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Docket: T-1536-06

Citation: 2007 FC 608

Ottawa, Ontario, June 7, 2007

PRESENT: THE HONOURABLE MR. JUSTICE SHORE

BETWEEN:

JEAN-CLAUDE BOUCHARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] [94] A duty of procedural fairness rests on every public authority making administrative decisions affecting the rights, privileges or interests of an individual...

(*May v. Ferndale Institution*, 2005 SCC 82, referring to *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311)

JUDICIAL PROCEDURE

[2] Jean-Claude Bouchard is currently incarcerated at the Federal Training Centre in Laval, a reinforced minimum security penitentiary. He is applying to the Court for judicial review of a third-

level decision rendered by the Assistant Commissioner of the Correctional Service of Canada (CSC) denying his grievance in which he had challenged his placement in involuntary segregation, the raising of his security classification from low to medium and his involuntary transfer to a medium-security institution.

FACTS

[3] On July 23, 2003, Mr. Bouchard filed a third-level grievance to challenge the raising of his minimum security classification to medium security as well as the decision to transfer him from the Sainte Anne des Plaines Institution (SAPI) (minimum security) to Cowansville Institution (medium security).

[4] On August 25, 2003, the CSC Assistant Commissioner denied the applicant's third-level grievance, having determined that the decisions to place the applicant in segregation, raise his security classification and transfer him were all justified.

[5] On June 16, 2006, the Federal Court reversed the CSC Assistant Commissioner's decision and ordered her to re-examine the third-level grievance in light of the Court's reasons. In that ruling, the Court found as follows:

- the Assistant Commissioner's decision was vitiated by errors of procedural fairness, given that relevant documents were not in her possession, i.e., various observation reports, security intelligence reports, a letter the applicant had sent to the National Parole Board (NPB) and

the document from February 21, 2003 relating to the applicant's placement in administrative segregation;

- the Assistant Commissioner failed to address the matter of the delay in responding to the second-level grievance;
- in the re-examination of the grievance, the issues relating to the alleged violations of sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I, Schedule B of the Canada Act, 1982, c. 11 (U.K.), (Charter), would have to be addressed, particularly around the question of whether there was sufficient communication and information-sharing with the applicant when his security classification was raised and he was involuntarily transferred.

(*Bouchard v. Canada (Attorney General)*, 2006 FC 775, [2006] F.C.J. no. 963 (QL))

[6] On July 19, 2006, a new Assistant Commissioner re-examined the applicant's third-level grievance in the light of the Federal Court's reasons for decision.

[7] The new Assistant Commissioner ruled that the applicant's grievance did not relate to the segregation challenge, that the response time at the second grievance level was in accordance with the Commissioner's Directive and that, in any case, whatever slight delay there was did not prejudice the applicant. The new Assistant Commissioner determined that the applicant's increased security classification and involuntary transfer were in compliance with the relevant legislative provisions and were justified.

[8] That is the decision for which judicial review is being sought in this Court.

ISSUES

[9] (1) Did the Assistant Commissioner err when he refused to exercise his jurisdiction over the question of whether administrative segregation was justified?

(2) Did the Assistant Commissioner commit a patently unreasonable error by determining that the delay in responding to the applicant's grievance was not prejudicial to the applicant?

(3) Was there a breach of procedural fairness with respect to the sufficiency of the information shared with the applicant when his security classification was raised and he was involuntarily transferred?

(4) Did the decision-maker commit a patently unreasonable error in determining that the applicant's increased security classification and involuntary transfer were warranted?

STANDARD OF JUDICIAL REVIEW

[10] Regarding a potential failure by the Assistant Commissioner to act fairly, there is no reason to perform a pragmatic and functional analysis to determine the appropriate standard of judicial review. Indeed, where procedural fairness or a principle of natural justice has been violated, except in certain exceptional circumstances, the Court must intervene and quash the decision.

[11] As to the issue of whether the impugned decision is unfounded having regard to the evidence in the record, as the Federal Court of Appeal indicated in *Canada (Attorney General) v. Boucher*, 2005 FCA 77, [2005] F.C.J. no. 352 (QL), at paragraph 16, this is basically a question of fact, and the appropriate standard of review is patent unreasonableness.

ANALYSIS

(1) Did the Assistant Commissioner err when he refused to exercise his jurisdiction over the question of whether administrative segregation was justified?

[12] In this Court's decision of June 16, 2006, one of the reasons cited was that the then Assistant Commissioner, when responding to the third-level grievance, did not have before her the report from February 21, 2003, being the Director's decision to place the applicant in administrative segregation. On the other hand, it is important to note that she did have before her the report from April 24, 2003, namely, a cumulative document containing all previous reports relating to the segregation placement, including the report dated February 21, 2003.

[13] However, the Assistant Commissioner, in the decision under judicial review in this case, expressed himself as follows on the question of the administrative segregation:

> [TRANSLATION]
> The report from February 21, 2003 referred to by the Court as a key exhibit to be considered by the third-level decision-maker, concerns your placement in administrative segregation on February 21, 2003. However, consultation of your file reveals that you submitted **another grievance** on this specific subject. Indeed, grievance V30A00010309 was registered at the third level on May 6, 2003, and a decision was rendered on this subject on May 21, 2003 (rejected) by Ms. Fraser (ACPPC). In other words, this decision had already been rendered by the ACPPC nearly three months before the grievance concerning the involuntary transfer reached the third level.

> As indicated in paragraph 19 of Commissioner's Directive 081 (2002-03-04), *Offender Complaints and Grievances*: *"The decision of the Assistant Commissioner, Policy, Planning and Coordination constitutes the final stage of the Offender Complaints and Grievances process*." Therefore, Ms. Fraser did not technically have to take these factors into consideration in the analysis of grievance V30A00010878 (involuntary transfer).
>
> (emphasis added)

(Decision of the Assistant Commissioner, page 3)

[14] It appears that the Assistant Commissioner made no ruling on the administrative segregation issue because it had already been addressed in a response to another third-level grievance. The third-level grievance of concern to us in the case at bar challenges the raised security classification and the transfer, not the administrative segregation. Accordingly, the Assistant Commissioner did not err by refusing to examine the question of the administrative segregation.

(2) Did the Assistant Commissioner commit a patently unreasonable error by determining that the delay in responding to the applicant's grievance was not prejudicial to the applicant?

[15] With respect to the time required to respond to the applicant's second-level grievance, the Assistant Commissioner stated as follows:

> [TRANSLATION]
> Regarding time frames, it was noted that a response was provided to you by the Regional Deputy Commissioner, Richard Watkins, dated 2003-07-03, concerning grievance V30A00010878. Thus, the response was provided a few days past the time frame accorded for priority grievances in paragraph 7 of Commissioner's Directive (CD) 081, *Offender Complaints and Grievances* (within 15 working days of receipt by the respondent), i.e., 2003-06-26 in this particular case. You were notified of this delay on 2003-06-13, in compliance with paragraph 8 of CD 081. I am therefore of the opinion that there was no significant impact on your rights and freedoms as a result of this slight delay.

(Decision of the Assistant Commissioner, page 1)

[16] At the second grievance level, a response should have been provided to the applicant no later than June 26, 2003, in accordance with paragraph 7 of Commissioner's Directive 081, that is, within 15 working days of receiving the grievance.

[17] It appears that a notification was sent to the applicant on June 13, 2003, to inform Mr. Bouchard that additional time would be required to respond to his second-level grievance, in accordance with paragraph 8 of the Directive.

[18] Therefore the response to the second-level grievance provided on July 3, 2003 was in accordance with the Commissioner's Directive and caused no prejudice to the applicant.

(3) Was there a breach of procedural fairness with respect to the sufficiency of the information shared with the applicant when his security classification was raised and he was involuntarily transferred?

i) *Procedural fairness – sufficiency of information shared with the applicant when his security classification was raised and he was involuntarily transferred to Cowansville Institution*

[19] When the former Assistant Commissioner rendered her decision, she did not have before her certain key documents (Mr. Bouchard's letter to the NPB, segregation placement report of February 21, 2003 and observation and security intelligence reports), whereas the new Assistant Commissioner did in fact have those documents before him; accordingly, the question of procedural fairness raises different issues in the case before us than it did in the context of the former Assistant Commissioner's decision.

[20] In the case at bar, the issue of procedural fairness relates to the sufficiency of the information disclosed to the applicant as decisions were being taken to raise his security classification and effect his involuntary transfer to Cowansville Institution.

[21] The Court is of the opinion that there was no breach of procedural fairness. What would constitute sufficient sharing of information with the applicant regarding his increased security classification and his involuntary transfer? As stated in *May, supra*:

> [90] ... The requirements of procedural fairness must be assessed contextually in every circumstance: *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at para. 39; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 21; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 743; *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, at para. 82..
>
> [...]
>
> [92] In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet. If the decision-maker fails to provide sufficient information, his or her decision is void for lack of jurisdiction. As Arbour J. held in *Ruby*, at para. 40:
>
> > As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position ...

[22] In this case, the question is whether the CSC disclosed sufficient information to Mr. Bouchard to allow him to play a meaningful role in the decision-making process around increasing his security classification and transferring him to a higher-security institution—and to raise objections in that regard. The distinctions referred to in *Gallant v. Canada (Deputy*

Commissioner, Correctional Service of Canada), [1989] 3 F.C. 329, [1989] F.C.J. no. 70 (QL), and again in *Cartier v. Canada (Attorney General)*, [1998] FCJ no. 1211 (QL) are apposite in this context:

> [21] ...
>
> 1. ...
>
> The rationale behind the *audi alteram partem* principle, which simply requires the participation, in the making of a decision, of the individual whose rights or interests may be affected, is, of course, that the individual may always be in a position to bring forth information, in the form of facts or arguments, that could help the decision-maker reach a fair and prudent conclusion. It has long been recognized to be only rational as well as practical that the extent and character of such participation should depend on the circumstances of the case and the nature of the decision to be made. This view of the manner in which the principle must be given effect ought to be the same whether it comes into play through the jurisprudential duty to act fairly, or the common law requirement of natural justice, or as one of the prime constituents of the concept of fundamental justice referred to in section 7 of the Charter. The principle is obviously the same everywhere it applies.
>
> As I see it, the problem here is whether the *audi alteram partem* principle, in the circumstances that prevailed, required that more information be given to the inmate before asking him for his representations. In my judgment, having regard to the nature of the problem the appellant was facing and his responsibility toward those entrusted to his care, it did not.
>
> 2. It seems to me that, to appreciate the practical requirements of the *audi alteram partem* principle, it is wrong to put on the same level all administrative decisions involving inmates in penitentiaries, be they decisions of the National Parole Board respecting the revocation of parole, or decisions of disciplinary boards dealing with disciplinary offences for which various types of punishments, up to administrative segregation, can be imposed, or decisions, such as the one here involved, of prison authorities approving the transfer of inmates from one institution to another for administrative and good order reasons. Not only do these various decisions differ as to the individual's rights, privileges or interests they may affect, which may lead to different standards of procedural safeguards; they may also differ, and even more significantly, as to their purposes and justifications, something which cannot but influence the content of the

> information that the individual needs to be provided with, in order to render his participation, in the making of the decision, wholly meaningful. In the case of a decision aimed at imposing a sanction or a punishment for the commission of an offence, fairness dictates that the person charged be given all available particulars of the offence. Not so in the case of a decision to transfer made for the sake of the orderly and proper administration of the institution and based on a belief that the inmate should, because of concerns raised as to his behaviour, not remain where he is. In such a case, there would be no basis for requiring that the inmate be given as many particulars of all the wrong doings of which he may be suspected. Indeed, in the former case, what has to be verified is the very commission of the offence and the person involved should be given the fullest opportunity to convince of his innocence; in the latter case, it is merely the reasonableness and the seriousness of the belief on which the decision would be based and the participation of the person involved has to be rendered meaningful for that but nothing more. In the situation we are dealing with here, guilt was not what had to be confirmed, it was whether the information received from six different sources was sufficient to raise a valid concern and warrant the transfer.

Based on the foregoing, we need to determine whether Mr. Bouchard received information that afforded him wholly meaningful participation in the decision-making process relating to the raising of his security classification and his involuntary transfer to Cowansville Institution.

ii) Legislative Context

[23] As stated in *May*, supra:

> [94] A duty of procedural fairness rests on every public authority making administrative decisions affecting the rights, privileges or interests of an individual: *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Cardinal*; *Baker*, at para. 20. These privileges are reflected in and bolstered by the disclosure requirements imposed by the *CCRA*.

[24] Thus, to ensure the fairness of decisions affecting inmates, subsections 27(1), (2) and (3) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (CCRA) enact the obligation to

disclose, within "a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information":

27. (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.	**27.** (1) Sous réserve du paragraphe (3), la personne ou l'organisme chargé de rendre, au nom du Service, une décision au sujet d'un délinquant doit, lorsque celui-ci a le droit en vertu de la présente partie ou des règlements de présenter des observations, lui communiquer, dans un délai raisonnable avant la prise de décision, tous les renseignements entrant en ligne de compte dans celle-ci, ou un sommaire de ceux-ci.
(2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.	(2) Sous réserve du paragraphe (3), cette personne ou cet organisme doit, dès que sa décision est rendue, faire connaître au délinquant qui y a droit au titre de la présente partie ou des règlements les renseignements pris en compte dans la décision, ou un sommaire de ceux-ci.
(3) Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) or (2)	(3) Sauf dans le cas des infractions disciplinaires, le commissaire peut autoriser, dans la mesure jugée strictement nécessaire toutefois, le refus de communiquer des

would jeopardize (*a*) the safety of any person, (*b*) the security of a penitentiary, or (*c*) the conduct of any lawful investigation, the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (*a*), (*b*) or (*c*).	renseignements au délinquant s'il a des motifs raisonnables de croire que cette communication mettrait en danger la sécurité d'une personne ou du pénitencier ou compromettrait la tenue d'une enquête licite.

[97] The *Regulations* adopted pursuant to the *CCRA* shed additional light on the duties imposed upon prison authorities. Section 13 of the *Regulations*, which applies to involuntary transfers on an emergency basis, provides a right of information to inmates after their transfer to a new facility. The Institutional Head of the penitentiary to which an inmate is being transferred must meet with the inmate within two days in order to explain the reasons for the transfer. An opportunity to make representations must also be given to the inmate. Finally, written notice of the final transfer decision must be provided.

[98] Other specific provisions in the Standard Operating Practices ("SOP") directives further clarify the duty to disclose. The Security Classification of Offenders directive, SOP 700-14, sets out the security classification procedures for inmates. In all cases where a security classification is assigned or revised, a notice must be provided to the offender. The notice must contain reasons as well as the information considered in making the decision (para. 26).

[99] The Transfer of Offenders directive, SOP 700-15, sets out the criteria for the transfer of prisoners and indicates the extent to which disclosure should be made. An Assessment for Decision must be completed at the earliest possible time within two days following an offender's emergency transfer. The offender shall be provided with written notification of a recommendation for a transfer. The directive is very specific in this regard:

> The Notice of Involuntary Transfer Recommendation . . . must contain enough information to allow the offender to know the case against him or

> her. The offender must be in a position to be able to respond to the recommendation for an involuntary transfer. To meet this standard, the details of the incident(s) which prompted the transfer recommendation must be provided to the greatest extent possible. This may include providing the offender with the following information regarding the incident(s): where it occurred, when it occurred, against whom it occurred, the extent of injury or damage which resulted, the evidence or proof of its occurrence, and any further relevant information which may elaborate on the incident(s). In cases where sensitive information exists which cannot fully be shared, the offender shall be provided with a gist.
>
> [100] Having determined that the applicable statutory duty of disclosure in respect of the transfer decisions is substantial and extensive, we must now go on to consider whether it was respected in these cases. If it was not, the transfer decisions will have been unlawful.

(*May*, *supra*)

iii) <u>Information Disclosed to Mr. Bouchard</u>

[25] In the case before the Court, it is apparent that Mr. Bouchard received sufficient information in a variety of reports to ascertain the concerns of the correctional authorities that warranted his increased security classification and transfer to another institution; it is also apparent that he had the opportunity to make his submissions on that subject.

[26] Moreover, it is clear that Mr. Bouchard not only received written documentation but that he met with CSC staff members on several occasions regarding his increased security classification and transfer to Cowansville Institution:

> a) **February 28, 2003**: Allegations Mr. Bouchard made in a letter sent to the NPB regarding two other inmates (conspiracy to commit murder) are investigated and deemed not credible. The investigator recommends that Mr. Bouchard be assessed for transfer out of SAPI. A security intelligence report is signed by the director that same day.

b) **March 13, 2003**: Computerized calculation of the applicant's security classification confirms medium security rating. Mr. Bouchard alleges he received a disciplinary report that same day.

c) **March 21, 2003**: Meeting between Mr. Bouchard and the Segregation Committee regarding potential transfer to Cowansville, a medium-security institution.

d) **March 27, 2003**: Mr. Bouchard alleges he has received a letter from the correctional investigator to the effect that the decisions relating to his increased security classification and transfer to Cowansville Institution have already been taken.

e) **April 11, 2003**: An assessment report is completed with a view to officially amending the applicant's security classification and transferring him to an appropriate higher-security institution.

As well, Mr. Bouchard's Correctional Plan Progress Report (CPPR) is written up with a view to recommending transfer and reviewing the possibility of day parole and full parole (negative recommendation).

f) **April 15, 2003**: Mr. Bouchard's CPPR for transfer recommendation and day parole and full parole review is **given** to Mr. Bouchard. Notification of Involuntary Transfer is also **given** to Mr. Bouchard.

g) **April 18, 2003**: Mr. Bouchard files a complaint challenging his transfer and increased security classification.

h) **April 22, 2003**: Segregation Committee requests a meeting. Mr. Bouchard **declines to meet with the Segregation Committee.**

The report is signed by Ms. Savard, Acting Director of SAPI. In the report, it is noted that Mr. Bouchard received a document entitled Assessment for Decision. It summarizes a variety of information in Mr. Bouchard's file for 2002-2003. (More specficially, it deals with two reports dated July 30 and August 5, 2002 concerning an incident that occurred between Mr. Bouchard and a fellow inmate, twelve observation reports dating from May, June, July, August and September 2002, four reports from January 2003 referring to verbal altercations and death threats between the applicant and another inmate.)

i) **April 24, 2003**: Inmate security classification decision and Notification of Involuntary Transfer are given to Mr. Bouchard.

[27] Therefore, there was no breach of procedural fairness and no violation of the applicant's Charter section 7 rights.

(4) Did the decision-maker commit a patently unreasonable error in determining that the applicant's increased security classification and involuntary transfer were warranted?

i) Security Classification

[28] Assignment of security classifcations is governed by section 30 of the CCRA and sections 17 and 18 of the *Corrections and Conditional Release Regulations*, SOR/92-620 (Regulations) which read as follows:

Act:

30. (1) The Service shall assign a security classification of maximum, medium or minimum to each inmate in accordance with the regulations made under paragraph 96(*z*.6).	**30.** (1) Le Service assigne une cote de sécurité selon les catégories dites maximale, moyenne et minimale à chaque détenu conformément aux règlements d'application de l'alinéa 96z.6).
(2) The Service shall give each inmate reasons, in writing, for assigning a particular security classification or for changing that classification.	(2) Le Service doit donner, par écrit, à chaque détenu les motifs à l'appui de l'assignation d'une cote de sécurité ou du changement de celle-ci.

Regulations:

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.

18. For the purposes of section 30 of the Act, an inmate shall be classified as

18. Pour l'application de l'article 30 de la Loi, le détenu reçoit, selon le cas :

(*a*) maximum security where the inmate is assessed by the Service as

a) la cote de sécurité maximale, si l'évaluation du Service montre que le détenu :

(i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or

(i) soit présente un risque élevé d'évasion et, en cas d'évasion, constituerait une grande menace pour la sécurité du public,

(ii) requiring a high degree of supervision and control within the penitentiary;

(ii) soit exige un degré élevé de surveillance et de contrôle à l'intérieur du pénitencier;

(*b*) medium security where the inmate is assessed by the Service as	*b*) la cote de sécurité moyenne, si l'évaluation du Service montre que le détenu :
(i) presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or	(i) soit présente un risque d'évasion de faible à moyen et, en cas d'évasion, constituerait une menace moyenne pour la sécurité du public,
(ii) requiring a moderate degree of supervision and control within the penitentiary; and	(ii) soit exige un degré moyen de surveillance et de contrôle à l'intérieur du pénitencier;
(*c*) minimum security where the inmate is assessed by the Service as	*c*) la cote de sécurité minimale, si l'évaluation du Service montre que le détenu :
(i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and	(i) soit présente un faible risque d'évasion et, en cas d'évasion, constituerait une faible menace pour la sécurité du public,
(ii) requiring a low degree of supervision and control within the penitentiary.	(ii) soit exige un faible degré de surveillance et de contrôle à l'intérieur du pénitencier.

[29] The rationale for raising the applicant's security classification from minimum to medium is set out in the documentary evidence, specifically in the documents entitled *Assessment for Decision - Involuntary Transf. – Amendment to Security Classification* and in *Inmate Security Classification Decision*.

[30] Therefore, it was not patently unreasonable for the Assistant Commissioner to rule that an increased security classification was warranted, specifically based on the criteria under section 18 of the Regulations for assigning a medium security classification.

ii) <u>Involuntary Transfer</u>

[31] In this case, the involuntary transfer of the applicant was governed by section 28 of the CCRA and section 12 of the Regulations, which read as follows:

Act:

29. The Commissioner may authorize the transfer of a person who is sentenced, transferred or committed to a penitentiary to (*a*) another penitentiary in accordance with the regulations made under paragraph 96(*d*), subject to section 28; or (*b*) a provincial correctional facility or hospital in accordance with an agreement entered into under paragraph 16(1)(*a*) and any applicable regulations.	**29.** Le commissaire peut autoriser le transfèrement d'une personne condamnée ou transférée au pénitencier, soit à un autre pénitencier, conformément aux règlements pris en vertu de l'alinéa 96*d*), mais sous réserve de l'article 28, soit à un établissement correctionnel provincial ou un hôpital dans le cadre d'un accord conclu au titre du paragraphe 16(1), conformément aux règlements applicables
28. Where a person is, or is to be, confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which the person is confined is one that provides the least restrictive environment for that	**28.** Le Service doit s'assurer, dans la mesure du possible, que le pénitencier dans lequel est incarcéré le détenu constitue le milieu le moins restrictif possible, compte tenu des éléments suivants :

person, taking into account

(*a*) the degree and kind of custody and control necessary for

(i) the safety of the public,

(ii) the safety of that person and other persons in the penitentiary, and

(iii) the security of the penitentiary;

a) le degré de garde et de surveillance nécessaire à la sécurité du public, à celle du pénitencier, des personnes qui s'y trouvent et du détenu;

(*b*) accessibility to

(i) the person's home community and family,

(ii) a compatible cultural environment, and

(iii) a compatible linguistic environment; and

b) la facilité d'accès à la collectivité à laquelle il appartient, à sa famille et à un milieu culturel et linguistique compatible;

(*c*) the availability of appropriate programs and services and the person's willingness to participate in those programs.

c) l'existence de programmes et services qui lui conviennent et sa volonté d'y participer.

Regulations:

12. Before the transfer of an inmate pursuant to section 29 of the Act, other than a

12. Sauf dans le cas du transfèrement demandé par le détenu, le directeur du

transfer at the request of the inmate, an institutional head or a staff member designated by the institutional head shall

pénitencier ou l'agent désigné par lui doit, avant le transfèrement du détenu en application de l'article 29 de la Loi :

(*a*) give the inmate written notice of the proposed transfer, including the reasons for the proposed transfer and the proposed destination;

a) l'aviser par écrit du transfèrement projeté, des motifs de cette mesure et de la destination;

(*b*) after giving the inmate a reasonable opportunity to prepare representations with respect to the proposed transfer, meet with the inmate to explain the reasons for the proposed transfer and give the inmate an opportunity to make representations with respect to the proposed transfer in person or, if the inmate prefers, in writing;

b) après lui avoir donné la possibilité de préparer ses observations à ce sujet, le rencontrer pour lui expliquer les motifs du transfèrement projeté et lui donner la possibilité de présenter ses observations à ce sujet, en personne ou par écrit, au choix du détenu;

(*c*) forward the inmate's representations to the Commissioner or to a staff member designated in accordance with paragraph 5(1)(*b*); and

c) transmettre les observations du détenu au commissaire ou à l'agent désigné selon l'alinéa 5(1)*b*);

(*d*) give the inmate written notice of the final decision respecting the transfer, and the reasons for the decision,

d) l'aviser par écrit de la décision définitive prise au sujet du transfèrement et des motifs de celle-ci :

(i) at least two days before the transfer if the final decision is to

(i) au moins deux jours avant le transfèrement, sauf s'il

transfer the inmate, unless the inmate consents to a shorter period; and	consent à un délai plus bref lorsque la décision définitive est de le transférer,
(ii) within five working days after the decision if the final decision is not to transfer the inmate.	(ii) dans les cinq jours ouvrables suivant la décision, lorsque la décision définitive est de ne pas le transférer.

[32] The rationale for the involuntary transfer of the applicant is set out in the documentary evidence, specifically in the documents entitled *Assessment for Decision - Involuntary Transf. – Amendment to Security Classification, Correctional Plan Progress Report, Notice of Involuntary Transfer Recommendation, Inmate Security Classification Decision* and *Notification of Involuntary Transfer*.

[33] Therefore, it was not patently unreasonable for the Assistant Commissioner to rule that there were grounds for the involuntary transfer of the applicant and that these grounds were based on concerns significant enough to lead the correctional authorities to believe that the applicant [TRANSLATION] “should be transferred to ensure the orderly and effective adminstration of the institution.”

CONCLUSION

[34] Accordingly, the Court dismisses the application for judicial review.

JUDGMENT

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

OBITER

> The length of time served may be one of the circumstances considered in applying the statutory criteria to an individual's circumstances. It may not of itself justify parole but it may well serve as an indication that the inmate is no longer dangerous. As well, a lengthy incarceration with the concomitant institutionalizing effect upon the inmate may serve to explain and perhaps to some extent excuse certain breaches of discipline.
>
> (*Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385.)

Despair often engenders frustration. Mr. Bouchard has spent nearly 25 years of his life in prison. For 17 years, his conduct was exemplary. In 2002, the decision to reduce his full parole eligibility period created in Mr. Bouchard an expectation of imminent release from incarceration and re-entry into the community. However, since the incidents reported by the CSC in 2002-2003, Mr. Bouchard has lost hope and his situation is deteriorating. The refusal to grant parole in 2003 threw him into a cycle of frustration of the sort referred to above. Indeed, Mr. Bouchard's refusal to cooperate with the National Parole Board (NPB) can be traced back almost exclusively to his most recent years of imprisonment. Since that time, this behaviour has been the product of his frustration, and he is focussing his energy on alternative legal remedies to secure his release.

In light of the foregoing, the decision in Mr Bouchard's parole review scheduled for 2008 must be based on the criteria set out by Mr. Justice Peter deCarteret Cory in *Steele, supra,* at paragraph 65; in other words, the Board will grant parole where (**i) the inmate has derived the maximum benefit from imprisonment, (ii) the inmate's reform and rehabilitation will be aided by the grant of parole, and (iii) the inmate's release would not constitute an undue risk to society**. In *R. v. Lyons*, [1987] 2 S.C.R. 309, at pages 340-341, Mr. Justice Gérard V. La Forest described as follows the fundamental importance of these criteria in the Board's assessment of offender sentences:

> [48] ... in the context of a determinate sentencing scheme the availability of parole represents an additional, superadded protection of the liberty interests of the offender. In the present context, however, it is, subsequent to the actual imposition of the sentence itself, the sole protection of the dangerous offender's liberty interests. [...] Seen in this light, therefore, the parole process assumes the utmost significance

> for it is that process alone that is capable of truly accommodating and tailoring the sentence to fit the circumstances of the individual offender.

Therefore, these criteria will serve as guidelines for the Board to take into consideration as it assesses the progress of Mr. Bouchard, not only since the incidents that occurred in 2002, but also for the 17 years before that.

i) Has the inmate derived the maximum benefit from imprisonment?

Throughout Mr. Bouchard's incarceration, specialists' reports have stated that he was deriving the maximum benefit from his imprisonment. First, the grant of parole in 2002 was based on abundant evidence of good conduct and the fact that, having given up drugs and alcohol since 1984-85, he had participated in numerous rehabilitation programs and completed more than ninety (90) escorted temporary absences (ETA). In that regard, it is important to note that all of the ETA reports dated 2000 to 2001 are positive and all assessment reports subsequent to temporary absences or work releases dated 2001 to 2003 are positive, except for the one dated August 7, 2001 (Exhibit D-9).

Secondly, according to the assessment of criminological factors dated February 3, 2002 (Exhibit D-5), Mr. Bouchard made significant progress towards a re-entry into the community. Certain parts of that report should be noted for a better understanding of the sort of progress Mr. Bouchard has achieved since the outset of his incarceration :

Re behaviour:

> [TRANSLATION]
> [Mr. Bouchard] presents in the interview as being relatively at ease. He was extremely cooperative with me. The atmosphere quickly became conducive to a productive exchange. His speech was candid and straightforward and he demonstrated openness and authenticity. His thinking was coherent and his vocabulary was appropriate. This is a sociable, approachable, fairly articulate person. He is modest and humble in his presentation and description of himself. He likes to talk to people and shows an interest in becoming a better person.
>
> He spoke to me frankly about his past, present and future and was open and transparent about past thoughts and actions that had the potential to cast him in a bad light. He courageously told me about his beliefs, his truth. He was not afraid to bare himself psychologically, and did so with surprising candour; indeed, this openness seems to be part of who he is now.
>
> I was not able to detect any kind of manipulation on his part such as diversion, systematic obstruction, direct or veiled intimidation, prevarication, flattery, seduction or overstated victimization. His version of his life story corresponds in

every respect to all of the other assessments on file that have been carried out to date.

Mr. Bouchard appears to have a strong potential for introspection, which allows him to care about others and adapt while developing effective personal and social skills so as to derive a sense of personal achievement from it.

Self-criticism is fairly articulate. He recognizes his criminal orientation from that time, his inconsistent and egocentric behaviour, his rigid approach, his lack of social empathy, his moral judgment narrowed and perverted by criminal objectives. He admits that he mortgaged the lives of many members of his family and those of others (his victims) as well as his own life. He has a clear perception of his former personal deficiencies, and over time, he has come to identify fairly clearly the dynamic anchors that motivated him at that time in his life.

His affect is modulated to his speech. He is capable of interpersonal sensitivity and well-adapted emotions. He becomes sad when he talks about the various losses in his life (parents, siblings) and shows optimism about the future. He is capable of affective attachment; we noted that he is highly receptive to others' points of view and demonstrates an excellent ability to interact with others. His attitude appears natural and sincere, not superficial or forced: Mr. Bouchard does not exhibit any kind of manipulation aimed at creating a favourable image of himself. This is a communicative and expressive person. He has good adaptive resources and effective control.

His overall demeanour is confident and self-assured, without being presumptuous or rash. In other words, this is someone who is not fearful or apprehensive in the face of obstacles; rather, he is determined, energetic and anxious to realize his full potential.

(Exhibit D-5, pages 3-4)

Re his progress over the course of his sentence:

[TRANSLATION]
[…] The death of his brothers and a sister at the end of the 1980s […] was a very painfully emotional experience for the subject, one that appears to have set in motion a gradual, noticeable softening of his adaptive mechanisms. He has started to appear more reasonable and interactive towards authority and his entourage, adopting a more constructive, less arrogant and resistant approach. He listens more (he did not listen at all before) and he participates in institutional programs at a significant level. In short, since 1990, we detect a certain desire to distance himself from his former deviant and antisocial attitudes.

[…] Since 1990, therefore, there has been a noticeable calming in terms of his behaviour. The initial changes were not dazzling, but they occurred quietly, one by one, and evolved over a period of lengthy reflection. This period was followed by a slight opening up to things that could help him in his process of change. He got involved in the Toastmasters Program. Then came the Self-Awareness Program and the Lifeskills Program. He did a lot of reading at that time and started writing as well. Writing about himself, his life, his family—it all gradually enabled him to explore his inner life more closely and brought him to realize that he needed help.

In 1995, he asked to meet with a psychologist and started regular psychotherapeutic counselling for approximately one year […]

He enrolled in all treatment programs that the Correctional Service offered to him and his involvement was qualitative and sincere. He also took on more altruistic projects such as World Vision and the Life-Hope group (of which he was also president for one year) and became involved in religious workshops as well. He was also president of the Inmates Committee for close to two years. He acquitted himself of these responsibilities very well.

All of this led to a gradual downgrading of his security classification until, in June 1998, he was transferred to Ste-Anne-des-Plaines Institution to start a social reintegration program and he entered the Living Units program.

Since 2000, Mr. Bouchard has been granted about 60 escorted temporary absences for family contact, personal development and community services; he has not caused any problems of a security nature. In two ETAs out of 60, the comments of the escort (the same person both times) were negative. All other ETAs transpired without any difficulty, and the ETA reports were written by some 18 different escorts, based on the information we have at this time.

(Exhibit D-5, at pages 6-8)

Criminological Assessment:

[TRANSLATION]
[…] He has been working on this for over eleven years now, and his determination has been noticed; all of his caseworkers, including myself, consider it beneficial. Through all these years, through his participation in all treatment programs offered by the CSC and through psychological counselling, which appears to have propelled him towards a wholesale reconstruction of his personality, we are seeing the gradual development of a greater awareness of himself and of others that has led Mr. Bouchard to “mature” relationally, affectively and emotionally.

> […] His lengthy imprisonment (more than nineteen years) appears to have eroded his antisocial personality traits, finally promoting a process of introspection. He understands that the trajectory of his life at the time was leading him nowhere except into a dead end. It appears that Mr. Bouchard has not used drugs or alcohol for over seventeen years.
>
> [...] We detect in Mr. Bouchard a great ability and willingness to adhere to current prosocial values. On the other hand, this adherence appears to have peaked—it cannot go any farther in his current living conditions. **In the early stages of incarceration, the closed environment can be ideal for stopping and learning to face up to oneself. But over time, it has less and less to offer in terms of the stimuli of real life in society. As a result, the subject's progress has now reached a kind of stagnation point.**
>
> **He needs to move beyond the stagnation and developmental dead-end he is experiencing, having reached a ceiling, a saturation point in the prison environment. His institutional and personal progress reveals to us an individual firmly in control of himself thanks to a better awareness of himself, his limitations and his strengths […]** (emphasis added)
>
> (Exhibit D-5, at pages 9-13)

Finally, the documentary evidence reveals that since the 2003 incident, Mr. Bouchard has been incarcerated at the Federal Training Centre in Laval, a reinforced *minimum* security penitentiary. Moreover, the applicant has been pursuing his secondary school studies with the goal of upgrading his education; he has also been trying to become involved in activities such as the occupational health and safety group.

ii) Will the inmate's reform and rehabilitation be aided by the grant of parole?

Mr. Bouchard's situation since the incidents of 2002-2003 has been deteriorating; despair and frustration have been controlling his life and preventing him from progressing within the institutional setting. The documentary evidence clearly shows that in Mr. Bouchard's case parole merits thorough consideration:

> [TRANSLATION]
> This gradual return to society does not appear to pose any undue risk to the public at this time. It will enable the subject to continue making the kind of progress he has initiated so successfully within our institutions and adjust it to the realities of life on the outside. He will be empowered to find and rebuild a place for himself within society where he can make a worthwhile contribution and continue to reform his life appropriately and prosperously. His current incarceration and the loss of certain members of his family appear to have affected Mr. Bouchard deeply and painfully;

> they have most definitely had a powerful and lasting deterrent effect upon him as he now strives to lead the life of a well-adjusted, responsible person. He is willing and able, and in addition, Mr. Bouchard has managed to create for himself an appropriate and healthy social support network comprised of family members and their friends, particularly his brother Marcel and his friends. Mr. Bouchard is 48 years old and wants to live out his final years outside of pentitentiary walls; we believe that, with the help he will receive from the CSC for the rest of his life, he can do it.
>
> (Criminological Report, Exhibit D-5, at pages 13 and 14)

iii) Will the inmate's release constitute an undue risk to society?

Protecting society is one of the imperatives of the correctional system. If an inmate's release continues to constitute an undue risk to the public, then his or her detention can be justifiably maintained for a lifetime. (*Steele, supra*, at paragraph 71.)

However, according to the documentary evidence from January 3, 2002, Mr. Bouchard did not pose a danger to society at the time:

> This gradual return to society does not appear to pose any undue risk to the public at this time.…
>
> (Criminological Report, Exhibit D-5, at page 12)

Moreover, he has taken part in several rehabilitation programs and completed more than ninety (90) escorted temporary absences (ETA). It is important to note in this regard that all of the ETA reports dating from 2000 to 2001 are positive and all of the assessment reports following a temporary absence or work release dated 2001 to 2003 are positive, except for the one from August 7, 2001.

The length of the term served may be one of the assessment factors considered in applying the statutory criteria to an individual's circumstances. It may not of itself justify parole but it may well serve as an indication among an array of factors that the inmate is no longer dangerous and could be paroled.

Finally, since the incidents of 2002-2003, Mr. Bouchard has been incarcerated at the Federal Training Centre in Laval, a reinforced **minimum** security institution.

On this point, an analysis should take into account the incidents that occurred in 2002-2003 and any explanations as to the reasons for their occurrence. A lengthy incarceration with the concomitant institutionalizing effect upon the inmate may serve to explain and perhaps to some extent excuse certain breaches of discipline. Rather than focussing indiscriminately on breaches of discipline, the analysis must concentrate on the crucial issue of whether granting parole would constitute an undue risk to society (*Steele, supra,* at paragraphs 77-79).

In short, to break the perpetual cycle of despair and frustration and to assess the potential risk to the public, it is vital that Mr. Bouchard and the CSC re-establish meaningful contact with each other in order to come to an understanding that takes due account of the concerns of both parties and does not minimize the rationale for his prolonged incarceration thus far.

For the sake of society's and Mr. Bouchard's welfare, there needs to be an analysis not just of acts that have been committed, but of attitudes leading to action, in order to achieve a collective result based on cooperation and a sincere desire for change—which in itself represents the goal of the correctional system.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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