TOR

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SEAL

Court File No. T-1157-20

FEDERAL COURT

BETWEEN:

DAVID FRENCH

Applicant

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following pages 3 et seq.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard by videoconference between the Toronto Local Office of the Court and Bath Institution, Canada.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by

the *Federal Court Rules* and serve it on the Applicant's solicitor, or if the Applicant is self-represented, on the Applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Court Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGEMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

~~*September 22, 2020*~~

VETON MAMUDOV
SEP 2 5 2020 REGISTRY OFFICER
AGENT DU GREFFE

Issued by: _____

(Registry Officer)

Address of local office: Toronto Local Office
180 Queen Street West,
Suite 200
Toronto Ontario
M5V 3L6

TO: **THE CLERK OF THE COURT**

AND TO: **THE ATTORNEY GENERAL OF CANADA**
Respondent
per: *Federal Court Rules*, Rule 133

AND TO: **THE COMMISSIONER OF CORRECTIONS**
per: The Attorney General of Canada,
Respondent

APPLICATION

THIS IS AN APPLICATION for judicial review under section 18.1 of the *Federal Courts Act* in respect of a decision made at National Headquarters ("NHQ") of the *Correctional Service of Canada* (the "CSC"), a Creature of Statute existing in and by S.C. 1992 c. 20 as am., a.k.a. *Corrections and Conditional Release Act* (the "CCRA"), Part 1, pursuant to s. 5 thereof. The decision is in respect of the Applicant's "Grievance Presentation" at the 'Final Level' of the CSC – administered grievance process required by the CCRA, Part 1, pursuant to ss. 4 (f), 90 and 91 thereof, and whereby Larry Motiuk ("Motiuk"), Assistant Commissioner, Policy, upon 'analysis' by J. Araujo ("Araujo"), Analyst, Offender Redress, CSC NHQ, acted for the Commissioner of Corrections (the "Commissioner") upholding, only in part, the Applicant's said Grievance Presentation Reference No. V40R00038525 ("38525"), and, in the result, failed to quash the Applicant's unlawful suspension said to have been issued under *Commissioner's Directive* ("CD") 730 at para. 46, with back pay, as per the Applicant's initially requested corrective action.

The decision is dated "2020-08-01" but was first received by the Applicant only this 2020-08-26 through CSC's tardy internal mail process.

The Araujo -authored, Motiuk decision is such as to, once again, remind of the words of The Honourable Louise Arbour who, in 1996, condemned the CSC organization top to bottom as a "deplorable defensive culture" in which "THE ABSENCE of the Rule of Law is most noticeable at the management level, both within the prison and at the Regional and National levels" – and that "even if the law is known, there is a general perception that it can always be departed from for valid reasons [sic], and that, in any event, compliance with prisoners' rights is not a priority." (emphasis added)[1]

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[1] Arbour, **Commission of Inquiry**: Chap 2.3.3.3, 2. 12 "**Measuring CSC's Performance Against its Mission Statement**", p. 173 at 174; Chap. 3.1.2 "**The breakdown of the Rule of Law**", p. 179 at 180, and para. 2.3.3.3. Ottawa Public Works and Government Services Canada, 1996.

The Applicant was suspended from his workplace assignment on 2019-03-08, for an incident alleged to have occurred on 2019-03-07. The initial allegation, alleging that the inmate was, "attempting to take extra food from the workplace," that, if true, would have constituted a disciplinary offence under section 40 (d) of the CCRA, from which a lawful suspension could have then been laid with respect to the allegations, was ultimately abandoned following an investigation arising from the offender's *Correctional Intervention Board* ("CIB") submissions and Offender Grievance Presentation #V40R00038525 ("38525"). The second allegation, alleging that the offender became, "aggressive and argumentative," that, if true, would have constituted a disciplinary offence under section 40 (f) of the CCRA, from which a lawful suspension could have then been laid with respect to the allegations, was maintained as the driving force for the issuing of the said suspension. The suspension, issued in error, under *Commissioner Directive* 730, as opposed to being laid in response to the appropriate disciplinary infraction under section 40 (f) of the CCRA, illegally limited the full scope of protections afforded an inmate against such an allegation, ended up costing the Applicant a very good prison job, and has had a negative impact on the offender's otherwise exceptional prison record.

This Application is brought in the public interest to enforce public rights and to prevent public nuisance in the workplace, in what amounts to a wrongful and/or constructive dismissal/suspension from a workplace assignment.

THE APPLICANT MAKES APPLICATION FOR:

1. A writ of *certiorari*, or an Order in the nature pursuant to s. 18 (3) (b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 as am., to quash the Applicant's wrongful suspension from the workplace.

2. An Order declaring that the Applicant was not provided with full disclosure in the manner required under the CCRA, Part 1, at ss. 27 (1), thus impeding his ability to meet the case, and that the decision is

therefore null and without effect for want of jurisdiction.

3. An Order declaring that the Respondents' acted in a biased and arbitrary fashion toward the Applicant in the taking of the decision.

4. An Order declaring that the decision at issue was taken in an unfair, arbitrary fashion, or was taken based on purposes irrelevant to, or contrary to, those provided under the CCRA.

5. A writ of *mandamus*, or an Order in the nature that the CSC accept responsibility for being negligent in respect to its failure to meet the mandatory requirements of the CCRR, Part 1, at ss. 31 (1) (a), the CCRA, Part 1, at ss. 41 (1), the CCRA, Part 1, at ss. 27 (1), the CCRA, Part 1, at s. 39, and *Commissioner's Directive* 580 at para. 5.

6. An Order declaring that the decision at issue was taken in breach of the Applicant's entitlements under the CCRR, Part 1, at ss. 31 (1) (a), the CCRA, Part 1, at ss. 27 (1), the CCRA, Part 1, at s. 39, the CCRA, Part 1, at ss. 41 (1), and *Commissioner's Directive* 580 at para. 5.

7. An Order declaring that the CSC is under a legal duty to preserve evidence upon request and is lawfully obligated to provide such evidence without delay upon request.

8. An Order declaring that the Applicant was not provided with full disclosure in the manner required under the CCRA, Part 1, at ss. 27 (1) and the CCRR, Part 1, at ss. 31 (1) (a), and that the decision is therefore null and without effect for want of jurisdiction.

9. An interlocutory and permanent injunction restraining the Respondents', any persons acting under the counsel, instruction or direction of them or

any of them, and all other persons having knowledge of the Order of the Court from:

i. Impeding, interfering, blocking, obstructing, or attempting to impede, interfere, block or obstruct the Applicant's right to gainful employment;

ii. Impeding, interfering, blocking, obstructing, or attempting to impede, interfere, block or obstruct the Applicant's right to live a free and dignified material life;

iii. causing or attempting to cause a public nuisance through harassment or willful negligence in the workplace;

iv. assaulting, harassing, impeding, obstructing, threatening, or intimidating the Applicant in the workplace;

10. In addition, an Order to have all references to the quashed conviction removed from the Applicant's inmate files pursuant to s. 24 of the CCRA.

11. His expenses on this Application and in proceedings in connection with this Application.

12. Such further and other relief as the Honorable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE

1. **THAT** in accordance with s. 18.1 (1) of the *Federal Courts Act,* R.S.C. 1985, c. F-7 as am., (the "Act"), the Applicant is directly affected by the matter in respect of which relief is sought.

2. **THAT** in accordance with s. 18.1 (4) of the Act, the Commissioner by Araujo and Motiuk:

a. acted without jurisdiction or beyond his jurisdiction in overstepping the CCRA, Part 1, at ss. 27 (1) by having not disclosed "all the information to be considered in the taking of the decision or a summary of that information," namely the Incident/Observation Report(s) of March 7, 2019, with respect to the incident leading to the suspension;

b. acted without jurisdiction or beyond his jurisdiction in overstepping the CCRA, Part 1, at ss. 41 (1) by having not taken all reasonable steps to resolve the matter informally;

c. acted without jurisdiction or beyond his jurisdiction in overstepping the CCRA, Part 1, at s. 39 by having disciplined the inmate other than in accordance with the CCRA, Part 1, sections 40 to 44 and the regulations, for conduct that, if true, would have fell under section 40 of the CCRA and not that of *Commissioner Directive* 730 at para. 46, under which the suspension was erroneously issued;

d. acted without jurisdiction or beyond his jurisdiction in overstepping the CCRR, Part 1, at ss. 31 (1) (a), by having not allowed the inmate to question witnesses through the person conducting the hearing, introduce evidence, call witnesses on the inmates behalf and examine all exhibits and documents to be considered in the taking of the decision;

e. refused to exercise the CSC's legal obligations due and owed the Applicant under and by the CCRA, Part 1, at ss. 27 (1);

f. refused to exercise the CSC's legal obligations due and owed the Applicant under and by the CCRR, Part 1, at ss. 31 (1) (a);

g. refused to exercise the CSC's legal obligations due and owed the Applicant under and by the CCRA, Part 1, at ss. 41 (1);

h. refused to exercise the CSC's legal obligations due and owed the Applicant under and by the CCRA, Part 1, at ss. 90 and 91 pursuant to ss. 4 (f) and 4 (i);

i. refused to exercise the CSC's legal obligations due and owed the Applicant under and by *Commissioner's Directive* 60 at para. 11;

j. failed to observe a principle of procedural fairness through the willful destruction of evidence;

k. In all events, failed to observe the mandatory procedure required by the CCRA, in that the initial Incident/Observation Report(s) of March 7, 2019, referencing the alleged issue from which the suspension allegedly stemmed, was not provided upon request for the CIB hearing and as a result impeded in the accused's preparation of defence, including his ability to make full answer and defence;

l. failed to observe the mandatory procedure required by the CCRA, Part 1, at ss. 41 (1), CCRA, Part 1, at ss. 27 (1), CCRA, Part 1, at s. 39, and the CCRR, Part 1, at ss. 31 (1) (a);

m. **THAT** in taking the decision, the Respondents' failed to properly exercise their discretion and acted in a biased and arbitrary fashion;

n. **THAT** the Respondents' unlawful and punitive intentions, bias and failure to provide procedural fairness resulted in harm to the Applicant's liberty, other than in accordance with the principles of

fundamental justice, and thus breached the Applicant's rights under s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*");

o. **THAT** the Respondents' had no justification under s.1 of the *Charter* for the Respondents' decisions which did not fulfil CSC's obligation to prepare offenders for safe reintegration back into the community;

p. erred in law in making his decision against:

- the CCRA, Part 1, at ss. 27 (1), by having not disclosed "all the information to be considered in the taking of the decision or a summary of that information," namely, and primarily, the Incident/Observation Report of March 7, 2019, with respect to the incident leading to the suspension;

- the CCRA, Part 1, at s. 39, by having disciplined the inmate other than in accordance with the CCRA, Part 1, sections 40 to 44 and the regulations, for conduct that, if true, would have fell under section 40 of the CCRA and not that of *Commissioner Directive* 730 at para. 46, under which the suspension was erroneously issued;

- the CCRR, Part 1, at ss. 31 (1) (a), by having not allowed the inmate to question witnesses through the person conducting the hearing, introduce evidence, call witnesses on the inmates behalf and examine all exhibits and documents to be considered in the taking of the decision, namely and especially the Incident/Observation Report of March 7, 2019, from which the material statement(s), leading to the suspension, could be properly contested, thus impeding the Applicant's ability to

make full answer and defence and denying him a fair hearing;

- the CCRA, Part 1, at ss. 41 (1), by issuing a charge without having taken all reasonable steps to resolve the matter informally.

3. In bringing this Application, he acts in person of necessity *bona fides* pursuant to, and for all purposes of in full accordance with:

   a. Statement of Principles on Self-represented Litigants and Accused Persons, adopted in 2006 by the Canadian Judicial Council: **TAB A;**

   b. SOR/98-106 as am., a.k.a. *Federal Court Rules* 3, 119, 122 read in context of the *Interpretation Act*, R.S.C. 1985, c. 1-21 as am., ss. 3, 10, 11, and 12;

   c. *Federal Courts Act*, R.S.C. 1985, c. F-7 as am, s. 4; and

   d. The *Canadian Charter of Rights and Freedoms* ("Charter") s. 24 (1) pursuant to s. 32 (1) thereof.

4. S.C. 1992 c. 20 as am., a.k.a. *Corrections and Conditional Release Act*: Part 1, ss. 4 (f), ss. 4 (j), ss. 41 (1), ss. 27 (1), s. 39, s. 90, and s. 91 ("**Subject to**").

5. SOR 92-620 as am., a.k.a. *Corrections and Conditional Release Regulations:* Part 1, ss. 26 and ss. 31 (1) (a) ("**Subject to**").

6. *Federal Courts Act*, R.S.C. 1985, c. F-7 as am, ss. 4; 18, 18.1.

7. *Federal Courts Rules*, SOR/98-106 as am: Part 5.

8. The judgement in *Savard v. Canada (Attorney General)* (1997), 128 FTR 271, 1997 CarswellNat 677 (FCTD) [*Savard*] that when improper disclosure prevents the raising of full answer and defence, the charge must be dismissed.

9. The judgement of the Supreme Court of Canada in *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 [*May*] at para. 77 that "[CSC] decisions that violate the *Charter* are null and void for lack of jurisdiction [i.e., the CCRA, Part 1, does not authorize CSC to Violate the *Charter*]".

10. The judgement in *Tehrankari v. Canada (Correctional Service)*, 2000 CanLII 15218 (FC) [*Tehrankari*] that under s.24 of the CCRA, the CSC must take reasonable steps to ensure that any information in an offender's files is accurate, up-to-date, and complete.

11. Such other grounds as this Honourable Court may determine.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. The Affidavit of David French and the exhibits referred to therein.

2. Transcript of Minor Disciplinary Hearing dated March 19, 2019.

3. This Notice of Application.

4. Grievance Presentation #V40R00038501.

5. Letter from the *Office of the Privacy Commissioner of Canada*, dated 2019-09-19, re: P-2018-05406, suspension report.

6. Letter from the *Office of the Privacy Commissioner of Canada*, dated 2019-10-10, re: P-2018-04058, video-footage.

7. Such further and other material as the Applicant may advise and the Honourable Court may accept.

THE APPLICANT REQUESTS that the Attorney General of Canada send a certified copy of the following material that is not in the Applicant's possession but is in the possession of the Commissioners of Corrections and his National Headquarters ("NHQ"), to the Applicant and Registry:

1. Incident/Observation Report, March 7, 2019, Cameron Cooke.

2. Incident/Observation Report, March 7, 2019, Evan Pyle.

3. Incident/Observation Report, March 8, 2019, Tom Gencarelli.

4. All emails, notes to file, memoranda, etc. from and to and/or to and from Cook and Motiuk in connection with 38501.

5. All emails, notes to file, memoranda, etc. from and to and/or to and from J. Araujo and Motiuk in connection with V40R00038525 ("38525").

6. All emails, notes to file, memoranda, etc. from and to and/or to and from Tom Gencarelli and Don Thompson in connection with 38501.

7. All emails, notes to file, memoranda, etc. from and to and/or to and from CM Phillip Gottlieb and Tom Gencarelli in connection with 38501.

8. All emails, notes to file, memoranda, etc. from and to and/or to and from CM Phillip Gottlieb and Don Thompson and in connection with 38501.

9. All emails, notes to file, memoranda, etc., from and to Cameron Cooke in connection to David French, 38501 and/or 38525, in between March 6-20, 2019.

10. All emails, notes to file, memoranda, etc., from and to Tom Gencarelli in connection to David French, 38501 and/or 38525, in between March 6-20, 2019.

11. All emails, notes to file, memoranda, etc., from and to Evan Pyle in connection to David French, 38501 and/or 38525, in between March 6-20, 2019.

12. All emails, notes to file, memoranda, etc., from and to Phillip Gottlieb in connection to David French, 38501 and/or 38525, in between March 6-20, 2019.

13. All emails, notes to file, memoranda, etc., from and to Don Thompson in connection to David French, 38501 and/or 38525, in between March 6-20, 2019.

14. The executive summary for 38501 together with the executive summary for 38525 and the Final Level Response thereto.

15. Offender Privacy Act Request Response P-2019-05015.

16. Offender Privacy Act Request Response P-2019-05406.

17. *Commissioner's Directive* 001.

18. *Commissioner's Directive* 60.

19. *Commissioner's Directive* 580.

20. *Commissioner's Directive* 730.

21. S.C. 1992 c. 20 as am., a.k.a. *Corrections and Conditional Release Act.*

22. SOR 92-620 as am., a.k.a. *Corrections and Conditional Release Regulations.*

23. Any legislation, policy, or Offender Management System ("OMS") information used in the taking of the decision.

September 22, 2020

(Signature of Solicitor or party)

David French
5775 Bath Road
P.O. Box 1500
Bath ON
K0H 1G0

TAB A

CANADIAN JUDICIAL COUNCIL
STATEMENT OF PRINCIPLES
ON SELF-REPRESENTED LITIGANTS AND ACCUSED PERSONS*

PREAMBLE

Whereas the system of criminal and civil justice in Canada is predicated on the expectation of equal access to justice, including procedural justice, and equal treatment under the law for all persons;

Whereas the achievement of these expectations depends on awareness and understanding of both procedural and substantive law;

Whereas access to justice is facilitated by the availability of representation to all parties, and it is therefore desirable that each person seeking access to the court should be represented by counsel;

Whereas those persons who do remain unrepresented by counsel both face and present special challenges with respect to the court system;

Therefore, judges, court administrators, members of the Bar, legal aid organizations, and government funding agencies each have responsibility to ensure that self-represented persons are provided with fair access and equal treatment by the court; and

Therefore, it is desirable to provide a statement of principles for the guidance of such persons in the administration of justice in relation to self-represented persons.

*Notes:

1. Throughout this document, the term "self-represented" is used to describe persons who appear without representation. The use of this term is not meant to suggest inferences about the reasons the individual is without representation, nor the quality of their self-representation, and recognizes that some individuals prefer to represent themselves.

2. The Statements, Principles and Commentaries are advisory in nature and are not intended to be a code of conduct.

A. PROMOTING RIGHTS OF ACCESS

STATEMENT:

Judges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation.

PRINCIPLES:

1. Access to justice for self-represented persons requires all aspects of the court process to be, as much as possible, open, transparent, clearly defined, simple, convenient and accommodating.

2. The court process should, to the extent possible, be supplemented by processes that enhance accessibility, informality, and timeliness of case resolution. These processes may include case management, alternative dispute resolution (ADR) procedures, and informal settlement conferences presided over by a judge.

3. Information, assistance and self-help support required by self-represented persons should be made available through the various means by which self-represented persons normally seek information, including for example: pamphlets, telephone inquiries, courthouse inquiries, legal clinics, and internet searches and inquiries.

4. In view of the value of legal advice and representation, judges, court administrators and other participants in the legal system should:
   (a) inform any self-represented parties of the potential consequences and responsibilities of proceeding without a lawyer;
   (b) refer self-represented persons to available sources of representation, including those available from Legal Aid plans, *pro bono* assistance and community and other services; and
   (c) refer self-represented persons to other appropriate sources of information, education, advice and assistance.

COMMENTARY:

1. Informed opinion and research suggests that the numbers of self-represented persons in the courts are increasing. However, the average person may be overwhelmed by the simplest of court procedures.

2. Self-represented persons are generally uninformed about their rights and about the consequences of choosing the options available to them; they may find court procedures complex, confusing and intimidating; and they may not have the knowledge or skills to participate actively and effectively in their own litigation.[1]

3. Many self-represented persons have limited literacy skills, and many speak Canada's official languages as a second language, if at all. As a result, many self-represented persons tend to access information about the courts through means other than the written word. For this reason, it is essential that information be provided using other means, including videos and pictures. Further, having an official available to answer questions posed by self-represented persons should, to the extent possible, supplement pre-packaged materials.

4. Given these factors, it is important that judges, court administrators and others facilitate, to the extent possible, access to justice for self-represented persons.

5. Providing the required services for self-represented persons is also necessary to enhance the courts' ability to function in a timely and efficient manner.

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[1] Hann, Robert *et al.* *A Study of Unrepresented Accused in Nine Canadian Courts*. Ottawa: Department of Justice, 2003.

B. PROMOTING EQUAL JUSTICE

STATEMENT:

Judges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation.

PRINCIPLES:

1. Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.

2. Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.

3. Where appropriate, a judge should consider engaging in such case management activities as are required to protect the rights and interests of self-represented persons. Such case management should begin as early in the court process as possible.

4. When one or both parties are proceeding without representation, non-prejudicial and engaged case and courtroom management may be needed to protect the litigants' equal right to be heard. Depending on the circumstances and nature of the case, the presiding judge may:
   (a) explain the process;
   (b) inquire whether both parties understand the process and the procedure;
   (c) make referrals to agencies able to assist the litigant in the preparation of the case;
   (d) provide information about the law and evidentiary requirements;
   (e) modify the traditional order of taking evidence; and
   (f) question witnesses.

COMMENTARY:

1. It is consistent with the requirements of judicial neutrality and impartiality for a judge to engage in such affirmative and non-prejudicial steps as described in Principles 3 and 4. A careful explanation of the purpose of this type of management will minimize any risk of a perception of biased behaviour.

2. Judges must exercise diligence in ensuring that the law is applied in an even-handed way to all, regardless of representation. The Council's statement of *Ethical Principles for Judges* (1998) has already established the principle of equality in principles governing judicial conduct. That document states that, "Judges should conduct themselves and proceedings before them so as to ensure equality according to law."

3. However, it is clear that treating all persons alike does not necessarily result in equal justice. The *Ethical Principles for Judges* also cites *Eldridge v. British Columbia (Attorney General)*[2] on a judge's duty to "rectify and prevent" discriminatory effects against particular groups.

4. Self-represented persons, like all other litigants, are subject to the provisions whereby courts maintain control of their proceedings and procedures. In the same manner as with other litigants, self-represented persons may be treated as vexatious or abusive litigants where the administration of justice requires it. The ability of judges to promote access may be affected by the actions of self-represented litigants themselves.

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[2] [1997] 3 S.C.R. 624 *per* LaForest, J. for the court at 667.