Court File No.

**FEDERAL COURT**

BETWEEN:

**ASHRAF BOUAB**

Applicant

**- and -**

**ATTORNEY GENERAL OF CANADA**

Respondent

APPLICATION pursuant to Section 18.1 of the *Federal Courts Act*

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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 page.

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 at a sitting of the Federal Court in Kingston, Ontario.

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 prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts 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, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

**DATE: _____ 2023**

**Issued By:**

(Registry Office)

**Address of Local office:** Federal Court
90 Sparks St
Ottawa, ON  K1A 0H9

**TO:** Mr. Stephen Zap
Independent Chairperson
Disciplinary Court
Warkworth Institution
County Road #29
P.O. Box 760
Campbellford, Ontario
K0L 1L0
**Decision maker**

Attorney General of Canada
c/o Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON  K1A 0H8
**Respondent**

## APPLICATION

1. This is an Application for judicial review of the 24 January 2023 decision of Independent Chairperson Stephen Zap of the Warkworth Institution Disciplinary Court (the "Chair") finding the Applicant guilty of the disciplinary offence of "fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55", contrary to paragraph 40(l) of the *Corrections and Conditional Release Act* (the "*CCRA*"), and imposing a $40 fine.
2. The Applicant's conviction was unreasonable. The Chair made findings of fact that were legally incompatible with a finding of guilt: specifically, the Chair accepted that the Applicant attempted in good faith to provide a urine sample, and that he was physically unable to do so. In short, the Chair acknowledged that the Applicant's non-compliance was involuntary, but convicted him nonetheless. In doing so, the Chair disregarded the applicable legal test set out in the jurisprudence of this Court and the Federal Court of Appeal, all of which was binding on him, and did so without any intelligible justification. The conviction must be set aside and an acquittal entered in its place.

**The Decision Under Review:**

3. The Applicant was charged with the serious disciplinary offence of "fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55" [of the *CCRA*], contrary to paragraph 40(l) of the *CCRA*. The Applicant had been randomly selected to provide a sample for urinalysis pursuant to section 54(b) of the *CCRA*. The trial took place on 24 January 2023, and the Chair issued his

decision orally at the conclusion of the trial.

4. There were only two witnesses at trial: Officer Jeff Semple (the urinalysis collector for Warkworth Institution) and the Applicant.

***The Institution's Evidence***

5. Officer Semple initially testified that the Applicant refused to attend the Admissions and Discharge area ("A&D") to provide a sample and he could not recall if the Applicant gave any reason for refusing to attend. He testified that the Applicant was shown written notice of the demand; however, the Applicant refused to sign the document.
6. In cross-examination, the Applicant's counsel pointed out that Officer Semple's Observation Report (which was written by Officer Semple on the same date that the incident took place) stated that (contrary to the Officer's oral testimony), the Applicant attended A&D. Additionally, Applicant's counsel pointed out that the written notice of the demand was in fact signed by the Applicant.
7. Upon reviewing his paperwork, Officer Semple then agreed that the Applicant came down to A&D and attempted to provide a sample. The Officer was unable to recall any specifics of what was said between him and the Applicant or how long the Applicant remained at A&D.
8. The Officer went on to state that if any offender provides an insufficient amount of urine, it is deemed an "automatic refusal".

***The Applicant's Evidence***

9. There were no adverse credibility findings made against the Applicant, and all of his evidence was accepted by the Chair. The Chair found the Applicant's

testimony to be “clear and unequivocal”, “not embellished in any fashion” and preferred it to the evidence of Officer Semple.

10. The Applicant’s evidence established the following: on the morning of 22 November 2022, the Applicant was summoned to A&D and, shortly after he arrived, was asked to provide a urine sample. The Applicant testified that difficulty arose because he had just urinated that morning, immediately prior to attending A&D (he did not know that he was going to be asked to provide a sample). Under the governing Commissioner’s Directive (*CD 566-10: Urinalysis Testing* at s. 48), prisoners subject to a urinalysis demand are permitted to drink a certain amount of water in order to ensure that they are able to comply with the demand. Upon arriving at A&D, the Applicant drank all of the water that he was allowed.[1]

11. The Applicant remained at A&D for approximately an hour and a half and made efforts to produce urine. Despite these efforts, the Applicant was physically unable to produce any urine. The Applicant testified that he knew he was needed at his job in the kitchen as soon as possible and so he decided to leave A&D once it became apparent that he would be unable to produce any urine.

***The Chair’s Decision***

12. Applicant’s counsel submitted that the charge should be dismissed because the Applicant’s failure to provide a urine sample was not voluntary, relying on the binding Federal Court of Appeal authority of *Ayotte v. Canada (Attorney General),* 2003 FCA 429 (CanLII*)* at para 18*.* Applicant’s counsel also submitted

[1] Pursuant to CD 566-10, s. 39, the maximum amount of water allowable over a 2-hour period is 300ml (see below).

that the Applicant had offered a lawful excuse on all the evidence.

13. In the Chair's decision, he explicitly stated that he believed and accepted the Applicant's evidence, thereby accepting that the Applicant made efforts to provide a urine sample and that he was not physically able to produce. Nonetheless, he convicted the Applicant of the offence.

14. The Chair's reasoning in support of this incongruous and legally untenable conclusion is unclear. The Chair makes no reference to the binding jurisprudence that was cited to him on the issue of voluntariness and lawful excuse (which holds that an involuntary failure to provide cannot support a disciplinary conviction). He stated that he would "have a reasonable doubt" if the Applicant had stayed at A&D for the entire maximum allowable timeframe of two hours, however, because the Applicant's early departure from A&D was voluntary, the Chair erroneously held that the offence was made out.

15. This is the relevant portion of the Chair's ruling (emphasis added):

> I do find that Mr. Bouab did act in good faith. Obviously, we have sort of a disagreement as to what the word random means and random clearly means that Mr. Bouab would have no prior notice, although you say that you had a pass today and you were notified but again a random urinalysis means just that, it's random, no prior notice.
>
> I do take notice that Mr. Bouab did consume water before he went down to A&D; he had two or three cups. His evidence was clear and unequivocal, he did not embellish in any fashion, and quite frankly I prefer Mr. Bouab's evidence over Officer Semple but recognizing that Officer Semple deals with hundreds of inmates every several months and had no immediate recollection. There's no question Mr. Bouab was cooperative throughout.
>
> The difficulty in this matter is that Mr. Bouab did describe that he was dressed in his kitchen whites, he had extra work that needed to be done and he was needed at the kitchen and that I give him credit for, for being gainfully employed and being committed to work. The difficulty in this, sir, is that you had left 20 minutes early. That was by your own admission. If you had remained the entire two hours, and the evidence again I accept

> as very clear and unequivocal that you had consumed water, both before you went down to A&D and also two or three cups I believe you described, coffee cup sizes so the small white Styrofoam cups, and still was unable to provide, I would have a reasonable doubt but the fact of you leaving twenty minutes early, that creates the issue that your departure from A&D was in fact voluntary. So in other words, or in hindsight, if you had remained the entire two hours, I would have a reasonable doubt but the fact that you left twenty minutes early sir, I do not have a reasonable doubt. Your departure was in fact voluntary and I do find you guilty of the offence as charged.

**THE APPLICATION IS FOR:**

1. An Order setting aside the Applicant's 24 January 2023 conviction;
2. An Order in the nature of *mandamus* requiring the Independent Chairperson to dismiss the Applicant's disciplinary charge;
3. An Order that all references to the Applicant's charge and conviction be removed from the Applicant's correctional files and any fines collected by the Correctional Service be returned to the Applicant;
4. The Applicant's costs of this Application;
5. Such other relief as may seem just.

**THE GROUNDS FOR THE APPLICATION ARE:**

1. There is one ground for this Application:

   (1) The decision is unreasonable as the Chair's findings of fact were legally incompatible with a finding of guilt.

***The Legislative and Regulatory Framework***

2. Section 40(l) of the *CCRA* states:

> **40** An inmate commits a disciplinary offence who

…

**(l)** fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55 ….

3. Paragraph 54(b) of the *CCRA* authorizes the collection of randomly demanded urinalysis samples, in accordance with the applicable Commissioner's Directive:

> **54** Subject to section 56 and subsection 57(1), a staff member may demand that an inmate submit to urinalysis
>
> …
>
> **(b)** as part of a prescribed random selection urinalysis program, conducted without individualized grounds on a periodic basis and in accordance with any Commissioner's Directives that the regulations may provide for; …

4. Paragraph 66(1)(c) of the *Corrections and Conditional Release Regulations* (*CCRR*) stipulates "the collector shall provide the donor with a container for the sample and shall supervise as the donor provides the sample". Paragraph 66(1)(d) provides that "the collector shall give the donor up to two hours to provide a sample, from the time of a demand".
5. Similarly, Commissioner's Directive 566-10: "Urinalysis Testing" (CD 566-10) states at section 38: "Offenders will be provided a maximum of two hours to provide a sample. The time will commence from the point of notification or from the scheduled time of the test in cases where prior notification has been provided." CD 566-10 states at section 39: "During the same two hours, the offender may drink fluids. The amount of water allowed is 250 ml per hour or a maximum of 300 ml over two hours."
6. CD 566-10 Defines a "urine sample" as follows: "**Urine sample**: a quantity of unadulterated urine of at least 30 ml for drug analysis and 4 ml (full vial) for

alcohol testing, supplied at one time, sufficient to permit analysis by an authorized laboratory."

***Voluntariness – The Applicable Legal Test***

7. It is a basic principle of penal law that involuntary conduct is not culpable. When a prisoner's failure to provide a urine sample is not voluntary, it is not culpable under the *CCRA*. Parliament has not authorized prison authorities to discipline prisoners for conduct over which they have no control.
8. It was accepted by the Chair that the Applicant made genuine efforts to provide a urine sample but was unable to do so. Nonetheless, the Chair proceeded to find the Applicant guilty on the grounds that he stayed at the A&D area for approximately an hour and forty minutes before deciding to leave. The Chair's illogical and legally untenable reasoning was that he would have dismissed the charge if the Applicant had waited for the maximum allowable timeframe of two hours.
9. In finding the Applicant guilty on this basis, the Chair departed from the binding authority of the Federal Court of Appeal's ruling in *Ayotte v. Canada (Attorney General),* 2003 FCA 429 (CanLII) at para 18, which holds a failure to provide a urine sample must be voluntary, or else the disciplinary offence will not be made out.[2] The Chair misinterpreted this legal principle by finding that because the Applicant's decision to leave A&D after an hour and forty minutes was a voluntary decision, he was satisfied that the *actus reus* of the offence was made

[2] This principle has also been applied and followed in the case of *Cyr v. Canada (Attorney General)*, 2011 FC 213 (CanLII) at para. 19 (in which Justice de Montigny held that evidence such as that accepted by the Chair in the case "would have negated the *actus reus* of the offence in that he was unable, despite reasonable efforts, to provide the requested urine sample.").

out. However, a charge under s. 40(l) of the *CCRA* is not a charge for leaving A&D early and the voluntariness of the act of leaving the area is irrelevant. Such a decision from the Chair is contrary to the *CCRA*, contrary to binding jurisprudence from the Federal Courts, as well as contrary to the most basic principles of penal law.

***The Only Appropriate Remedy: Dismissal of the Disciplinary Charge***

10. Given that the Chair made findings of fact that are legally incompatible with a finding of guilt, there is only one appropriate remedy in this case: dismissal of the disciplinary charge. This is not a case that can properly be sent back for reconsideration or a new trial. There is only one reasonable outcome, given the findings of fact made by the Chair. There is simply no lawful way to arrive at a conviction once one accepts (as the Chair accepted in his decision) that the Applicant made efforts to comply with the demand but was physically unable to provide a sample. It would be unfair to subject the Applicant to the jeopardy of a reconsideration of the evidence or new trial; the charge must be dismissed.

**Provisions Relied Upon:**

1. The Applicant relies on the following statutory provisions and rules:

    *Corrections and Conditional Release Act* sections 38-44, 54-56;

    *Corrections and Conditional Release Regulations* sections 24-41, 60-71;

    Commissioner's Directive No. 566-10: "Urinalysis Testing";

    Commissioner's Directive No. 580: "Discipline of Inmates".

**This Application will be Supported by the Following Material:**

1. The Certified Tribunal Record;

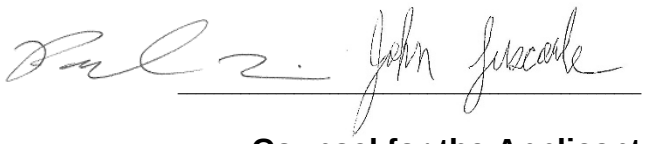
2. Affidavit of Applicant or representative (if necessary, depending on the completeness of the Certified Tribunal Record);

3. Transcript of the Disciplinary Court hearing.

**Request for Material in the Possession of the Tribunal**

1. Pursuant to Rule 317 of the *Federal Courts Rules*, the Applicant requests the Certified Tribunal Record, which should include all of the documentary evidence that was presented at the hearing before the Chair of the Warkworth Institution Disciplinary Court, as well as an electronic file of the audio recordings of all Disciplinary Court appearances in relation to this matter.

DATE: 17 February 2023



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