Federal Court  Cour fédérale

Date: 20140306

Docket: T-119-13

Citation: 2014 FC 212

Ottawa, Ontario, March 6, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

BRIAN MACINNES

Applicant

and

THE WARDEN OF MOUNTAIN INSTITUTION AND THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of an Assessment for Decision made by Correctional Services Canada [CSC] to maintain the Applicant's classification as a medium security inmate. The application is coupled with a request for a declaration that the Applicant's rights pursuant to section 7 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] were violated as a result of inadequate medical care, and, consequently, a mandamus order for the

Respondent to provide medical treatment and services to the Applicant within a prescribed timeframe.

II. Background

[2] The Applicant, Mr. Brian MacInnes, was sentenced to a term of imprisonment of 7 years, 10 months, after pleading guilty to seven counts of robbery, three counts of uttering threats, one count of failing to stop for police, one count of possession of a stolen vehicle, one count of dangerous driving, one count of using an imitation firearm, and one count of theft under $5000. The Applicant began his sentence as a medium security inmate on February 23, 2009.

[3] Since March 2012, the Applicant has allegedly been involved in a number of untoward incidents resulting in other inmates assaulting him. The injuries arising from these incidents caused the Applicant to require several hospital visits. The Applicant consulted several health care professionals for medical services and treatments after the assaults.

[4] The Applicant was kept in administrative segregation several times to prevent any untoward incidents that might lead to further assaults.

[5] On January 9, 2013, an Institutional Parole Officer issued an Assessment for Decision maintaining the Applicant's medium security classification. This assessment is done annually.

[6] It is important to note that, on February 2013, the Applicant was transferred from Mountain Institution to the Regional Treatment Centre at the Pacific Institution, where he remains as per the last submissions on file.

[7] The Applicant brought an application for judicial review before the Federal Court of the Parole Officer's decision.

III. Issues

[8] (1) Is it appropriate for the Court to exercise its judicial discretion to dispose of this application given that the Applicant applied to this Court directly, without first pursuing the internal grievance process?

(2) If the Court decides to exercise its discretion to hear this matter, then, was the Respondent's decision to maintain the Applicant's medium security classification reasonable, and, did the Applicant receive adequate medical care from Mountain Institution?

IV. Relevant Legislative Provisions

[9] An offender is entitled to a fair and expeditious process for resolving grievances that fall within the jurisdiction of the Commissioner of CSC by virtue of section 90 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*]:

90. There shall be a procedure for fairly and expeditiously resolving offenders' grievances on matters within the jurisdiction of the Commissioner, and the	90. Est établie, conformément aux règlements d'application de l'alinéa 96u), une procédure de règlement juste et expéditif des griefs des délinquants sur des questions relevant du

procedure shall operate in accordance with the regulations made under paragraph 96(u).	commissaire.

[10] The procedure for the resolution of grievances is established by sections 74 to 82 of the *Corrections and Conditional Release Regulations*, SOR/92-620 [*Regulations*] (reference to sections 74 to 82 of the *Regulations* are set out in Annex at pp 13 to 18 of this Decision).

[11] As briefly summarized by Justice James O'Reilly in *Spidel v Canada (Attorney General)*, 2012 FC 1245, 420 FTR 121:

> [8] … offenders should begin the process with a complaint to the supervisor of the staff member involved, unless the supervisor is the Institutional Head, the Regional Deputy Commissioner, or the Commissioner himself (s 13). In any case, the decision of the Commissioner represents the final stage of the grievance process (s 15). CD 081 also sets out the time frames within which decision makers at the various levels must respond, depending on the priority of the complaint (s 18).

V. Analysis

[12] It is a well-established in the relevant case law that this Court has the discretion to decline to exercise its judicial review jurisdiction if an adequate, alternate remedy exists.

[13] In his submissions, the Applicant raises a number of arguments to establish that the Court should exercise its jurisdiction to hear this matter. These arguments include:

a) The Applicant's matter is urgent and the grievance process cannot address his complaint in a timely fashion;

b) The grievance process is incapable of providing the Applicant the *Charter* relief he is seeking;

c) The Applicant is challenging the deprivation of his residual liberty as a result of the continuance of his medium security classification; therefore, must come directly to the Court;

d) The Applicant is contesting the legality of two of the Commissioner's policies; therefore, he cannot expect a fair and impartial hearing through CSC's grievance process, as the decision-maker would be subordinate to the Commissioner.

[14] The Respondent submits that the Applicant has no evidentiary basis for claiming that the grievance procedure is slow and/or inadequate, or that there has been a prima facie deprivation of his residual liberty. Likewise, the Applicant has not established an evidentiary basis for the *Charter* relief he is seeking.

[15] The Respondent therefore asks that the Court decline to hear the application for judicial review as it is premature; the Applicant did not exhaust the recourse provided by the internal grievance process.

a) Inadequacy of the grievance process and apprehension of institutional bias

[16] On the issue of the adequacy of CSC's internal grievance process, the Court agrees with the Respondent that it was an adequate alternative remedy, and the Applicant ought to have pursued his grievances through this process before applying to the Court for judicial review.

[17] Contrary to the Applicant's assertions, CSC's grievance process has consistently been recognized by this Court as an adequate remedy (*Reda v Canada (Attorney General)*, 2012 FC 79,

404 FTR 85 at para 23; reference is also made to *Ewert v Canada (Attorney General)*, 2009 FC 971, 355 FTR 170; *Spidel*, above; *McDougall v Canada (Attorney General)*, 2011 FC 285, 386 FTR 8).

[18] There are strong policy and statutory reasons for requiring inmates to use this process, and the Court should not interfere with it except for "exceptional circumstances" such as cases of emergency, evident inadequacy in the procedure, or where physical or mental harm is caused to an inmate (*Rose v Canada (Attorney General)*, 2011 FC 1495 at para 35; *Marleau v Canada (Attorney General)*, 2011 FC 1149 at para 34; *Spidel*, above, at para 12; *Ewert*, above, at para 34; *Gates v Canada (Attorney General)*, 2007 FC 1058, 316 FTR 82 at para 26). Consequently, the Court has generally declined to deal with judicial review applications where an applicant has not first pursued this grievance process.

[19] In the present case, the Court finds that the claims advanced by the Applicant do not present compelling or exceptional circumstances that would require the Court's intervention.

[20] The Applicant claims that this case is one of urgency requiring the Court's immediate intervention; however, he has provided no evidence of undue or excessive delays in the grievance process; this, despite the fact that he has already received a first level response in regard to grievances made concerning his medical care in Mountain Institution.

[21] Instead, the Applicant relies solely on general evidence regarding inefficiencies within CSC's grievance process to support his allegation; in particular, the Applicant relies on the Annual Report of the Correctional Investigator 2006-2007 (Ottawa: Public Works and Government

Services, 2007), which suggests that CSC's grievance procedures have been ineffective in dealing with a chronic backlog of cases.

[22] Although the Court agrees that such evidence may assist the Applicant in demonstrating inadequacies in the grievance process, such evidence is not, in and of itself, sufficient to justify the Applicant bypassing the grievance process established by the *CCRA*. The Applicant has provided no indication as to how this evidence relates to his particular case.

[23] As articulated by Justice Luc Martineau in *Rose*, above:

> [34] Although the evidentiary record shows that some cases have clearly been subject to excessive delays, in the Court's view, such statistical and anecdotal evidence is simply insufficient to support a general all-inclusive declaration that the grievance procedure is wrought with delay and thus not an adequate alternative to judicial review ...

[24] The Court further refers to Justice François Lemieux's comments regarding undue delays in CSC's grievance process, in *Ewert*, above:

> [39] … As pointed out by counsel for the Respondent whether the grievance system has been reasonably responsive from a timing perspective depends on the facts and circumstances of each particular case. There may well be contributing factors complicating the decision making process. I agree with the Respondent, the CSC inmate system on the evidence before me cannot be found presumptively flawed on account of undue delay in processing grievances… [Emphasis added.]

[25] As in *Rose* and *Ewert*, above, the general evidence submitted by the Applicant in the present case does not permit the Court to conclude that CSC's grievance process would not resolve his complaints in a timely manner; any delay in the processing of the Applicant's grievances has been caused by the Applicant's choice to seek judicial review, and not the grievance process.

[26] In the Applicant's submissions, there is also no evidence that the Applicant's grievances will not be fairly considered. The Applicant argues that he would not receive a fair and impartial decision from the internal grievance process as he is questioning the legality of CSC's policies, which are sanctioned by the Commissioner. Citing *May v Ferndale*, 2005 SCC 82, [2005] 3 SCR 809, at paragraph 63, the Applicant argues that where the legality of the Commissioner's policy is contested, it cannot be reasonably expected that the decision-maker, who is subordinate to the Commissioner, could fairly and impartially decide the issue.

[27] Based on the evidence, the Court cannot accept the Applicant's contention that the grievance procedure will inevitably result in an unfavourable decision on this basis.

[28] In fact, the Court does not find that the Applicant is questioning the legality of CSC's policies whatsoever; but, rather, the Respondent's interpretation of those policies and the discretionary decision taken thereon. For instance, the Applicant argues that the Parole Officer responsible for drafting the Assessment for Decision, dated January 9, 2013, erred in basing her decision to maintain the Applicant's medium security classification on his involvement in recurrent incidents with other inmates and his placement in administrative segregation as a result of those incidents.

[29] Similarly, the Applicant limited himself to arguing that CSC's policy regarding the supply of medication to inmates was inappropriately followed by the physician visiting the institution.

[30] The Applicant failed to comment on the legality of either policy.

[31] The Applicant also argues that the grievance process is unable to provide him the *Charter* relief he is seeking; therefore, it does not provide him with an adequate alternative remedy. The Applicant is seeking a declaration that his rights pursuant to section 7 and 12 of the *Charter* were violated as a result of inadequate medical care, and a mandamus order for the Respondent to provide medical treatment and services to the Applicant within a prescribed timeframe.

[32] The Court does not find that this argument justifies his request for a judicial review. It is well established that the mere fact that the Commissioner is not a court of competent jurisdiction for the purpose of granting a remedy under subsection 24(1) of the *Charter* does not relieve an Applicant of his or her obligation to exhaust the grievance process (*Veley v Warden of Fenbrook Institution*, 2004 FC 1571 at para 24). The Court is of the view that CSC's grievance process can adequately resolve the Applicant's complaints, without resort to section 24 of the *Charter*.

[33] In any event, the Court notes that, even if it were to accept jurisdiction over this matter, it could not grant the relief the Applicant is seeking. The Applicant is essentially asking that the Court manage his medical care in the place of his physicians. The Court cannot set out a treatment plan for the Applicant, nor can it compel the Commissioner or a physician to prescribe medication. As correctly noted by the Respondent, the exercise of professional medical judgment is not reviewable under subsection 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7. This Court is concerned with legal error, not clinical judgment (*Powell v Canada (Attorney General)*, 2004 FC 1304, 260 FTR 124). Moreover, it is most significant to note that the Applicant was transferred and is no longer at Mountain Institution, making such a request for a mandamus order moot. (It is also noted by the

Court that the Applicant has not provided sufficient evidence to demonstrate that he is not receiving adequate medical attention at the Pacific Institution where he is currently detained subsequent to the transfer.)

b) Deprivation of residual liberty

[34] Relying on the cases of *May*, above, and *R v Scarcella*, 2009 CanLII 32918 (ON SC), the Applicant claims that he has the choice to challenge the Respondent's decision to maintain his security classification at medium security directly to the Court, as it affects his residual liberty. The Court does not agree with this proposition.

[35] This Court has reiterated several times that the *May* decision, above, does not relieve applicants from pursuing the internal grievance process before seeking relief from the Court simply because they have chosen to challenge the legality of a decision affecting their residual liberty. In *McMaster v Canada (Attorney General)*, 2008 FC 647, 335 FTR 647, this Court clarified the persistent mischaracterization of the principles set out in *May*:

> [29] In my view, counsel's reliance upon the May decision is misplaced. There, the issue was the availability of the remedy of habeas corpus from provincial superior courts when there was an existing right to seek judicial review in the Federal Court. The majority of the Supreme Court found that inmates may choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of habeas corpus or in the Federal Court by way of judicial review. In so finding, the Supreme Court relied, at least in part, on the fact that historically, the writ of habeas corpus has never been a discretionary remedy. Unlike other prerogative relief, and declaratory relief, the writ of habeas corpus issues as of right. The *May* decision does not, in my view, alter the obligation of an inmate to pursue the internal grievance procedure before seeking discretionary declaratory relief on judicial review. [Emphasis added.]

(Reference is also made to *Reda*, above; *Ewert*, above; *Spidel*, above; *McDougall*, above; *Collin v Canada (Attorney General)*, 2006 FC 544; *Condo v Canada (Attorney General)*, 2003 FCA 99, 239 FTR 158; *Giesbrecht v Canada* (1998), 148 FTR 81, [1998] FCJ No 621 (QL/Lexis).)

[36] The Court further clarified the *May* decision in *Rose*, above:

> [46] The applicants rely on *May v Ferndale Institution*, 2005 SCC 82 [*May*] to suggest that their case should be allowed to go directly to judicial review. However, the question in that case was whether provincial superior courts should decline their habeas corpus jurisdiction over CSC decisions affecting the residual liberty of inmates, merely because an alternative remedy exists and seems sufficiently convenient. The Supreme Court of Canada ruled that courts would only be required to decline such jurisdiction if the legislator had put in place a "complete, comprehensive and expert procedure for review of an administrative decision", such as the scheme created for immigration matters, and concluded that this was not the case of the offender grievance procedure.
>
> [47] More particularly, the Supreme Court of Canada held in May that the language of the *CCRA* and its regulations made it clear that Parliament did not intend to bar federal inmates' access to *habeas corpus*. Accordingly, timely judicial oversight, in which provincial superior courts are called to exercise the habeas corpus jurisdiction, was still necessary to safeguard the human rights and civil liberties of inmates, and to ensure that the rule of law applies within penitentiary walls.

[37] In this case, the Court is unable to find any exceptional circumstances which would justify the Applicant not first exhausting his available remedies within CSC's grievance process before coming to this Court. There is a comprehensive grievance procedure for review of the Applicant's complaints open to him; and, which, based on the evidence, he has already effectively used in challenging certain decisions regarding his medical care at Mountain Institution. (Reference is also made to the Federal Court of Appeal decision in *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61, [2011] 2 FCR 332 at para 30-33, and the Supreme Court of Canada

decisions referenced therein. The Court also reiterates in this context the *Ewert*, above, in its decision at para 39 which is most relevant to this case.)

VI. Conclusion

[38] For all of the above reasons, the Applicant's application for judicial review is considered premature and is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be dismissed.

The Respondent shall have the costs of the application.

"Michel M.J. Shore"

Judge

ANNEX

The procedure for the resolution of grievances is established by sections 74 to 82 of the *Corrections and Conditional Release Regulations*, SOR/92-620:

Offender Grievance Procedure	Procédure de règlement de griefs des délinquants
74. (1) Where an offender is dissatisfied with an action or a decision by a staff member, the offender may submit a written complaint, preferably in the form provided by the Service, to the supervisor of that staff member.	74. (1) Lorsqu'il est insatisfait d'une action ou d'une décision de l'agent, le délinquant peut présenter une plainte au supérieur de cet agent, par écrit et de préférence sur une formule fournie par le Service.
(2) Where a complaint is submitted pursuant to subsection (1), every effort shall be made by staff members and the offender to resolve the matter informally through discussion.	(2) Les agents et le délinquant qui a présenté une plainte conformément au paragraphe (1) doivent prendre toutes les mesures utiles pour régler la question de façon informelle.
(3) Subject to subsections (4) and (5), a supervisor shall review a complaint and give the offender a copy of the supervisor's decision as soon as practicable after the offender submits the complaint.	(3) Sous réserve des paragraphes (4) et (5), le supérieur doit examiner la plainte et fournir copie de sa décision au délinquant aussitôt que possible après que celui-ci a présenté sa plainte.
(4) A supervisor may refuse to review a complaint submitted pursuant to subsection (1) where, in the opinion of the supervisor, the complaint is frivolous or vexatious or is not made in good faith.	(4) Le supérieur peut refuser d'examiner une plainte présentée conformément au paragraphe (1) si, à son avis, la plainte est futile ou vexatoire ou n'est pas faite de bonne foi.
(5) Where a supervisor refuses to review a complaint	(5) Lorsque, conformément au paragraphe

pursuant to subsection (4), the supervisor shall give the offender a copy of the supervisor's decision, including the reasons for the decision, as soon as practicable after the offender submits the complaint.

(4), le supérieur refuse d'examiner une plainte, il doit fournir au délinquant une copie de sa décision motivée aussitôt que possible après que celui-ci a présenté sa plainte.

75. Where a supervisor refuses to review a complaint pursuant to subsection 74(4) or where an offender is not satisfied with the decision of a supervisor referred to in subsection 74(3), the offender may submit a written grievance, preferably in the form provided by the Service,

75. Lorsque, conformément au paragraphe 74(4), le supérieur refuse d'examiner la plainte ou que la décision visée au paragraphe 74(3) ne satisfait pas le délinquant, celui-ci peut présenter un grief, par écrit et de préférence sur une formule fournie par le Service :

(*a*) to the institutional head or to the director of the parole district, as the case may be; or

a) soit au directeur du pénitencier ou au directeur de district des libérations conditionnelles, selon le cas;

(*b*) if the institutional head or director is the subject of the grievance, to the Commissioner.

b) soit, si c'est le directeur du pénitencier ou le directeur de district des libérations conditionnelles qui est mis en cause, au commissaire.

76. (1) The institutional head, director of the parole district or Commissioner, as the case may be, shall review a grievance to determine whether the subject-matter of the grievance falls within the jurisdiction of the Service.

76. (1) Le directeur du pénitencier, le directeur de district des libérations conditionnelles ou le commissaire, selon le cas, examine le grief afin de déterminer s'il relève de la compétence du Service.

(2) Where the subject-matter of a grievance does not fall within the jurisdiction of the Service, the person who is reviewing the grievance pursuant to subsection (1) shall advise the offender in writing

(2) Lorsque le grief porte sur un sujet qui ne relève pas de la compétence du Service, la personne qui a examiné le grief conformément au paragraphe (1) doit en informer le délinquant par écrit

and inform the offender of any other means of redress available.

et lui indiquer les autres recours possibles.

Previous Version

Version précédente

77. (1) In the case of an inmate's grievance, where there is an inmate grievance committee in the penitentiary, the institutional head may refer the grievance to that committee.

77. (1) Dans le cas d'un grief présenté par le détenu, lorsqu'il existe un comité d'examen des griefs des détenus dans le pénitencier, le directeur du pénitencier peut transmettre le grief à ce comité.

(2) An inmate grievance committee shall submit its recommendations respecting an inmate's grievance to the institutional head as soon as practicable after the grievance is referred to the committee.

(2) Le comité d'examen des griefs des détenus doit présenter au directeur ses recommandations au sujet du grief du détenu aussitôt que possible après en avoir été saisi.

(3) The institutional head shall give the inmate a copy of the institutional head's decision as soon as practicable after receiving the recommendations of the inmate grievance committee.

(3) Le directeur du pénitencier doit remettre au détenu une copie de sa décision aussitôt que possible après avoir reçu les recommandations du comité d'examen des griefs des détenus.

78. The person who is reviewing a grievance pursuant to section 75 shall give the offender a copy of the person's decision as soon as practicable after the offender submits the grievance.

78. La personne qui examine un grief selon l'article 75 doit remettre copie de sa décision au délinquant aussitôt que possible après que le détenu a présenté le grief.

79. (1) Where the institutional head makes a decision respecting an inmate's grievance, the inmate may request that the institutional head refer the inmate's grievance to an outside review board, and the institutional head

79. (1) Lorsque le directeur du pénitencier rend une décision concernant le grief du détenu, celui-ci peut demander que le directeur transmette son grief à un comité externe d'examen des griefs, et le directeur doit accéder à cette

shall refer the grievance to an outside review board.

demande.

(2) The outside review board shall submit its recommendations to the institutional head as soon as practicable after the grievance is referred to the board.

(2) Le comité externe d'examen des griefs doit présenter au directeur du pénitencier ses recommandations au sujet du grief du détenu aussitôt que possible après en avoir été saisi.

(3) The institutional head shall give the inmate a copy of the institutional head's decision as soon as practicable after receiving the recommendations of the outside review board.

(3) Le directeur du pénitencier doit remettre au détenu une copie de sa décision aussitôt que possible après avoir reçu les recommandations du comité externe d'examen des griefs.

80. (1) If an offender is not satisfied with a decision of the institutional head or director of the parole district respecting their grievance, they may appeal the decision to the Commissioner.

80. (1) Lorsque le délinquant est insatisfait de la décision rendue au sujet de son grief par le directeur du pénitencier ou par le directeur de district des libérations conditionnelles, il peut en appeler au commissaire.

(2) [Repealed, SOR/2013-181, s. 3]

(2) [Abrogé, DORS/2013-181, art. 3]

(3) The Commissioner shall give the offender a copy of his or her decision, including the reasons for the decision, as soon as feasible after the offender submits an appeal.

(3) Le commissaire transmet au délinquant copie de sa décision motivée aussitôt que possible après que le délinquant a interjeté appel.

Previous Version

Version précédente

80.1 A senior staff member may, on the Commissioner's behalf, make a decision in respect of a grievance submitted under paragraph 75(*b*) or an appeal submitted under subsection 80(1) if the staff

80.1 L'agent supérieur peut, au nom du commissaire, rendre une décision relativement à un grief présenté en vertu de l'alinéa 75*b*) ou à un appel interjeté en vertu du paragraphe 80(1) si, à la fois, il :

member

(*a*) holds a position equal to or higher in rank than that of assistant deputy minister; and

(*b*) is designated by name or position for that purpose in a Commissioner's Directive.

a) occupe un poste de niveau égal ou supérieur à celui du sous-ministre adjoint;

b) est désigné à cette fin dans les Directives du commissaire soit expressément, soit en fonction du poste qu'il occupe.

81. (1) Where an offender decides to pursue a legal remedy for the offender's complaint or grievance in addition to the complaint and grievance procedure referred to in these Regulations, the review of the complaint or grievance pursuant to these Regulations shall be deferred until a decision on the alternate remedy is rendered or the offender decides to abandon the alternate remedy.

81. (1) Lorsque le délinquant décide de prendre un recours judiciaire concernant sa plainte ou son grief, en plus de présenter une plainte ou un grief selon la procédure prévue dans le présent règlement, l'examen de la plainte ou du grief conformément au présent règlement est suspendu jusqu'à ce qu'une décision ait été rendue dans le recours judiciaire ou que le détenu s'en désiste.

(2) Where the review of a complaint or grievance is deferred pursuant to subsection (1), the person who is reviewing the complaint or grievance shall give the offender written notice of the decision to defer the review.

(2) Lorsque l'examen de la plainte ou au grief est suspendu conformément au paragraphe (1), la personne chargée de cet examen doit en informer le délinquant par écrit.

82. In reviewing an offender's complaint or grievance, the person reviewing the complaint or grievance shall take into consideration

82. Lors de l'examen de la plainte ou du grief, la personne chargée de cet examen doit tenir compte :

(*a*) any efforts made by staff members and the offender

a) des mesures prises par les agents et le délinquant pour

to resolve the complaint or grievance, and any recommendations resulting therefrom;

régler la question sur laquelle porte la plainte ou le grief et des recommandations en découlant;

(*b*) any recommendations made by an inmate grievance committee or outside review board; and

b) des recommandations faites par le comité d'examen des griefs des détenus et par le comité externe d'examen des griefs;

(*c*) any decision made respecting an alternate remedy referred to in subsection 81(1).

c) de toute décision rendue dans le recours judiciaire visé au paragraphe 81(1).

FEDERAL COURT

SOLICITORS OF RECORD

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