

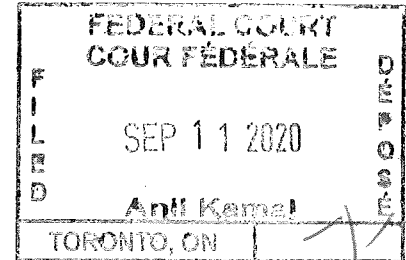
Court File No.

T-7062-20

**FEDERAL COURT**

**BETWEEN:**

**DAVID FRENCH**



**Applicant**

**-and-**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

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**NOTICE OF APPLICATION**

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**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 1, 2020*

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 Darren Cook (“Cook”), 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. V40R0003501 (“38501”), and, in the result, failed to fulfill CSC’s legal obligation to quash the Applicant’s unlawful minor disciplinary conviction, under para. 40 (f) of the CCRA, as per the Applicant’s initially requested corrective action.

The decision is dated “2020-07-19” but was first received by the Applicant only this 2020-08-06 through CSC’s tardy internal mail process.

The Cook-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)<sup>1</sup>

The Applicant was charged with a minor disciplinary offence contrary to para. 40 (f) of the CCRA on 2019-03-08, in retaliation for raising concerns to the Chief of Food

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<sup>1</sup> 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.

Services, during the serving of his suspension notice, about a Food Service employee who harassed the Applicant and arbitrarily suspended him from his workplace assignment. The suspension that preceded the laying of the minor disciplinary charge was based upon two unfounded allegations both of an extremely inflammatory nature. The initial allegation, alleging that the offender was "attempting to take extra food from the workplace," 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 was maintained as the driving force for the issuing of the said suspension. The inclusion of the minor disciplinary charge, issued following a discussion surrounding the potential cause of suspension, 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.

**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 conviction.
2. An Order declaring that the Respondents' acted in a biased and arbitrary fashion toward the Applicant in the taking of the decision.
3. 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.
4. 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, ss. 41 (1), and *Commissioner's Directive 580* at para. 5.

5. 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, ss. 41 (1), and *Commissioner's Directive 580* at para. 5.
6. 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.
7. An Order declaring that the Applicant was not provided with full disclosure in the manner required under the CCRR, Part 1, at ss. 31 (1) (a), and that the decision is therefore null and without effect.
8. 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;

9. 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.
10. His expenses on this Application and in proceedings in connection with this Application.
11. 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 Cook and Motiuk:
  - a. 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;
  - b. acted without jurisdiction or beyond his jurisdiction in overstepping the CCR, Part 1, at s. 26 by giving rise to two disciplinary actions for conduct flowing from a single action, simultaneous action, or chain of uninterrupted actions;
  - c. refused to exercise the CSC's legal obligations due and owed the Applicant under and by the CCR, Part 1, at ss. 31 (1) (a);

- d. refused to exercise the CSC's legal obligations due and owed the Applicant under and by the CCRA, Part 1, at ss. 41 (1);
- e. 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);
- f. refused to exercise the CSC's legal obligations due and owed the Applicant under and by *Commissioner's Directive 60* at para. 11;
- g. failed to observe a principle of procedural fairness in failing to make judgement from the facts submitted and instead based his decision on undisclosed information and conversations he indicated he had with Food Service staff on the day of the hearing;
- h. failed to observe a principle of procedural fairness through the willful destruction of evidence;
- i. In all events, failed to observe the mandatory procedure required by the CCRA, in that the charge sheet did not reference the alleged statement to be contested and as a result impeded in the accused's preparation of defence, including his ability to make full answer and defence;
- j. failed to observe the mandatory procedure required by both the CCRA, Part 1, at ss. 41 (1) and the CCR, Part 1, at ss. 31 (1) (a);
- k. **THAT** in taking the decision, the Respondents' failed to properly exercise their discretion and acted in a biased and arbitrary fashion;

- l. **THAT** the Applicant did not act without “colour of right” in believing that he was within his right to voice his concerns regarding his suspension to the appropriate head, Tom Gencarelli (*R. v. Simpson*, 2015 SCC 40 at para. 22, 23, 31, 32);
- m. **THAT** the Applicant did not act without “colour of right” in believing that he was within his right to voice his concerns after being invited into the office by the appropriate head, Tom Gencarelli, in what appeared as a request for him to learn more about the potential cause of the suspension (*R. v. Simpson*, 2015 SCC 40 at para. 22, 23, 31, 32);
- n. **THAT** the Applicant did not act without “colour of right” in believing that he was within his right to provide further context for his defence, in a conversation that was initiated by Tom Gencarelli after being invited into the office by the appropriate head, Tom Gencarelli, in what appeared as a request for him to learn more about the potential cause of the suspension (*R. v. Simpson*, 2015 SCC 40 at para. 22, 23, 31, 32);
- o. **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”);
- p. **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;
- q. erred in law in making his decision against:



- the CCRR, Part 1, at s. 26, by giving rise to two disciplinary actions for alleged conduct flowing from a single action, simultaneous actions, or a chain of uninterrupted actions;
  - the CCRR, Part 1, at ss. 31 (1) (a), by failing to make reference to the alleged statement to be contested, impeding the Applicant's ability to make full answer and defence;
  - 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), 4 (j), 41, 90, 91 ("**Subject to**").

5. SOR 92-620 as am., a.k.a. *Corrections and Conditional Release Regulations*: Part 1, ss. 26 and 31 (“**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 Hearing dated March 19, 2019.

3. This Notice of Application.
4. Grievance Presentation #V40R00038525.
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. All emails, notes to file, memoranda, etc. from and to and/or to and from Cook and Motiuk in connection with 38501.
2. All emails, notes to file, memoranda, etc. from and to and/or to and from J. Araujo and Motiuk in connection with V40R00038525 ("38525").
3. All emails, notes to file, memoranda, etc. from and to and/or to and from Tom Gencarelli and Don Thompson in connection with 38501.
4. 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.

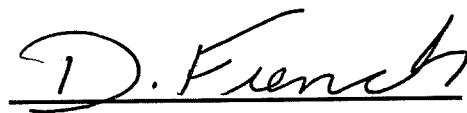
5. All emails, notes to file, memoranda, etc. from and to and/or to and from CM Phillip Gottlieb and Don Thompson and in connection with 38501.
6. All emails, notes to file, memoranda, etc., from and to Cameron Cooke in connection to David French, 38501 and/or 38525, in between March 6-20, 2019.
7. All 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.
8. 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.
9. 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.
10. The executive summary for 38501 together with the executive summary for 38525 and the Final Level Response thereto.
11. Offender Privacy Act Request Response P-2019-05015.
12. Offender Privacy Act Request Response P-2019-05406.
13. *Commissioner's Directive* 001.
14. *Commissioner's Directive* 60.
15. *Commissioner's Directive* 580.

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

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

18. Any legislation, policy, or Offender Management System (“OMS”) information used in the taking of the decision.

*September 1, 2020*

A handwritten signature in black ink that reads "D. French". The signature is written in a cursive style with a large, looped initial "D". A horizontal line is drawn underneath the signature.

(Signature of Solicitor or party)

David French  
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Bath ON  
K0H 1G0