

Federal Court



Cour fédérale

Date: 20250409

Docket: T-2076-23

Citation: 2025 FC 647

Ottawa, Ontario, April 9, 2025

PRESENT: Madam Justice Pallotta

BETWEEN:

KEITH SCHELL

Applicant

and

HIS MAJESTY THE KING

Respondent

JUDGMENT AND REASONS

[1] The applicant, Keith Schell, is a federal penitentiary inmate who seeks judicial review of a March 23, 2023 final level grievance decision by the Assistant Commissioner, Policy (the AC) at Correctional Service Canada (CSC).

[2] In September 2020, CSC staff observed Mr. Schell in his cell using what appeared to be a cellular phone. They could not seize what he was holding because he flushed it down the toilet, but they found a quantity of “shatter”, a THC-potent marijuana derivative, and charged him with

possession of contraband. CSC estimated the institutional value of the shatter at \$1,500. CSC staff seized additional items during a search of Mr. Schell's cell in November 2020, including two cellular phones, a vape pen with charger and oil, and three packages of shatter. The estimated institutional value of the seized items was over \$21,000. Mr. Schell was again charged with possession of contraband and transferred to a higher security institution on the belief that he was involved in the drug subculture. The charges against him were later withdrawn due to an unreasonable lapse of time.

[3] After the charges were withdrawn, Mr. Schell asked that the seized items be returned. His request was refused. Mr. Schell filed a grievance, arguing that the items were no longer required as evidence in a disciplinary proceeding and he was entitled to have them returned for pick up by a friend outside of the penitentiary in accordance with section 59 of the *Corrections and Conditional Release Regulations*, SOR/92-620 [CCRR]. The Deputy Warden denied the grievance, stating that while the charges against Mr. Schell were withdrawn, this did not negate the fact that the items were contraband and not authorized to be inside the penitentiary. Furthermore, the items were not listed on Mr. Schell's personal property card and the rightful owner could not be identified. Since the seized items were contraband or unauthorized and the owner was unknown, they were destroyed.

[4] Mr. Schell filed a higher-level grievance challenging the refusal. He argued that CCRR paragraph 59(5)(e) only provides for forfeiture of a seized contraband or unauthorized item where the inmate is found guilty of a disciplinary offence in relation to the item. CCRR subsection 59(4) states that an inmate may be given a reasonable opportunity to arrange for

safekeeping outside the penitentiary if the seized item would constitute contraband or be unauthorized inside the penitentiary but its possession outside the penitentiary would be lawful. Since CSC withdrew the charges against him, Mr. Schell argued he was entitled to have the seized items returned so that he could arrange for their shipment outside the institution. Mr. Schell also argued that CSC had no justification for stating the rightful owner was not known. There is no policy or legislative requirement that items must be listed on a personal property card or obtained with prior authorization in order for an inmate to be considered the owner, and CSC knew or believed he was the rightful owner of the items because CSC staff found them in his cell and charged him with possession. CSC also assumed he introduced the items into the institution, thereby acknowledging a belief that he was the rightful owner.

[5] The AC denied the grievance. The AC noted that Mr. Schell referred to *CCRR* paragraph 59(5)(e) but found that *CCRR* paragraphs 59(5)(a) and (c) applied, which provide for forfeiture in circumstances where CSC does not know who the owner is and 30 days have passed since the item was seized, or where possession of the item would be unlawful. The reasons state:

- the fact that the items were found in Mr. Schell's possession does not mean he is their rightful owner;
- none of the seized items are on the list of permitted personal items under Commissioner's Directive (CD) 566-12, they are therefore considered unauthorized and/or contraband, and they had to have been introduced into the institution illegally;

- as a result, their ownership would not be documented on an inmate's personal property record or other permit, and CSC would not be able to verify ownership within the context of *CCRR* paragraph 59(5)(a);
- while the shatter was also contraband of unverifiable ownership, it was additionally subject to forfeiture in accordance *CCRR* paragraph 59(5)(c), as its possession would be unlawful even outside of the penitentiary.

[6] Mr. Schell alleges the final grievance decision was both unreasonable and procedurally unfair. He argues that he was entitled to the seized items for the reasons argued in the grievance, CSC made a mistake by destroying them, the AC's reasons for refusing his grievance do not justify the decision, and CSC was looking to find any excuse to avoid following the applicable policy and legislation in view of the predicament caused by the mistake. He asks the Court for a writ of *mandamus* requiring CSC to return the seized items or pay for their value.

[7] The standard for reviewing the merits of the AC's decision, including the interpretation of the applicable law, is reasonableness: *Creelman v Canada (Attorney General)*, 2024 FC 61 at paras 9-10 [*Creelman*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Reasonableness review is a deferential but robust form of review that considers whether the decision, including the reasoning process and the outcome, is transparent, intelligible, and justified: *Vavilov* at paras 13, 99. A reasonable decision is based on an internally coherent and rational chain of analysis, and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

[8] Issues of procedural fairness are reviewed on a standard that is akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Elder v Canada (Attorney General)*, 2024 FC 763 at para 33. However, as explained below, Mr. Schell has not identified a procedural fairness issue and there is no basis for concluding that the process was unfair.

[9] Before turning to the main issue, I note that the respondent's record includes an affidavit from a security intelligence officer who was on the team that investigated Mr. Schell's involvement in contraband at his former institution. At the hearing, the Court pointed out the general rule that the evidentiary record on judicial review is restricted to the record that was before the decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 19. There are exceptions to the general rule, including recognized exceptions for evidence that: (i) provides general background information to assist the Court in understanding the issues relevant to the judicial review, without providing evidence relevant to the merits of the administrative decision; (ii) explains procedural defects that cannot be found in the record, so that the Court can fulfill its role of reviewing for procedural unfairness; or (iii) highlights a complete absence of evidence before the administrative decision maker when it made a particular finding: *Ibid* at para 20. The respondent's position was that the affidavit evidence provides background information and evidence that is relevant to procedural fairness.

[10] None of the affidavit evidence relates to procedural fairness, and since Mr. Schell did not identify any aspect of the process that was unfair, there was no need for such evidence in any

event. Mr. Schell simply asserted, in his notice of application, that CSC failed to observe a principle of natural justice, procedural fairness, or other procedure that it was required by law to observe, and that CSC failed to observe the regulations. He has not identified any basis for concluding that the process did not afford him the level of procedural fairness he was owed for a grievance decision that was administrative in nature: *Elder* at para 33. Mr. Schell knew the case to meet, and he was afforded full opportunity to present his case at two levels of grievance.

[11] The affidavit does provide background evidence that is necessary for the Court to understand and decide the issues on judicial review. However, in my view, some of the evidence goes beyond what is necessary as background or strays into improper evidence that relates to the merits. For example, the affidavit includes detailed evidence about the reasons for transferring Mr. Schell to a higher security institution that is not found in the certified record of materials before the AC or mentioned in the AC's decision, and does not respond to Mr. Schell's arguments. I have only relied on evidence that I am satisfied is properly admissible on this application for judicial review.

A. *Arguments*

[12] Turning to reasonableness review, Mr. Schell alleges that the Deputy Warden supported the first level grievance decision with the following irrelevant facts: the charges were dropped for administrative delay; the seized items were not listed on his personal property card; the seized items were not authorized in any federal institution; and the seized items were introduced without prior authorization. He also alleges that the AC relied on the irrelevant fact that the seized items do not appear on the list of approved items in CD 566-12, and on an inaccurate

fact—that shatter, a marijuana derivative, is unlawful even outside the institution. Mr. Shell argues that all items seized from his cell are lawful outside of a penitentiary.

[13] Mr. Schell does not dispute that the items seized from his cell were contraband as defined in section 2 of the *Corrections and Conditional Release Act*, SC 1992, c 20, and unauthorized inside the penitentiary. However, he argues that the AC unreasonably concluded that the seized items were forfeited under *CCRR* paragraphs 59(5)(a) and (c). Mr. Schell argues it is absurd to say CSC would not be able to verify an inmate's ownership of an item on the basis that it would not be documented on the inmate's personal property record or other permit. The purpose of *CCRR* section 59 and the policy set out in CD 568-5 is to address how to deal with seized contraband and/or unauthorized items, including when such items can be returned, and an item that is on an inmate's personal property record or other permit is necessarily not a contraband or unauthorized item. The *CCRR* and policy do not say that contraband and unauthorized items must appear on an inmate's personal property card for the inmate to be considered the rightful owner, and according to Mr. Schell, if CSC could refuse to return a seized item on the basis that the inmate did not list it on his personal property card then the *CCRR* and the policy would say so directly and that would be the end of it.

[14] Furthermore, Mr. Schell claims that CSC offers no evidence to support the assertion that he is not the rightful owner of the seized items. There is no evidence that the seized items were stolen or reported as stolen or that CSC tried to find out who owned them. He contends the only circumstances where CSC would not know the rightful owner would be a “no case seizure”, such as a seizure of items found in the yard or hidden in a common area that all inmates can access. In

a “no case seizure”, no inmate can be identified as the owner or charged as the person in possession of the items. In his case, Mr. Schell states there is no dispute that the items were found in his cell that he alone occupied. He argues that anything located in an inmate’s cell belongs to the inmate, including contraband items, pointing to section 588 of the *Criminal Code*, RSC, 1985, c C-46. He also took full responsibility for the items seized from his cell and acknowledged they were his.

[15] According to Mr. Schell, CSC acted in a manner consistent with a belief that he is the rightful owner of the items. *CCRR* subsection 59(1) states that CSC must notify the owner, if known, of a seizure. He was given a seizure tag for the items seized from his cell, which means CSC knew he owned them. CSC charged him with possession of the items and used the seizure to justify his transfer to a higher security institution. CSC also assumed that he brought the items in.

[16] Mr. Schell states the seized items did not meet the conditions for forfeiture under *CCRR* subsection 59(5) and he should have been given a reasonable opportunity to arrange for their safekeeping outside the penitentiary in accordance with *CCRR* subsection 59(4) and CD 568-5 section 17.

[17] The respondent submits the AC reasonably denied the final-level grievance in view of the legislation and policy. The search, seizure, and disposal of seized items were justified because the items were properly considered to be contraband or unauthorized items, and ownership was unknown. The respondent contends the AC reasonably relied on *CCRR* paragraphs 59(5)(a) and

(c) to conclude that the items were forfeited, and Mr. Shell confuses possession with ownership. Also, drugs cannot be returned to inmates, the AC was in a good position to determine whether, in view of all the circumstances including the quantities involved, possession of the seized shatter would be unlawful outside the institution, and reasonably concluded it would. The AC's decision that CSC was not required to give Mr. Schell an opportunity to arrange for seized items to be sent outside the penitentiary was reasonable, and the respondent states there is no basis for the Court to interfere. The respondent adds that a writ of *mandamus* is an extraordinary remedy reserved for special circumstances, such as where there is only one possible outcome that is reasonable. It is not appropriate in this case.

B. *Disposition*

[18] I begin by pointing out that while the Deputy Warden's decision provides context, the decision under review is the AC's decision. For the reasons below, I find Mr. Schell has not established that the final-level grievance decision was unreasonable. Mr. Schell has not established a reviewable error in the AC's determination that the seized items were subject to forfeiture under *CCRR* paragraphs 59(5)(a) and (c).

[19] Mr. Schell asserts that he was entitled to have the seized items returned because CSC withdrew the charges associated with them, and forfeiture was not triggered under *CCRR* paragraph 59(5)(e). However, the AC was right to look to the full subsection in order to determine whether the seized items were forfeited to the Crown. The question for review is whether the AC reasonably relied on paragraphs 59(5)(a) and (c).

[20] With respect to the shatter, I agree with the respondent that the AC was in a position to decide whether possession of the seized shatter would be unlawful outside the institution and his decision is owed deference. Considering the quantities involved and their estimated institutional value, I am not persuaded that the AC erred in finding that the shatter was forfeited to the Crown pursuant to *CCRR* paragraph 59(5)(c).

[21] In Mr. Schell's case, the AC relied on paragraph 59(5)(a) alone to conclude that the other seized items were forfeited. Paragraph 59(5)(a) states that a seized item is forfeited to the Crown if CSC does not know who the owner is, and 30 days have passed since the seizure.

[22] The AC was correct that the fact that the items were found in Mr. Schell's possession does not, in itself, make him the rightful owner. Possession and ownership are not the same, and Mr. Schell is wrong that a "no case seizure" is the only way CSC would not know the rightful owner. The fact that the seized items were found in a cell that he alone occupied does not demonstrate ownership, and taking responsibility for the items or acknowledging they were his did not establish that he owns them. There is no merit to Mr. Shell's argument that anything located in an inmate's cell belongs to the inmate. Section 588 of the *Criminal Code* does not say so and the condition for triggering its deeming provision does not apply to Mr. Schell's situation.

[23] CSC did not act in a manner consistent with a belief that Mr. Schell is the rightful owner of the seized items. Section 5 of CD 568-5 requires CSC staff to issue a seizure tag to the person from whom an item was seized. The possession charge does not mean CSC believed Mr. Schell

owned the items, nor does the assumption that Mr. Schell was responsible for bringing them into the institution.

[24] Mr. Schell argues that the AC's decision did not accord with the applicable law and policy. Since CSC withdrew the charges against him, he was entitled to have the seized items returned for shipment outside the institution. He states that the items were not forfeited under paragraphs 59(5)(a) and (c) and the AC's findings to the contrary were unreasonable. The AC's reasoning regarding *CCRR* paragraph 59(5)(a) and its application to his case was illogical because contraband and unauthorized items, by their very nature, would never be recorded as personal belongings, and *CCRR* paragraph 59(5)(c) did not apply because all the items that were seized from his cell are lawful outside of a penitentiary.

[25] For the reasons explained above, the AC reasonably found that the shatter was forfeited to the Crown in accordance with *CCRR* paragraph 59(5)(c). The AC did not find that paragraph 59(5)(c) applied to any of the other items.

[26] Turning to the arguments regarding *CCRR* paragraph 59(5)(a), I do not agree with Mr. Schell's argument that contraband items would never be included on a personal property record or other permit. The respondent correctly points out that items listed on such permits may become restricted, as was the situation in *Johnson v Canada (Attorney General)*, 2008 FC 1357. In that case, the inmate sought the return of a typewriter that had been approved but was later seized as contraband on the basis that he had gone over his cell effect limit.

[27] Mr. Schell's more compelling argument is that the AC unreasonably interpreted the relevant legislation and policy to impose a requirement that is not there—namely, that contraband and unauthorized items must appear on an inmate's personal property card for the inmate to be considered the rightful owner—and therefore erred by finding that the seized items were forfeited.

[28] Judicial review begins with the reasons. The AC's reasons on this point were:

The list of authorized personal property items for men inmates is provided in Annex B of Commissioner's Directive (CD) 566-12, *Personal Property of Offenders* (2015-10-19). Notably, none of the seized items identified above appear on this list. As such, these items are considered unauthorized and/or contraband, and would have to have been introduced into the institution illegally. As a result, their ownership would not be documented on one's [personal property record] or other permit, such as a hobby craft permit, and the [CSC] would not be able to verify ownership within the context of paragraph 59(5)(a) of the CCRR.

[29] I can appreciate why Mr. Schell believed the AC was reading a listing requirement into CCRR paragraph 59(5)(a), meaning that it would never be possible for CSC to verify ownership under paragraph 59(5)(a), or at least not an inmate's ownership, if a seized item is not listed on a personal property record or other permit. However, when read in context, I do not interpret the reasons in this way. The AC was addressing how paragraph 59(5)(a) applied to Mr. Schell's request for the items that were seized from his cell. For those items, there is no indication that CSC had any evidence to prove who owns them. In that context, the AC was saying CSC would not be able to verify ownership of the seized items because their ownership would not be documented on a personal property record or other permit.

[30] In my view, the AC reasonably determined that CSC would not be able to verify ownership of the items that had been seized from Mr. Schell's cell. Mr. Schell asserted that the items are his, but he did not provide evidence to prove that he is the rightful owner. He relied on the fact that the items were in his possession, and as the AC pointed out, there is no presumption that he is the rightful owner because the items were found in his possession. The AC referred to CD 566-12, which is the policy that sets out CSC's procedures for tracking, verifying, and recording inmates' property in prisons. However, the seized items were introduced into the institution illegally, bypassing the means by which CSC tracks and verifies inmates' property. Whether it was Mr. Schell who bypassed those procedures or someone else, the result is the same. Absent other proof, CSC would not have known who owned seized items that were not documented in CSC's records, and the items were forfeited under paragraph 59(5)(a) of the *CCRR*.

[31] In view of my finding, the remedy issue does not arise.

[32] In conclusion, Mr. Schell has not established that the final grievance decision was unreasonable or procedurally unfair. Accordingly, I must dismiss this application.

[33] The respondent requested costs. Mr. Schell represented himself, and his written and oral submissions were concise and clear. While the respondent was successful, the AC's reasons could have been clearer. In the exercise of my discretion, I decline to award costs.

JUDGMENT IN T-2076-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. No costs are awarded.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2076-23

STYLE OF CAUSE: KEITH SCHELL v HIS MAJESTY THE KING

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: AUGUST 14, 2024

JUDGMENT AND REASONS: PALLOTTA J.

DATED: APRIL 9, 2025

APPEARANCES:

Keith Schell

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Alexandra Scott

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Vancouver, British Columbia

FOR THE RESPONDENT