouse's complaint in the record does not allow the CSC to conclude that the information they contain is true. In correctional matters, it is up to the decision-maker to determine if it is fair to take into consideration disputed information. In *Mooring*, *supra*, at paragraphs 36 and 37, the Court stated:

> What is the content of the Board's "duty to act fairly"? The content of the duty of fairness varies according to the structure and the

> function of the board or tribunal in question. In the parole context, the Parole Board must ensure that the information upon which it acts is reliable and persuasive. To take an extreme example, information extracted by torture could not be considered reliable by the Board. It would be manifestly unfair for the Board to act on this kind of information. As a result, the Board would be under a duty to exclude such information, whether or not the information was relevant to the decision. Wherever information or "evidence" is presented to the Board, the Board must make a determination concerning the source of that information, and decide whether or not it would be fair to allow the information to affect the Board's decision.
>
> In determining whether or not it would be fair to consider a particular piece of information, the Board will often be guided by decisions of the courts regarding the exclusion of relevant evidence. For instance, where incriminating statements are obtained from the offender, the law of confessions based on an admixture of reliability and fairness will be pertinent although not binding. The Board may, in appropriate circumstances, conclude that reliance on a coerced confession is unfair. Decisions concerning s. 24(2) of the *Charter* will also be relevant to the Board's final decision. However, cases decided under s. 24(2) should not be determinative of the Board's decision to exclude relevant information based on the principles of fairness. Obviously, different considerations will often apply in the parole context. For example, s. 101(*a*) of the *Corrections and Conditional Release Act* requires "that the protection of society be the paramount consideration in the determination of any case". This will accordingly be a guiding principle where the Board is required to rule on the admissibility of a particular piece of information. The Board's expertise and experience concerning the protection of society will aid the Board in arriving at a decision. Should the Board fail to abide by the principles of fairness in making those decisions, an appeal lies to the Appeal Division under s. 147(1)(*a*) of the *Corrections and Conditional Release Act*. The Board's decision is also subject to judicial review. [Emphasis added.]

[25] As for the March 11, 1996 statement, the applicant submits that it should meet the same fate as his March 8, 1996 statement, given that the Quebec Court of Appeal ordered a new trial on the ground that the earlier statement was made with the hope of advantage. Based on the above-stated

legal principles, there is no evidence in the record that the March 11, 1996 statement was obtained under duress. The factual components are relevant and meet the probability test. Even though the applicant was not charged following his confession, I feel it is important that the CSC make note of it in its records. The CSC did not judge the applicant as a result of that statement; it entered the statement in his correctional record with a notation that the applicant denied the crime. Accordingly, I find no reviewable error here.

[26] As for his ex-spouse's complaint and her request to institute legal proceedings, the applicant claims that his ex-spouse acknowledged that the complaint was false, that she had lied and made up the story under pressure from her godmother in Canada, Mrs. Barbosa, acting for the Cali crime cartel in Colombia. The applicant added that his ex-spouse even [TRANSLATION] "admitted lying during an examination." Again, except for the applicant's statement in his affidavit, there is absolutely no evidence supporting these allegations. I notice, however, that the CSC indicated in its documents that the applicant disagrees with the version of facts in the complaint. Notwithstanding that no charges were filed against the applicant following that complaint, I may not, in view of the CSC's broad inclusionary mandate (*Mooring, supra*), order these documents to be set aside.

[27] The applicant also disputes items 2, 9, 11, and 15 of his SIR. Pursuant to the guidelines in Commissioner's Directive 705-6 of April 10, 2006 regarding notations (middle of tab 10 in the applicant's record) the accuracy of the information should be verified through all available sources (file review, offender, collateral contacts, etc.).

[28] I carefully reviewed the applicant's reasons for disputing these items, but his explanations have convinced me that the Court should not intervene. For instance, the applicant maintains that he was working full-time in the six-month period prior to committing his offence (item 15: employment status at the time of arrest). The CSC's reply is contained in a September 8, 2006 memorandum (applicant's record, page 58):

> [TRANSLATION]
>
> The subject claims that he was working at the time of his arrest. We know from reading the record that most of his income was derived from illicit trafficking in narcotics. In addition, the initial assessment of 97-12-08 notes that he runs businesses and is able to support himself. (We do not know whether this was honest, reported work.) The assessment also discloses that he recently had employment problems.
>
> Given his propensity for lying and deceit, we requested, on 06-02-28, that he provide us with evidence in this regard, such as income tax returns or other non-forged documents that could help us verify their genuineness. We told him that if he produced this type of evidence, we would be happy to amend his SIR. We have not yet received such documents.

[29] This is not an unreasonable response and it demonstrates that there was no breach of fairness on the part of the CSC.

[30] In sum, the CSC correctly interpreted the Act and Regulations and the principles stated by the Supreme Court in *Mooring, supra.* The CSC therefore did not act unreasonably in dismissing the third-level grievances.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed.

"Michel Beaudry"
Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-412-07
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