IN THE CANADIAN COURT OF JUSTICE
ON APPEAL FROM THE FEDERAL COURT OF CANADA

COUR CANADIENNE DE JUSTICE
EN APPEL DE LA COUR D'APPEL FÉDÉRALE

BETWEEN/ENTRE:

ATTORNEY GENERAL OF CANADA/ PROCUREUR GÉNÉRAL DU CANADA

Respondent/Intimé

- and/et -

JACKSON HAYES

Appellant/Appelant

FACTUM OF THE RESPONDENT

MÉMOIRE DE L'INTIMÉ

School number 5/École numéro 5

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Part 1 – Statement of Facts

[1] Lacombe Institution (the "Institution" or "Lacombe") is a Federal medium-security prison in Alberta. The Institution houses offenders who are serving federal sentences of two years or more, within the administrative organization of the Penitentiary Service of Canada ("PSC"). As part of the PSC, the Institution's primary function is the incarceration and rehabilitation of the offenders who are housed there.[1]

[2] In order to protect the rights of inmates, the Institution has a statutory grievance procedure by which inmates are entitled to make complaints, and have those complaints heard fairly and expeditiously. This appeal concerns the review of one such grievance, which was brought in relation to the Institutional Head's decision regarding Lacombe's program offerings.

[3] Mr. Jackson Hayes is a federal offender serving a six-year custodial sentence for fraud. Although originally assessed as a low-risk inmate, Mr. Hayes demonstrated a tendency to violent and disorderly conduct, seemingly undeterred by the disciplinary convictions which he swiftly accumulated.[2] Immediately prior to Lacombe, Mr. Hayes was incarcerated at a maximum-security facility in an effort to contain the pernicious effects of his influence.

[4] Mr. Hayes was transferred to Lacombe after being removed from two other facilities because of his disruptive behaviour and suspected involvement in drug

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[1] *Penitentiary Service of Canada Act,* RLL, c P-12 (extracts) at s 2 [*PSCA*].
[2] *Jackson Hayes & Lacombe Institution Association of Farm Program Inmates v Attorney General (Canada)*, 2017 FC 47 at paras 12, 15 [*Hayes FCTD*].

trafficking.[3] In the few months that he resided at the Institution before the events giving rise to this judicial review, Mr. Hayes became involved in a farm program which used to be offered there.

[5] The farm program was one of many rehabilitative programs offered at Lacombe in keeping with the PSC's mandate to help offenders prepare for reintegration into their communities.[4] Lacombe's programs are tailored to the needs of its inmate population, and are designed to provide the best support possible, given the available resources. At the farm, offenders like Mr. Hayes were able to cultivate their work ethic, respect for authority, teamwork, and other non-technical skills.[5]

[6] Management of the Institution changed hands in April of 2016.[6] Recognizing that rehabilitative programming was central to her mandate, the incoming Institutional Head, Ms. Marcia Bennett, undertook an overhaul of the programs offered at Lacombe. Ms. Bennett carefully examined the full lineup of programs so that she could craft the most comprehensive rehabilitative strategy possible. She applied her professional expertise to an analysis of the available resources and the existing program offerings.[7] Her goal was to provide the inmates in her care with modern and relevant skills to equip them for successful re-entry into their communities upon release.[8]

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[3] *Hayes FCTD, supra* note 2, at para 12.
[4] *PSCA supra* note 1, s 2.
[5] *Hayes FCTD*, *supra* note 2 at para 15.
[6] *Ibid* at para 16.
[7] *Ibid* at para 71.
[8] *Ibid* at para 72.

[7] Ms. Bennett was relatively new to Lacombe, so she took steps to fully inform herself of the real needs of the inmates. She spent an entire month consulting with staff, psychologists, and parole officers at Lacombe.[9] She also met with the Chair of the Inmate Committee, an independently elected representative of the inmate population, to get the perspective of the people who would be most directly affected by her decision.[10]

[8] At the end of her extensive consultation, Ms. Bennett made the difficult decision to close the Institution's farm program. Although the farm had been popular with the 24 inmates who worked there, its closure freed up resources, making it possible for the Institution to offer more relevant programs to more inmates. For example, Ms. Bennett was able to bring in a French tutor and offer an accounting course.[11] Some prison staff expressed concerns, but psychologists and parole officers supported the change because it gave inmates more time to address their criminal dynamics.[12]

[9] Mr. Hayes was upset by the closure of the farm and complained to the Inmate Committee. The Committee had already contributed to Ms. Bennett's decision on behalf of the inmate population, and so declined his request for further interventions. Displeased with this response, Mr. Hayes and 23 others who were formerly involved in the farm program (the "Association") stopped actively participating in their correctional plans.

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[9] *Ibid* at para 18.
[10] *Ibid*.
[11] *Ibid* at paras 17, 78.
[12] *Ibid* at para 18.

They refused to attend their other programs and would not speak to their psychologists during counselling sessions.[13]

[10] Mr. Hayes then escalated the disruption at the Institution by inciting other inmates to disobey the lawful orders of staff members and violate mandatory procedures.[14] The Association staged multiple protests in defiance of the Institution,[15] threatening the security of staff and inmates at Lacombe.

[11] This led to disciplinary proceedings before an Independent Chairperson, in which Mr. Hayes and the other Association members were found guilty beyond a reasonable doubt of participating in a situation that threatened the security of the Institution. As a result, they were sentenced to disciplinary segregation.[16]

[12] Over the course of these events, Ms. Bennett refused to be drawn into negotiations by Mr. Hayes' disruptive behaviour. When he found that his efforts to force the farm's reopening were unsuccessful, he filed a grievance with the Deputy Minister of Homeland Security ("Deputy Minister"), in accordance with the statutory process. Mr. Hayes' grievance made three allegations:

1. The decision to withdraw the farm program was unreasonable;
2. The decision to withdraw the farm program had been made in a way that was procedurally unfair; and

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[13] *Ibid* at para 25.
[14] *Ibid* at paras 22-26.
[15] *Ibid*.
[16] *Hayes FCTD, supra* note 2 at para 28; *PSCA, supra* note 1, s 52.

3. Ms. Bennett's refusal to participate in discussions with the Association infringed the section 2(d) *Charter* rights of Mr. Hayes and the other Association members.[17]

[13] In keeping with the objectives and procedures that are set out in the enabling statute, the Deputy Minister undertook a thoughtful consideration of Mr. Hayes' grievance. Ultimately, the Deputy Minister decided to dismiss Mr. Hayes' claim, for reasons which were provided to Mr. Hayes in a timely manner.[18] Mr. Hayes was not willing to accept the Deputy Minister's dismissal of his grievance and brought an application for judicial review.

Judicial History

[14] Justice Ferrell of the Federal Court allowed Mr. Hayes' application.[19] While he found that Ms. Bennett's decision to replace the farm program was reasonable,[20] he concluded that the Deputy Minister was incorrect to dismiss Mr. Hayes' grievance, because the inmates had a *Charter*-protected right to strike which had been violated by the Institutional Head.[21] Justice Ferrell sent the decision back to the Deputy Minister for reconsideration, and awarded punitive damages of $1,000 for each member of the

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[17] *Hayes FCTD, supra* note 2 at para 29; *PSCA, supra* note 1, s 71.
[18] *Hayes FCTD, supra* note 2 at paras 29, 32.
[19] *Ibid* at paras 68, 69.
[20] *Ibid* at para 79.
[21] *Hayes FCTD, supra* note 2 at paras 62, 68; *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(d) [*Charter*].

Association based on the discretionary jurisdiction found in section 44 of the *Federal Courts Act*.[22]

[15] The Federal Court of Appeal allowed the PSC's appeal,[23] finding that the Appellant's rights had not been violated by Ms. Bennett,[24] who had carefully tailored her decision to fully respect the inmates' residual rights.[25] The Court of Appeal also rejected the remedial approach taken by Ferrell J, finding that the powers of the Court are exhaustively set out in section 18 and 18.1 of the *Federal Courts Act*.[26]

Part 2 – Issues

[16] This appeal of the Deputy Minister's decision to dismiss Mr. Hayes' grievance raises the following issues:

1. What is the appropriate standard of review?
2. Was the Institutional Head's decision to end the farm program reasonable?
3. Does the Deputy Minister's decision reflect an appropriate balancing of the PSC's statutory objectives with Mr. Hayes' right to freedom of association?
    a. Does the Decision engage the *Charter* by limiting its protections?
    b. Have those *Charter* protections been affected as little as reasonably possible in light of the statutory objectives?

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[22] *Hayes FCTD, supra* note 2 at para 95; *Federal Courts Act* RSC 1985, c F-7; *Attorney General (Canada) v Jackson Hayes,* 2018 FCA 1 at para 60 [*Hayes FCA*].
[23] *Hayes FCA*, *supra* note 22 at para 60
[24] *Ibid* at para 55.
[25] *Ibid* at para 58.
[26] *Ibid* at para 67.

4. Did the Institutional Head fulfill her procedural obligations to Mr. Hayes and the Association Members?

Part 3 – Argument

Overview

[17] This is an appeal of a judicial review of the Deputy Minister's decision regarding a grievance brought by an inmate. Mr. Hayes' grievance asked the Deputy Minister to review another decision, made by another decision-maker, which resulted in the closure of Mr. Hayes' favourite rehabilitative program.

[18] The subsequent history of Mr. Hayes' case gave rise to an intricate maze of legal issues, which were rendered even more complex by the Federal Court's attempt to reinvent the wheel on the standard of review,[27] freedom of association,[28] and remedies.[29]

[19] This is in fact an uncomplicated appeal, which can be resolved through application of long-standing principles of administrative and constitutional law. The real subject-matter of the case is the decision that was made by the Deputy Minister to dismiss the grievance advanced by Mr. Hayes on October 15, 2016. The real question is whether that decision fell within a range of reasonable outcomes.

[20] The appeal should fail because:

1. The decision to replace the farm program was reasonable;

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[27] *Hayes FCTD, supra* note 2, at para 44.
[28] *Ibid* at para 58.
[29] *Ibid* at paras 90-97.

2. The Deputy Minister reasonably balanced the Appellant's *Charter* rights with the legislative objectives of the PSC;
3. The Institutional Head fulfilled all of her statutory and constitutional obligations to the inmates during the consultation process before closing the farm program;
4. The Institutional Head fulfilled any duty of procedural fairness that was owed to the Appellant; and
5. Damages are not available to the Appellant on a judicial review.

3.1 The standard of review

[21] The Deputy Minister's decision had three components, in response to the three concerns raised by Mr. Hayes. Each component attracts its own standard of review.[30]

[22] Ms. Bennett's decision to replace the farm program must be reviewed on a standard of reasonableness. The decision was an exercise of her discretion as Institutional Head, granted under section 37 of the *Penitentiary Service of Canada Regulation*, LASK 92/232 [the *Regulation*]: "[T]he Penitentiary Service of Canada shall, in each penitentiary, offer programs chosen by the institutional head for the inmates that it hosts." [emphasis added] Since the presumption of reasonableness has not been rebutted,[31] Ms. Bennett's

[30] *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502 [*Khela*].
[31] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association Teachers*, 2011 SCC 61 at para 39, [2011] 3 SCR 654 [*Alberta Teachers*]; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 22, [2016] 2 SCR 293 [*Edmonton East*].

overhaul of the non-mandatory programs offered at Lacombe is entitled to deference on judicial review.[32]

[23] The Deputy Minister's decision to dismiss Mr. Hayes' grievance must be reviewed on a standard of reasonableness. First, the decision required him to balance *Charter* values with a Parliamentary mandate in a specific legislative context.[33] Second, the decision was a mixed question of fact and law falling within the Deputy Minister's expertise.[34] Furthermore, the question at issue is not of fundamental importance to the legal system because its resolution has no significance outside of the *PSCA'*s operations.[35] Therefore, the presumption of reasonableness has not been rebutted.

[24] Issues of procedural fairness are reviewed on a standard of correctness,[36] so the procedural choices made by Ms. Bennett in arriving at her decision to replace the farm program should be evaluated on those terms. Her decision must stand unless it was the product of an unfair process.

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[32] *Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 49, 54-55, [2008] 1 SCR 190 [*Dunsmuir*].
[33] *Doré v Barreau du Québec*, 2012 SCC 12 at paras 45, 48, [2012] 1 SCR 395 [*Doré*]; see also *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, at para 37, [2015] 1 SCR 613 [*Loyola*].
[34] *Spidel v Canada (Attorney General)*, 2011 FC 999 at para 31, aff'd 2012 FCA 26 [*Spidel*]; *Sweet v Canada (Attorney General)* 2005 FCA 51 at para 14, 332 NR 87 [*Sweet*].
[35] *Naraine v Canada (Attorney General)* 2015 FC 934 at para 27, 339 CRR (2d) 1 [*Naraine*]; *Edmonton East, supra* note 31 at para 24.
[36] *Khela, supra* note 30 at para 79.

3.2 The decision to replace the farm program was reasonable

[25] As Institutional Head, Ms. Bennett is vested with wide-ranging discretionary power, but also with wide-ranging responsibility. Her position requires her to weigh and balance many factors, such as the age and demographic profile of the population at Lacombe, the types of criminals represented there, current trends in the labour market, the psychological needs of inmates, the personnel available to her, and the Institution's limited budget.[37] She had to balance all of these competing factors to provide effective programs to as many inmates as possible.

[26] While the provision of certain core programs is required by the *Regulations*, the remainder of programs are selected by the Institutional Head, who is to consider what will best help offenders successfully reintegrate into the community upon release.[38] For example, an over-emphasis on employment programs might deny inmates the time and resources that they need to work on the root psychological or social causes that led to their incarceration.

[27] Cancelling the farm program enabled Ms. Bennett to offer other useful opportunities to inmates.[39] Her decision may not have been popular with Mr. Hayes and the 23 other members of his Association, but as Institutional Head her responsibility was to consider the needs of the inmate population as a whole. She took this responsibility very seriously and took reasonable steps to inform herself on the matter before coming to her

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[37] *Hayes FCTD, supra* note 2 at para 71.
[38] *Penitentiary Service of Canada Regulation*, LASK 92/232, ss 36-37 [*The Regulation*].
[39] *Hayes FCTD*, *supra* note 2 at paras 17, 78.

conclusion.[40] She consulted with professionals in rehabilitation who had experience working at Lacombe, and heard from the Inmate Committee, which spoke on behalf of the entire inmate body.[41] She also ensured that inmates would be offered other rehabilitative programs during the transition period.[42]

[28] As an administrative official exercising her statutory discretion and making fact-based decisions relating to public policy, Ms. Bennett's decision falls within a range of acceptable alternatives that are defensible in fact and law.[43] The Deputy Minister did not err in deciding not to interfere with this decision.

3.3 The decision of the Deputy Minister to dismiss Mr. Hayes' grievance was reasonable

[29] The Deputy Minister's decision to dismiss Mr. Hayes' grievance was reasonable because:

1. The decision does not substantially interfere with Mr. Hayes' *Charter* protected interests; and
2. The decision proportionately balanced Mr. Hayes' *Charter* protected interests with the statutory mandate.

[30] The Deputy Minister's decision reflects a reasonable balancing of the legislative objectives with Mr. Hayes' freedom of association, because there was no substantial

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[40] *Ibid* at para 16.
[41] *Ibid* at paras 18, 73.
[42] *Hayes FCA, supra note 22* at para 38, Duval JA.
[43] *Khela*, *supra* note 30, at para 73.

interference with Mr. Hayes' section 2(d) rights during the consultative process. In light of the PSC's statutory mandate,[44] it was reasonable for the Deputy Minister to dismiss Mr. Hayes' grievance in order to maintain safety and security at Lacombe.

3.3(a) The interests protected by the Appellant's freedom of association

[31] The preliminary issue to be determined is whether and to what extent the Deputy Minister's decision affected the *Charter* interests of the Appellant.[45] This requires a contextual consideration of what interests are protected by freedom of association in the penitentiary context. Only once the affected *Charter* interests have been defined will it be possible to decide whether those interests were proportionally balanced in the Deputy Minister's decision.

[32] A purposive consideration of section 2(d) of the *Charter* leads to the conclusion that the Appellant was entitled to form an association with other inmates and to advance collective interests through a meaningful consultation process. They did so through the independent Inmate Committee. The Appellant did not have a *Charter* right to strike.

[33] As with any *Charter* right, freedom of association must be defined purposively and contextually.[46] In 1987 Chief Justice Dickson defined the purpose of section 2(d) as being "to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends."[47] This vision for

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[44] *PSCA,* supra note 1, s 2.
[45] *Loyola,* supra note 33 at para 39.
[46] *Dunmore v Ontario (AG)*, 2001 SCC 94 at para 107, [2001] 3 SCR 1016 [*Dunmore*].
[47] *Reference re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313 at 365, 38 DLR (4th) 161.

section 2(d) has blossomed into protection for a broad range of collective activities, but the core values protected by freedom of association remain the same.[48]

[34] The question to be asked in defining the content of Mr. Hayes' freedom of association is: What is required to protect the "profoundly social nature of human endeavours" in a penitentiary setting? The context is informed by the societal role of prisons in Canada, as expressed through the PSC's enabling statute.

[35] Robust associative rights have been recognized in the labour context to reduce the power imbalance between employees and employers, so that employees are able to meaningfully pursue their collective workplace goals. In the labour context, this imbalance of power is reduced by granting workers the right to collective bargaining, supported by the right to strike.[49] The prison context is different. Mr. Hayes and his Association exercise their *Charter* rights as inmates, not as employees,[50] and so the scope of their rights must be defined accordingly.

[36] In order to accomplish its mandate, the legislature has recognized that the *Charter* rights of inmates will have a more limited scope while they are incarcerated. Section 4 of the *PSCA* makes this clear:

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[48] *Mounted Police Association of Ontario v Canada (Attorney General),* 2015 SCC 1 at paras 93, 99, 169, [2015] 1 SCR 3 [*Mounted Police*].
[49] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 3, 52, 54-55, 57, [2015] 1 SCR 245 [*SFL*].
[50] *Hayes FCTD*, supra note 2 at para 22; *Guerin v Canada (Attorney General)*, 2018 FC 94 at para 137, 2018 CarswellNat 149 (WL Can) [*Guerin*]

> Inmates retain the rights set out in the *Canadian Charter of Rights and Freedoms* except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted.[51]

[37] Inmates such as Mr. Hayes retain their core freedom of association rights, except those that are necessarily restricted as a consequence of their incarceration. As articulated in *Mounted Police*, freedom of association generally protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.[52] The inmates at Lacombe are able to engage in the first two of these classes of activities. However, as a consequence of their incarceration, inmates are not empowered by their associative rights to meet on equal terms with the administration.[53]

The right to collective bargaining

[38] Inmates have the right to make collective representations and to have their collective representations considered in good faith.[54] The right to collective bargaining guarantees that parties will have a seat at the table when decisions are being made. Collective bargaining need not be inherently adversarial; in fact, a collaborative model which properly accounts for both sides' perspectives can better further everyone's

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[51] *PSCA*, *supra* note 1 at s 4.
[52] *Mounted Police*, *supra* note 48 at para 66
[53] *Hayes FCA, supra note 22* at para 50.
[54] *Mounted Police*, *supra* note 48 at para 193.

objectives.[55] The guarantee of a process does not guarantee that parties will always get their desired result.[56]

[39] At the Lacombe Institution, Mr. Hayes and the Association members can make representations to the Institutional Head through the Inmate Committee. Ms. Bennett, in fulfillment of her *Charter* obligations, met with the Inmate Committee before making the decision to overhaul the programs. She was never under an obligation to meet with the Association and did so at the Association's request as a good faith gesture.[57]

The right to an independent association

[40] Even in the labour context, section 2(d) does not guarantee a one-size-fits-all model of associative rights.[58] Given the legislative scheme and the very real security concerns of the penitentiary context, freedom of association protects the rights of inmates to determine their collective interests and pursue them through the statutory mechanism of the Inmate Committee. The Inmate Committee is independent and elected by inmates, in satisfaction of their fundamental right to collective bargaining.[59]

[41] Freedom of association under the *Charter* does not guarantee a particular model of collective activity, or even a group's preferred model.[60] Insofar as it is possible in the prison context, the Inmate Committee provides a mechanism for members to determine

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[55] *Mounted Police, supra* note 48 at para 207.
[56] *Ibid* at para 67.
[57] *Hayes FCTD, supra* note 2 at para 23.
[58] *Mounted Police*, *supra* note 48 at paras 97, 99.
[59] *Ibid* at paras 92, 99.
[60] *Mounted Police*, *supra* note 48 at para 66.

their common interests and meaningfully pursue them. The Inmate Committee satisfies the legal requirement of independence because it is elected by inmates and mandated with representing their interests. The Committee's continued existence is required by statute,[61] and thus not dependent on the approval of the Institutional Head. Unlike Mr. Hayes and his Association of farm workers, the Committee meaningfully represents the interests of all inmates at Lacombe.

[42] The only restriction placed on the Committee is regarding inmates who are in the segregation area, whose ability to interact with other inmates must be monitored. The segregation area is not freely accessible to inmates in the general population to ensure the security of the Institution and inmate safety.[62] The curtailment of the inmates' section 2(d) *Charter* right is minimally intrusive and necessary to achieve the Institution's objectives.[63] Recognition of a right to strike jeopardizes the key legislative objectives of safety and rehabilitation.

The right to strike

[43] In the labour context, the right to strike gives workers a way to exert economic pressure on employers without fear of reprisal, which is necessary to realize the purpose of section 2(d). Striking activities lead to industrial and socio-economic peace, because the interests of employers and employees can generally be reconciled. The right to strike

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[61] *The Regulation, supra* note 38, s 55.
[62] *Wilkins v Correctional Service Canada,* 2016 OHSTC 7 at para 11, 2016 CarswellNat 6272 (WL Can) [*Wilkins*]; *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 7491, at para 64, 2017 CarswellOnt 20253 (WL Can) [*CCLA*].
[63] *Loyola, supra* note 33 at paras 41-42.

corrects the power imbalance between employees and employers so that the two sides can meet on more equal terms to resolve impasses.[64]

[44] In contrast, correctional institutions are dangerous, volatile environments, where inmates and staff alike face daily threats to their personal safety.[65] In prison, the power imbalance between the Institution and the inmates must be maintained if the social and statutory goals of security and rehabilitation are to be accomplished. Granting inmates the right to strike would not place economic pressure on the Institution, because the objective of the programs is not profitability for the PSC, but the benefit of inmates.[66]

[45] The "striking" behaviour of Mr. Hayes and his Association consisted of open disobedience of direct orders from prison staff. Instead of serving the purpose of section 2(d), these activities undermined the safe and orderly operation of the Institution.[67] As required by the *Regulation*,[68] stand-to counts give Correctional Officers ("COs") a quick and effective way to locate inmates and verify their well-being.[69] According to the *Regulation* inmates must remain standing in their cells until the count has been completed.[70] Any delay in the process will thus have a detrimental effect on the entire inmate population.

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[64] *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia,* 2007 SCC 27 at para 84, [2007] 2 SCR 391.
[65] See for example *Wilkins*, *supra* note 62; *CCLA, supra* note 61 at paras 139-140.
[66] *Guerin*, *supra* note 50 at 64.
[67] *SFL supra* note 49 at para 48.
[68] *The Regulation, supra* note 38, s 12.
[69] *The Regulation, supra* note 38, s 15; see also *Crawshaw v Canada (Attorney General)* 2011 FCJ 192 at para 33; Correctional Service of Canada, "Counts and Security Patrols", Commissioner's Directive No 566-4 (Ottawa: CSC, 29 May 2017).
[70] *The Regulation*, *supra* note 38, s 13.

[46] More disquieting than the practical effects of an inmate strike would be its tendency to subvert the authority structure of the prison. Allowing inmates to disregard orders will threaten the control of staff members and inmate confidence in their ability to maintain order. Recognition of such rights is unsupportable given a purposive interpretation of section 2(d).

[47] Inmates have the right to an impasse resolution process tailored to the substance of their right to make collective representations in good faith. Since inmates do not have labour-style section 2(d) rights, they do not benefit from the full extent of dispute resolution options available to parties during collective agreement negotiations in the labour context.

[48] In the prison context, the statutory grievance procedure adequately satisfies the inmates' right to an impasse resolution process. Any encroachment on the inmates' section 2(d) right to be consulted in good faith can be properly adjudicated by a fair decision-maker responsible for hearing the grievance.[71] This process is appropriately measured with respect to the contextual content of their section 2(d) right.

3.3(b) The impact on the Appellant's freedom of association

[49] Ms. Bennett had a constitutional obligation to hear from the Inmate Committee in good faith, but their section 2(d) rights do not guarantee any particular outcome.[72] By meeting with inmate representatives and listening to them in good faith, she fully discharged her constitutional obligation. Her decision was a reasonable exercise of her

[71] *PSCA, supra* note 1, s 71.
[72] *Mounted Police, supra* note 48 at para 66.

statutory discretion and was made after a thorough consultation process. The Appellant's claim amounts to a suggestion that Ms. Bennett had a constitutional duty to set aside the best interests of the entire inmate population in order to satisfy the wishes of an association of farm workers that did not exist at the material time.

3.3(c) Freedom of association was proportionately balanced with the statutory objectives

[50] The Deputy Minister's decision will be reasonable if it impacted Mr. Hayes' freedom of association as little as reasonably possible given the statutory objectives which the Deputy Minister was bound to pursue.[73] The balancing of the statutory mandate with the Appellant's *Charter* interests, while not identical to an *Oakes* analysis under s.1, comes down to the same concept of proportionality.[74] The ultimate question is whether the interference with freedom of association under these circumstances was proportionate given the PSC's legislated mandate.

[51] The legislative objectives are clearly set out in section 2 of the *PSCA*:

> The purpose of the federal penitentiary system is to contribute to the maintenance of a just and safe society by carrying out sentences imposed by courts through the safe and humane custody and supervision of inmates; and assisting the rehabilitation of inmates and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries.[75]

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[73] *Loyola, supra* note 33 at para 40.
[74] *Dore*, *supra* note 33 at para 5.
[75] *PSCA*, *supra* note 1 at s 2

[52] When deciding whether the Deputy Minister's decision was reasonable, the court should assess whether the Deputy Minister reasonably weighed all of the relevant factors. The court should not engage in a re-weighing of these factors, or a *de novo* consideration of the constitutional issues, in recognition of the different obligations of Parliament, the PSC, and the judiciary.[76] Rather, the court should consider whether the Deputy Minister was alive to the question at issue and came to a result well within the range of reasonable outcomes.[77]

[53] The PSC has two central objectives: the safe and humane custody and supervision of inmates, and the provision of rehabilitative programs. Given this mandate, the decision not to tolerate disobedience of staff orders in the name of striking at Lacombe was minimally impairing of the Appellant's *Charter*-protected interests. There was no way for the PSC to realize its legislated mandate that allowed for broader expression of the Appellant's freedom of association.[78] A right to strike is irreconcilable with the safe and humane operation of the facility.[79]

[54] Safe and humane custody of inmates requires a high level of staff control in the penitentiary. Limited resources must be managed as efficiently as possible to provide a

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[76] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3; *Ktunaxa Nation v British Columbia (Forests Lands and Natural Resource Operations)*, 2017 SCC 54, at paras 37- 38, 77, 415 DLR (4th) 52 [*Ktunaxa Nation*]; *Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12, at para 59, [2009] 1 SCR 339.

[77] *Ktunaxa Nation*, *supra* note 76, at para 140; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 26, [2011] 3 SCR 708.

[78] *Alberta v Hutterian Brethren of Wilson County*, 2009 SCC 37 at para 53, [2009] 2 SCR 567.

[79] *Ktunaxa Nation, supra* note 76 at para 149.

high level of care and supervision for inmates, who can easily become vulnerable to bullying, violence, or mental illness while incarcerated. Giving ground to agitators like Mr. Hayes in the name of section 2(d) would interfere with the ability of guards and administrators to maintain order and safety among inmates. The consumption of staff resources necessary to supervise striking activity would strain the ability of the Institution to provide humane care to the rest of the inmate population.

[55] Allowing strikes at Lacombe would also interfere with the Institution's responsibility to provide rehabilitative programs to offenders. Any striking activity among inmates diverts staff time and attention—time and attention which would otherwise be spent escorting and supervising inmates for programming. In addition, strikes would lead to unpredictable disruptions in scheduling, effectively holding the entire Institution hostage to the demands of a small group of inmates. Such disruptions would make it difficult for non-striking inmates to achieve their rehabilitative goals.

[56] The context in which the inmates claim the right to strike is one of incarceration where paramount considerations are safety and security. Striking would threaten the security of guards and inmates alike by injecting a high degree of disruption into an environment which is otherwise predicated on order and timeliness. Such behaviours, by definition, undermine the hierarchy of power between inmates and guards which is essential for safety and security at the Institution.

[57] Incarceration of offenders promotes confidence in the criminal justice system and deters potential criminals.[80] This function would be undermined if inmates were permitted to flout the orders and procedures of the Institution in the name of free association.[81] As Mr. Hayes himself has pointed out, part of the rehabilitative process involves helping individuals learn to live in a peaceful, rules-based society.[82] Furthermore, prison is where criminal offenders surrender most of their liberty for the protection of communities and as penalty for their wrongful behaviour. Recognition of the right to strike would undermine these social functions.

[58] Balancing freedom of association in the prison context also engages serious policy considerations that must be taken into account. Recognizing a constitutional right for inmates to disrupt the smooth running of the Institution would result in dangerous and chaotic situations for prison staff, whose work is already stressful and challenging.[83] As an employer, PSC has an obligation to ensure the health and safety of its COs,[84] which the Deputy Minister had to take into account when balancing Mr. Hayes' section 2(d) interests.

[59] Given these considerations, it was reasonable for the Deputy Minister to conclude that the inmates do not have a right to strike. The existence of the Inmate Committee provides a minimally impairing opportunity for offenders at Lacombe to exercise their section 2(d) rights.

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[80] *Criminal Code of Canada*, RSC 1985 c C-46, s 718.
[81] *Hayes FCA, supra note 22* at para 54.
[82] *Hayes FCTD, supra* note 2 at para 15.
[83] *Wilkins, supra* note 62 at para 104.
[84] *Occupational Health and Safety Act*, RSA 2000 c O-2, s 2(1)(a).

3.4 Ms. Bennett fulfilled any procedural fairness obligation owed to the Appellant

3.4(a) The decision fell under the legislative exemption to procedural fairness

[60] The Appellant has no general claim to participation in the program re-evaluation process.[85] Therefore, Ms. Bennett owed no duty of procedural fairness to Mr. Hayes or to the Association members.[86] The decision to overhaul the programs at Lacombe was a legislative decision which affected the general inmate population and was not targeted at Mr. Hayes or the members of the Association. Ms. Bennett's decision was made in good faith according to the public policy choices of the PSC and took into account the changing needs of the inmates for whom she is responsible.[87]

[61] Correctional authorities have always been permitted to make general changes to the manner in which sentences are served, reflecting evolving approaches to correctional law and policy.[88] Initiatives that change the manner in which inmates serve their time are contrasted with specific decisions made in response to a particular inmate's needs or behaviour.[89] The withdrawal of the farm program happened as part of a modernizing initiative across the Institution, which impacted the manner in which inmates would complete their sentence.

[62] Ms. Bennett's decision to replace the farm program was a policy decision about how limited resources would be deployed to realize the custodial and rehabilitative goals

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[85] *Wells v Newfoundland*, (1999) 3 SCR 199 at para 61, 180 Nfld & PEIR 269.
[86] *Ibid* at para 58.
[87] *R v Imperial Tobacco Canada*, 2011 SCC 42, at para 87, [2011] 3 SCR 45.
[88] *Cunningham v. Canada*, [1993] SCJ No 47, [1993] 2 SCR 143 at 152 [*Cunningham*]
[89] *Ibid*.

of the PSC[90] for all of the inmates at Lacombe. She was acting as a delegated legislator to craft a global plan for programming at Lacombe,[91] which involved budgetary constraints and competing considerations far beyond the individual needs and behaviour of Mr. Hayes. As such, her decision falls within the legislative exemption and is not subject to a duty of procedural fairness to the Appellant.

3.4(b) In the alternative, the Appellant was entitled to a low degree of procedural fairness

[63] If the court should find that Ms. Bennett's decision was not legislative or general, Mr. Hayes' right to procedural fairness will depend on the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration*).[92] These factors are designed to strike a balance between efficient decision-making and fairness. Administrative officials like Ms. Bennett must be able to do their jobs effectively but cannot be perceived to act unfairly or arbitrarily.[93] Throughout the process under review, Ms. Bennett demonstrated fairness and thorough consideration of the relevant facts.

[64] The application of the *Baker* factors to the facts of this case demonstrates that Mr. Hayes was entitled to minimal procedural fairness. By giving both notice and a hearing to the inmate population through the Committee, Ms. Bennett fulfilled any duty of procedural fairness that she owed to the Appellant.

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[90] *PSCA*, *supra* note 1, s 2.
[91] *Inuit Tapirisat of Canada v Canada (Attorney General)*, [1980] 2 SCR 735, at 757, 115 DLR (3d) 1.
[92] *Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at paras 21-28, 174 DLR (4th) 193 [*Baker*].
[93] *Canada (Attorney General) v Mavi* 2011 SCC 30 at para 40 [2011] 2 SCR 504] [*Mavi*].

[65] The first *Baker* factor considers the nature of the decision being made and the process followed in making it.[94] This was purely a policy decision, made in consideration of many factors external to the interests of Mr. Hayes and the Association members. As Mr. Hayes has demonstrated, the decision was subject to the statutory grievance process through which he could appeal to an independent decision maker and, eventually, to a court.

[66] In contrast to adjudicative decisions that affect inmates' rights or security, such as disciplinary offences[95] or administrative segregation,[96] where a high degree of procedural fairness is owed, this decision was about inmate privileges,[97] made to promote the orderly and proper administration of the Institution. Non-punitive administrative decisions relating to privileges and prisoner routines, such as inmate transfers, attract a low degree of procedural fairness.[98]

[67] The second *Baker* factor looks to the nature of the statutory scheme.[99] Under section 37 of the *Regulation*, the Institutional Head is vested with the authority to make decisions about programs, other than the mandatory programs listed in section 36. Neither the *PSCA* nor the *Regulation* suggests any obligation for Ms. Bennett to consult with inmates when deciding what optional programs are to be offered at Lacombe. The

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[94] *Baker, supra* note 92 at para 23.
[95] *CCLA, supra* note 62 at para 149; *Sweet*, *supra* note 34 at para 34.
[96] *British Columbia Civil Liberties Association v Canada (Attorney General*), 2018 BCSC 62 at paras 355, 383, 410, 2018 CarswellBC 53 (WL Can).
[97] *R v Shubley*, [1990] 1 SCR 3 at 21, 71 OR (2d) 63; *Guerin, supra* note 50 at para 132.
[98] *May v Ferndale Institution,* 2005 SCC 82, [2005] 3 SCR 809; *Sweet, supra* note 34 at paras 33, 39.
[99] *Baker, supra* note 92 at para 24.

Regulation does, however, establish an Inmate Committee to represent the interests of the inmate population in their dealings with the Institutional Head.[100] The decision was not final, because appeal to the Deputy Minister through the statutory grievance process was always available.[101]

[68] The third *Baker* factor accounts for the impact of the decision on the person affected. The PSC does not wish to downplay the importance of this outcome to Mr. Hayes, but at the same time it should not be exaggerated. The farm program did not represent Mr. Hayes' "livelihood" because his earnings were nominal at best, and the Institution fulfilled all of his day-to-day needs. He also had numerous other opportunities available to him, which would allow him to reap equally valuable rehabilitative benefits. The impact of this decision was to restrict his freedom to exercise his preference for the farm over other rehabilitative opportunities.

[69] The fourth *Baker* factor is concerned with the reasonable procedural expectations of the person challenging the decision.[102] The farm was not the only program to be cancelled in this process. The inmates at Lacombe could not have had a reasonable expectation that Ms. Bennett would notify and sit down with each inmate whose program was to be affected. In the absence of a statutory or voluntary commitment from the Institution, Mr. Hayes cannot assert that he had a reasonable expectation to be personally consulted by Ms. Bennett as part of her decision-making process.

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[100] *The Regulation, supra* note 38, s 55.
[101] *Sweet*, *supra* note 34 at para 36.
[102] *Baker, supra* note 92 at para 26.

[70] The final *Baker* factor takes into account the procedural choices made by the administrator.[103] The *Regulations* grant the Institutional Head broad discretion with regard to the programs that are offered and the process for making programming decisions.[104] It is clear from the legislative scheme that the overriding consideration for selection of programs is to be the rehabilitation and reintegration of inmates. While the scheme does not preclude the Institutional Head from seeking input from inmates, it leaves the actual process open to the expertise of the decision-maker. As a result, Ms. Bennett's choices attract a degree of deference.[105]

[71] Under section 55 of the *Regulations*, the Inmate Committee exists to represent the interests of inmates in their dealings with the Institution. In light of the democratic mandate of the Committee, Ms. Bennett chose to consult with the inmates through that mechanism.[106] The Committee had both notice of the upcoming decision and an opportunity to present the concerns of the inmate population.

[72] Where a duty of procedural fairness is owed, the particular content will depend on the administrative and legislative context.[107] In light of these considerations, if Ms. Bennett had a duty of procedural fairness to Mr. Hayes, her obligation was to notify him that closure of the farm was being considered and to provide him with an opportunity to

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[103] *Ibid* at para 27.
[104] *The Regulation, supra* note 38, s 37.
[105] *Khela*, *supra* note 30 at para 89; *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 42, 72 Admin LR (5th) 1; *Maritime Broadcasting System Ltd v Canadian Media Guild*, 2014 FCA 59 at paras 48-58, 373 DLR (4th) 167.
[106] *Hayes FCA, supra* note 22 at para 15.
[107] *Mavi*, *supra* note 93 at para 41.

voice his concerns. Given the statutory role of the Inmate Committee to represent the inmates, Ms. Bennett rightfully discharged her obligation through the Committee.

3.5 Damages are not an available remedy for judicial review

[73] The application judge erred in ordering the Attorney General of Canada to pay $1,000 in punitive damages to each member of the Association. Justice Ferrell did not refer to any authority under which the jurisdiction to grant such an award of damages could be assumed.[108]

[74] Justice Stevenson of the Federal Court of Appeal was right to point out that section 44 of the *Federal Courts Act* does not create a wide-ranging discretion for the Federal Court to grant remedies in the form of punitive damages on judicial review.[109] Section 18.1(3) of the *Federal Courts Act* provides an account of the Federal Court's powers to grant a remedy on application for judicial review. Section 44 creates a residual power for the Federal Court to grant certain equitable remedies in extraordinary instances but contains no mention of damages.

[75] Even if the Canadian Court of Justice should find that section 44 is ambiguous, and that the Appellant can access a remedy beyond the ordinary jurisdiction of the court

[108] *Hayes FCTD, supra* note 2 at para 95.
[109] *Hayes FCA, supra note 22* at para 67.

as set out in sections 18 and 18.1, damages are not available on judicial review.[110] This is true even in cases where a *Charter* claim is being made.[111]

[110] *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 at para 167, [2017] 1 SCR 3; *Paradis Honey Ltd v Canada (Minister of and Agri-Food)*, 2015 FCA 89 at para 151, 382 DLR (4th) 720.
[111] *Garshowitz v Canada (Attorney General)*, 2017 FCA 251 at paras 10-11, 2017 CarswellNat 7421 (WL Can).

Part 4 – Order Sought

[76] The Respondent requests that the Canadian Court of Justice:

DISMISS the appeal in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of February 2018.

Counsel #1
Brendan Coffey

Counsel #2
Sarah Faber

ANNEX A – LIST OF AUTHORITIES REFERRED TO

LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Criminal Code of Canada, RSC 1985, c C-46.

Federal Courts Act, RSC 1985, c F-7.

Occupational Health and Safety Act, RSA 2000, c O-2.

Penitentiary Service of Canada Act, RLL c P-12.

Penitentiary Service of Canada Regulation, LASK 92/232.

Public Service Labour Relations Act, SC 2003, c 22.

JURISPRUDENCE

Attorney General (Canada) v Jackson Hayes, 2018 FCA 1.

Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association Teachers, 2011 SCC 6, [2011] 3 SCR 654.

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 174 DLR (4th) 193.

British Columbia Civil Liberties Association v Canada (Attorney General), 2018 BCSC 62, 2018 CarswellBC 53 (WL Can).

Canada (Attorney General) v Mavi, 2011 SCC 30, [2011] 2 SCR 504.

Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12, [2009] 1 SCR 339.

Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen, 2017 ONSC 7491, 2017 CarswellOnt 20253 (WL Can).

Crawshaw v Canada (Attorney General), 2011 FC 133, [2011] FCJ No 192.

Cunningham v. Canada, [1993] 2 SCR 143, [1993] SCJ No 47.

Doré v Barreau du Québec, 2012 SCC 12, [2012] 1 SCR 395.

Dunmore v Ontario (AG), 2001 SCC 94, [2001] 3 SCR 1016.

Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190.

Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd, 2016 SCC 47, [2016] 2 SCR 293.

Ernst v Alberta Energy Regulator, 2017 SCC 1, [2017] 1 SCR 3.

Garshowitz v Canada (Attorney General), 2017 FCA 251, 2017 CarswellNat 7421 (WL Can).

Guerin v Canada (Attorney General), 2018 FC 94, 2018 CarswellNat 149 (WL Can).

Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia, 2007 SCC 27, [2007] 2 SCR 391.

Hutterian Brethren of Wilson Colony v Alberta, 2009 SCC 37, [2009] 2 SCR 567.

Inuit Tapirisat of Canada v Canada (Attorney General), [1980] 2 SCR 735, 115 DLR (3d) 1.

Jackson Hayes and Lacombe Institution Association of Farm Program Inmates v Attorney General (Canada), 2017 FC 47.

Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54, 415 DLR (4th) 52.

Loyola High School v Quebec (Attorney General), 2015 SCC 12, [2015] 1 SCR 613.

Maritime Broadcasting System Ltd v Canadian Media Guild, 2014 FCA 59, 373 DLR (4th) 167.

May v Ferndale Institution, 2005 SCC 82, [2005] 3 SCR 809.

Mission Institution v Khela, 2014 SCC 24, [2014] 1 SCR 502.

Mounted Police Association of Ontario v Canada (Attorney General), 2015 SCC 1, [2015] 1 SCR 3.

Naraine v Canada (Attorney General), 2015 FC 934, 339 CRR (2d) 1.

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 SCR 708.

Paradis Honey Ltd v Canada (Minister of Agriculture and Agri-Food), 2015 FCA 89, 382 DLR (4th) 720.

R v Imperial Tobacco Canada, 2011 SCC 42, [2011] 3 SCR 45.

R v Shubley, [1990] 1 SCR 3, 71 OR (2d) 63.

Re: Sound v Fitness Industry Council of Canada, 2014 FCA 48, 72 Admin LR (5th) 1.

Reference re Public Service Employee Relations Act (Alta), [1987] 1 SCR 313, 38 DLR (4th) 161.

Saskatchewan Federation of Labour v Saskatchewan, 2015 SCC 4, [2015] 1 SCR 245.

Spidel v Canada (Attorney General), 2011 FC 999, [2011] FCJ No 1228, aff'd 2012 FCA 26.

Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 SCR 3.

Sweet v Canada (Attorney General), 2005 FCA 51, 332 NR 87.

Wells v Newfoundland, [1999] 3 SCR 199, 180 Nfld & PEIR 269.

Wilkins v Correctional Service Canada, 2016 OHSTC 7, 2016 CarswellNat 6272 (WL Can).

OTHER MATERIALS

Correctional Service of Canada, "Counts and Security Patrols", Commissioner's Directive No 566-4 (Ottawa: CSC, 29 May 2017).