Federal Court  Cour fédérale

Date: 20141201

Docket: T-711-14

Citation: 2014 FC 1143

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 1, 2014

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

MICHEAL SWIFT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant is an inmate at Donnacona Institution (the Institution). He is seeking a judicial review of a decision rendered on February 26, 2014, by an independent chairperson (ICP), under which he was found guilty of committing a serious offence, namely, triggering the emergency alarm in his cell without valid reason. The application for judicial review is dismissed for the following reasons.

I. **Background**

[2] On December 4, 2013, the applicant received a disciplinary offence report for triggering the emergency alarm in his cell on December 3, 2013, without valid reason. Section 4 of Section C of the institutional regulations in effect at Donnacona Institution (the Institutional Regulations), which concerns cell regulations, provides as follows:

> [TRANSLATION]
>
> 4. Intentionally triggering the fire alarm in the cell for a utilitarian purpose or as a means of protest is prohibited. Abusive and unnecessary use of this alarm may lead to the issue of an offence report.
>
> The alarm button in each cell is located on the wall near the sink. It is to be used only in the event of an emergency and not to have the door of the cell opened on request. Activating the alarm in the cell unnecessarily may lead to disciplinary action.

[3] In order to understand the issues in this case and the arguments of the parties, it is helpful to briefly outline certain aspects of the disciplinary system in a correctional setting. This disciplinary system is strictly regulated by the *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act], the *Corrections and Conditional Release Regulations*, SOR/92-620 [the Regulations], and *Commissioner's Directive 580 – Discipline of Inmates* (CD 580).

[4] Section 40 of the Act provides a list of types of conduct that are deemed to constitute disciplinary offences. In this case, the applicant was charged under paragraph 40(*r*) of the Act, for wilfully disobeying a written rule governing the conduct of inmates.

[5] Under subsection 41(2) of the Act, the institution head may charge an inmate with committing a disciplinary offence. This charge may concern either a minor or serious offence, and the category of the offence is determined by the seriousness of the misconduct and any aggravating or mitigating factors (see also section 8 of CD 580). Under section 9 of CD 580, the institution head may delegate this authority, by standing order, to a staff member not below the level of correctional manager, and that is what happened in this case.

[6] The applicable disciplinary process varies for each category of offence. When an inmate is accused of committing a minor disciplinary offence, the hearing is conducted by the institution head or by the designated representative of the institution head (subsection 27(1) of the Regulations). However, when an inmate is charged with committing a serious offence, the hearing must be conducted by an ICP (subsection 27(2) of the Regulations). The process for dealing with minor offences and the decisions arising therefrom may be the subject of a grievance. However, decisions rendered by ICPs cannot be the subject of a grievance. Consequently, these decisions can only be challenged by way of an application for judicial review before the Federal Court.

[7] Under subsection 30(3) of the Regulations, when an ICP is asked to hear a charge concerning a serious offence and is satisfied that the matter should instead be dealt with as a minor offence, he or she is required to amend the charge accordingly. The ICP may then conduct the disciplinary hearing or refer the matter to the institution head, as appropriate.

[8] The applicable burden of proof for disciplinary charges is the same as the burden of proof for criminal matters, that is, proof beyond a reasonable doubt. Subsection 43(3) of the Act provides as follows:

Decision	Déclaration de culpabilité
(3) The person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question.	(3) La personne chargée de l'audition ne peut prononcer la culpabilité que si elle est convaincue hors de tout doute raisonnable, sur la foi de la preuve présentée, que le détenu a bien commis l'infraction reprochée.

[9] As indicated above, the applicant was charged with committing a serious disciplinary offence, and the hearing was conducted by an ICP.

II. **Conduct of hearing and decision of ICP**

[10] At the beginning of the hearing, counsel for the applicant and the assessor of the Institution recommended that the ICP amend the charge under subsection 30(3) of the Regulations so that it referred to a minor offence rather than a major offence.

[11] The ICP did not act on this request. He stated that he was not bound by the suggestion of the parties and that he considered the offence in question to be a serious disciplinary offence and not a minor offence. The hearing then continued, and the Institution presented its evidence.

[12] The Institution's evidence consisted of the testimony of Yves Bonneau, who identified himself as the officer in charge on December 3, 2013. He stated that he had been in the control

room when the alarm in the applicant's cell was activated and that he had then asked the CX-4 officer who was responsible for this unit (the CX-4 officer) to go to the applicant's cell to find out what was going on. Mr. Bonneau stated that when the CX-4 officer returned, he was advised that there was no emergency and that the inmate had no justification for triggering the alarm. In response to questions from counsel for the applicant, Mr. Bonneau stated that he did not remember the identity of the CX-4 officer who had gone to the applicant's cell and provided him with a report thereafter. He also acknowledged that he did not speak directly to the applicant and that he did not have an exact recollection of the CX-4 officer's account of the applicant's reasons for triggering the alarm.

[13] After Mr. Bonneau's testimony, counsel for the applicant presented an application for non-suit. She asked the ICP to dismiss the charge on the grounds that the Institution had not been able to prove, beyond a reasonable doubt, that the applicant had triggered the alarm without valid reason. Counsel for the applicant also submitted that the applicant acknowledged that the evidence demonstrated that the CX-4 officer's had informed Mr. Bonneau that he was of the opinion that the applicant did not have a valid reason for triggering the alarm. However, she maintained that without testimony from the CX-4 officer to explain the objective and subjective bases for forming this opinion, the evidence provided was insufficient to establish, beyond a reasonable doubt, that the applicant did not have a valid reason to trigger the alarm.

[14] The ICP denied the application by counsel for the applicant. He stated that the evidence demonstrated that Mr. Bonneau had reported speaking with the CX-4 officer, who had gone to the applicant's cell and that this officer had informed him that the applicant "appeared perfectly

normal." The ICP added that there was nothing to lead him to believe that the applicant had requested medical services or any type of aid. He therefore concluded that there was no evidence that would allow him to believe that there was an emergency situation.

[15] The hearing therefore continued, and the applicant testified to explain why he had triggered the emergency alarm in his cell. He reported that he had triggered the alarm because he wanted to obtain the medication (Motrin) that he took to relieve migraines and arthritis. He also stated that he had made several unsuccessful requests to obtain the medication and that he had been waiting to get it for several days. The applicant also stated that at the time of the events, obtaining medication had become much more complicated than usual, owing to a strike at the Institution that had resulted in inmates being confined to their cells.

[16] At the conclusion of the hearing, the ICP found the applicant guilty of a serious disciplinary offence, namely, triggering the alarm in his cell without valid reason, thereby violating section 4 of the Institutional Regulations and paragraph 40(*r*) of the Act.

[17] The parties then presented a joint recommendation on the sentence to be imposed. They recommended that the applicant receive a sentence of three days in segregation without privileges, to be suspended for a period of 90 days. This recommendation was based on the fact that it was the applicant's first offence and that there had not been any serious consequences. The ICP instead chose to sentence the offender to five days in segregation without television, to be suspended for 90 days. He explained that he had added two days to the recommendation because

he did not believe that the applicant realized that he had committed a serious offence that should never be repeated.

III. **Issues**

[18] The applicant raises a number of criticisms regarding the ICP's decision and submitted five issues for decision. I would rephrase these issues as follows:

A. *First issue*

> (1) Did the ICP err in refusing to conclude that the offence related to a minor offence rather than a serious offence?

[19] The applicant advanced three arguments in relation to this question, which in fact raise three sub-issues:

- *Did the ICP err in disregarding the joint recommendation presented by the parties with respect to the category of the offence?*
- *Did the ICP err in ruling on the category of the disciplinary offence in question before even hearing the evidence?*
- *Did the ICP err in his interpretation of CD 580?*

B. *Second issue*

> (2) Did the ICP err in concluding that the evidence demonstrated beyond a reasonable doubt that the applicant had committed the offence with which he was charged?

[20] The arguments submitted by the applicant on this point can be divided into two sub-issues:

- *Did the ICP breach his duty of procedural fairness by refusing to allow the applicant's application for non-suit?*
- *Did the ICP err in concluding that the offence had been proven beyond a reasonable doubt?*

C. *Third issue*

> (3) Did the ICP err in deviating from the joint recommendation submitted by the parties with respect to the sentence to be imposed?

IV. **Standards of review**

[21] The applicant maintains that the correctness standard must apply to questions of law and procedural fairness and that the standard of reasonableness must apply to questions of fact and mixed questions of fact and law. The applicant finds support for his argument in *Bonamy v Canada (Attorney General)*, 2010 FC 153, at paragraphs 46-48, [2010] FCJ No 179.

[22] The respondent, however, maintains that all the issues in dispute are either questions of fact or mixed questions of fact and law and that the ICP's decision is to be reviewed by applying the standard of reasonableness. The respondent finds support for this argument in *McDougall v Canada (Attorney General)*, 2011 FCA 184, at paragraph 24, [2011] FCJ No 841 [*McDougall*].

[23] The first issue in dispute and the three related sub-issues raise mixed questions of fact and law, but in my opinion, it is possible to isolate questions of law from them. The ICP's

decision to refuse to amend the charge to a charge relating to a minor offence suggested an interpretation of subsection 30(3) of the Regulations and certain provisions of CD 580.

[24] In *Sweet v Canada (Attorney General)*, 2005 FCA 51, at paragraphs 14-15, [2005] FCJ No 216 [*Sweet*], the Federal Court of Appeal stated that in grievances filed by prisoners, questions involving the interpretation of the Act or its regulations are subject to the correctness standard. These principles are reiterated in *Yu v Canada (Attorney General)*, 2011 FCA 42, [2011] FCJ No 162 [*Yu*]. In paragraph 21 of *Yu*, the Federal Court of Appeal relied on *Mercier v Canada (Correctional Service)*, 2010 FCA 167, at paragraph 58, 320 DLR (4th) 429, to add that the Commissioner's Directives should be regarded as regulations. Consequently, the Court concluded that issues raised in the context of an inmate grievance process involving the interpretation of the Commissioner's Directives are also questions of law subject to the standard of correctness.

[25] These principles were subsequently reiterated in paragraph 24 of *McDougall*:

> 24 In assessing the standard of review of inmate grievance decisions, a standard of correctness applies to issues of law, including the interpretation of the Act and Regulations and of the Commissioner's Directives, as well as to issues of procedural fairness. A standard of reasonableness applies to issues of fact and to issues of mixed law and fact, unless an extricable issue of law can be identified, in which case a standard of correctness may apply to that extricable issue: *Sweet v Canada (Attorney General)*, 2005 FCA 51, 332 N.R. 87 at paragraphs 15-16; *Yu v Canada (Attorney General)*, above at paragraph 21.

[26] The principles set out in *Sweet*, *Yu* and *McDougall* concerned grievance decisions, not decisions rendered by ICPs. Therefore, the question raised here is whether these principles can be fully transposed to decisions on charges of committing a serious offence.

[27] Certain elements support arguments in favour of a positive response. When disciplinary charges relate to minor offences which may be the subject of a grievance, decision makers are required to interpret and apply the same Act, the same Regulations and the same Commissioner's Directive as the ICPs conducting hearings for charges of serious offences. It would therefore be logical for their decisions to be reviewable on the same standard of review. There is also the case law from our Court which transposed principles regarding the standards of review applicable to grievances to decisions rendered by ICPs (*Lemoy v Canada (Attorney General)*, 2009 FC 448, at paragraph 13, [2009] FCJ No 589. In *Cyr v Canada (Attorney General)*, 2011 FC 213, at paragraph 13, [2011] FCJ No 245 [*Cyr*], the Court also applied the correctness standard to a question of law before an ICP without referring to authorities concerning grievances.

[28] However, there are certain characteristics specific to ICPs which, in my opinion, support arguments in favour of the standard of reasonableness. ICPs are appointed by the Minister, and they are required to have knowledge of the administrative decision-making process in a correctional setting but must not be correctional officers or offenders (paragraph 24(1)(*a*) of the Regulations). Paragraph 60(*a*) of CD 580 provides that the institution head must ensure that senior institutional management can exchange information with the ICPs on a regular basis. Discussions should include:

i. institutional values, priorities, and objectives

ii. staff and inmate perceptions

iii. managerial concerns

iv. a review of court decisions which impact on the inmate disciplinary process

[29] Paragraph 60(*c*) of CD 580 provides that the institution head must also encourage the ICPs to meet with inmate population representatives to discuss institutional issues relevant to discipline.

[30] Discipline in a correctional setting therefore lies at the heart of the mandate of ICPs, whose unique role consists of conducting disciplinary hearings for serious disciplinary offences. The provisions of the Regulations which address the disciplinary process and the provisions of CD 580 are closely linked to the exercise of their mandate and their responsibilities. The ICPs are required to interpret subsection 30(3) of the Regulations and the provisions of CD 580 each time they are required to conduct a disciplinary hearing for a serious disciplinary offence.

[31] Consequently, it is my opinion that in this case, the ICP was required to interpret subsection 30(3) of the Regulations, section 8 of CD 580 and the definitions provided in Annex A of CD 580, and in so doing, he would have interpreted the provisions which lie at the heart of his mandate and expertise and of which he has extensive knowledge. Moreover, an interpretation of subsection 30(3) of the Regulations or the provisions of CD 580 does not involve matters related to constitutional questions, jurisdiction, or even questions that are of central importance to the legal system as a whole and which fall outside the scope of the ICP's expertise. It is therefore my view, in light of recent case law from the Supreme Court of Canada, that the ICP's interpretation of the Act, the Regulations and CD 580 must be reviewed on the

standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paragraphs 54, 57, [2008] 1 SCR 190; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, at paragraph 28, [2011] 1 SCR 160; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, at paragraph 16, [2011] 3 SCR 471; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at paragraphs 30, 34, [2011] 3 SCR 654; *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paragraphs 49-50, [2013] 2 SCR 559 [*Agraira*]; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, at paragraph 21, [2013] 3 SCR 895; *Canadian National Railway Co. v Canada (Attorney General)*, 2014 SCC 40, at paragraph 55, [2014] ACS No 40; *Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42, at paragraph 13, [2014] ACS No 101; *John Doe v Ontario (Finance)*, at paragraph 17, 2014 SCC 36, [2014] ACS No 36; *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at paragraphs 26-27, [2014] 1 SCR 674.

[32] As indicated, the second issue in dispute includes two sub-issues. The first raises a question concerning procedural fairness, which is not subject to deference and is reviewable on the standard of correctness (*Mission Institution v Khela*, at paragraph 79, 2014 SCC 24, [2014] 1 SCR 502; *Gendron v Canada (Attorney General)*, 2012 FC 189, at paragraph12, [2012] FCJ No 202 [*Gendron*]; *Obeyesekere v Canada (Attorney General)*, 2014 FC 363, at paragraph 21, [2014] FCJ No 386.

[33] The second sub-issue, which concerns the ICP's assessment of the applicant's guilt, raises a mixed question of fact and law which must be reviewed by applying the standard of

reasonableness. The case law is clear in that regard (see, for example, *Forrest v Canada (Attorney General)*, 2002 FCT 539, at paragraphs17-18, [2002] FCJ No 713 [*Forrest*], aff'd *Forrest v Canada (Attorney General)*, 2004 FCA 156, at paragraph 8, [2004] FCJ No 709; *Brennan v Canada (Attorney General)*, 2009 FC 4, at paragraph 29, [2009] FCJ No 81; *Lemoy* at paragraph 14; *Cyr* at paragraph 13; *Tremblay v Canada (Attorney General)*, 2011 FC 404, at paragraph 5, [2011] FCJ No 503; *Gendron* at paragraph 12; *Piché v Canada (Attorney General)*, 2013 FC 652, at paragraph 10, [2013] FCJ No 683).

[34] The third issue also raises a mixed question of fact and law subject to the standard of reasonableness (*Gendron*, paragraph 12).

V. **Positions of the parties**

A. *Position of the applicant*

[35] First, the applicant argues that under the provisions of subsection 30 (3) of the Regulations, the ICP had a duty to amend the charge, thereby changing it from a serious offence to a minor offence, and that by failing to amend it, the ICP committed an error of law. The applicant submits three main reasons in support of this position.

[36] He starts his argument by claiming that subsection 30(3) of the Regulations imposes an obligation on the ICP, who is not allowed any discretion in terms of whether or not to amend a charge when the offence in question is determined to constitute a minor offence. Moreover, the ICP could not render a decision on the category of the offence before even hearing the evidence

in this regard. From the applicant's point of view, in the absence of any evidence, the ICP's decision was based on conjecture and not on factual evidence relating to his case.

[37] The applicant further argues that the ICP could not disregard the joint recommendation of the parties, based on which the offence in question should have been considered as a minor offence. In this regard, the applicant bases his argument on a well-established principle in criminal and disciplinary law, according to which a decision maker cannot disregard a joint recommendation on sentencing unless he or she finds it to be unreasonable. When a decision maker does not intend to accept a joint recommendation, it is his or her duty to inform the parties accordingly and give them an opportunity to provide additional comments. If the decision maker nevertheless chooses not to accept a joint recommendation, then he or she must explain why the joint recommendation was rejected, and this decision must be firmly rooted in the evidence. The applicant relied on judgments in criminal matters and decisions concerning police ethics and standards of professional conduct to defend his position. The applicant maintains that in this case, the ICP erred in stating that he was in no way bound by the recommendation of the parties.

[38] The applicant also submits that the joint recommendation was reasonable because the offence he was accused of committing corresponded to a minor offence as defined in Annex A of CD 580. The applicant contends that the Commissioner's Directives are regulations that the ICP is required to respect.

[39] Second, the applicant maintains that it was unreasonable for the ICP to conclude that the offence had been proven beyond a reasonable doubt.

[40] In this regard, he asserts that the ICP failed to exercise his inquisitorial role fairly by completing an investigation before hearing his testimony. The applicant maintains that it would clearly not be possible to base a finding of guilt beyond a reasonable doubt on the testimony of Mr. Bonneau alone. The applicant insists that even though Mr. Bonneau indicated that the CX-4 officer had informed him that, in his opinion, the applicant did not have a valid reason to justify triggering the alarm, evidence showing how the CX-4 officer had come to this conclusion was never submitted. The applicant maintains that in light of this insufficient evidence, the ICP should have dismissed the charge or ordered the CX-4 officer to testify. The applicant adds that in denying his application for non-suit, the ICP forced him to testify even though the evidence, up to that point, was not sufficient to find him guilty beyond a reasonable doubt.

[41] The applicant also submits that the ICP erred in limiting his analysis of the offence in question solely to emergency situations. He should also have considered situations concerning abusive and unnecessary use of the alarm. According to the applicant, there was uncontested evidence which demonstrated that he had a medical reason to explain and justify his decision to trigger the alarm.

[42] Lastly, the applicant submits that in order to find him guilty of the offence, the ICP would also have to determine whether he had acted wilfully as opposed to just recklessly. In his opinion, the uncontested evidence demonstrated that he had triggered the alarm for medical reasons and had done so under exceptional circumstances (the ongoing strike at the Institution and his repeated requests to obtain his medication). He therefore maintains that the evidence demonstrated that he had not triggered the alarm abusively. The applicant therefore argues that,

based on the evidence, there is some doubt as to whether he committed the offence wilfully, and that the ICP had no way of concluding that the offence had been established beyond a reasonable doubt.

[43] Alternatively, the applicant submits that the joint recommendation on the sentence was reasonable, and that consequently, the ICP was not in a position to disregard it.

B. *Respondent's position*

[44] The respondent argues that the ICP did not have any obligation to accept the joint recommendation of the parties and amend the offence to a minor offence. The respondent submits that it is the responsibility of the institution head or a delegated representative of the institution head to determine the category of a disciplinary offence. On this point, the respondent refers to subsection 41(2) of the Act and sections 8 and 9 of CD 580. In this case, the determination of the category of the offence which the applicant was accused of committing complied with the applicable rules.

[45] The respondent's position was also based on section 34 of the Regulations, which requires the ICP to consider certain factors in the context of sentencing, including "any recommendations respecting the appropriate sanction made during the hearing" (paragraph 34(*g*)). In the opinion of the respondent, Parliament explicitly stated that the ICP was required to consider recommendations respecting the sanction and could have opted to be just as explicit in imposing a similar obligation for the determination of the category of the offence. Since there are no explicit instructions in this regard, Parliament did not intend to impose any

such obligation on the ICP when considering whether the offence truly relates to a serious offence.

[46] The respondent adds that it is only when the ICP determines that the offence in question relates to a minor offence, rather than a serious offence, that the ICP has an obligation to amend the charge. The ICP does not have an obligation to conclude that an offence belongs in the category of minor offences. In this case, the ICP found that the offence which the applicant was accused of committing constituted a major offence, and there is no evidence to indicate that the ICP had an obligation to accept or even consider the joint recommendation of the parties and to amend the charge.

[47] The respondent also maintains that the ICP did not err in concluding that the offence had been proven beyond a reasonable doubt because there was sufficient evidence to support a finding of guilt. In this regard, Mr. Bonneau stated that the CX-4 officer, whom he had directed to check on what was actually happening, had informed him that everything was normal and that nothing out of the ordinary had happened, and that is why the offence report was issued. The applicant also provided an explanation for why he had triggered the alarm, namely, to obtain Motrin. The respondent argues that it was reasonable to conclude that activating the alarm in order to obtain Motrin did not constitute an emergency situation. It was therefore reasonable for the ICP to conclude that based on the evidence, he was convinced beyond a reasonable doubt that the applicant had triggered the alarm without valid reason.

[48] Lastly, the respondent maintains that the ICP did not err in the choice of sentence imposed on the applicant and that all the relevant factors had been considered. The respondent claims that the ICP did indeed take the joint recommendation of the parties into consideration but did not have an obligation to fully endorse it. Moreover, the ICP explained why he decided to impose a sentence that was slightly more severe than the one recommended by the parties: he was not convinced that the applicant recognized that he had committed a serious offence and wanted to dissuade him from doing it again.

VI. **Analysis**

(1) Did the ICP err in refusing to conclude that the offence related to a minor offence rather than a serious offence?

[49] I am of the opinion that the ICP's interpretation of his obligation under subsection 30(3) of the Regulations was reasonable. It is useful to again reproduce subsection 30(3) of the Regulations:

30. (3) Where the independent chairperson determines that a charge of a serious offence should proceed as a charge of a minor offence, the independent chairperson shall amend the charge and shall conduct the hearing or refer the matter to the institutional head.	30. (3) Lorsque le président indépendant conclut qu'une accusation d'infraction grave se rapporte plutôt à une infraction mineure, il doit modifier l'accusation et soit tenir l'audition disciplinaire, soit renvoyer l'affaire au directeur du pénitencier.

[50] First, subsection 41(2) of the Act and section 8 of CD 580 clearly indicate that it is initially incumbent on the institution head or the staff member to whom such authority is delegated (section 9 of CD 580) to determine whether it is appropriate to lay a charge for a

disciplinary offence. Section 8 of CD 580 provides that the category of a disciplinary offence is determined by considering the gravity of the alleged misconduct and the existence of any aggravating or mitigating factors.

[51] Subsection 30(3) of the Regulations requires the ICP to review the category of the offence determined by the institution head. When the ICP has conducted this review and is satisfied that a charge of a serious offence should instead be dealt with as a minor offence, he or she is to amend the charge. However, this obligation only applies if the ICP deems that the category of the offence relates to a minor disciplinary offence. In this case, the ICP clearly indicated that in his opinion, the offence which the applicant was accused of committing constituted a serious offence.

a) *Did the ICP err in disregarding the joint recommendation with respect to the category of the offence?*

[52] Subsection 30(3) of the Regulations does not state that the ICP must consider a joint recommendation by the parties in the context of reviewing the category of the offence, and no other provision of the Act, the Regulations or CD 580 requires the ICP to consider this factor.

[53] It is worth noting that, as indicated by counsel for the respondent, paragraph 34(*g*) of the Regulations states that a recommendation presented during a hearing should constitute one of the factors to be considered by the ICP when establishing the sanction to be imposed. Therefore, in the context of sentencing, Parliament explicitly requires the ICP to consider the recommendations of the parties. I find that if Parliament had also wanted the ICP to consider a

joint recommendation when reviewing the category of the offence, this would have been explicitly and clearly indicated as well.

[54] The following comments by Professor Côté in Pierre-André Côté, *Interpretation of Legislation*, 4th ed., Montréal, Thémis, 2009, pages 326, 356 and 358, are in my view applicable in this context:

> It is reasonable to assume that the rationality of the legislature first manifests itself within a particular enactment: the statute is to be read as a whole, and each of its components should fit logically into its scheme. . . .
>
> . . .
>
> The presumption that the drafter is logical allows implicit conclusions to be drawn from explicit rules.
>
> . . .
>
> Examples of *a contrario* arguments in case law are numerous. . . . For example, if a statute mentions a part of a whole and then defines a rule to be applied to that part, it may be concluded that the rule does not apply to the unmentioned parts of the whole . . . .

[55] In this case, I find that the intent of Parliament is clearly indicated: the ICP has an obligation to consider a joint recommendation by the parties in the context of sentencing, but there was no intent to impose this same obligation on the ICP in the context of reviewing a charge to determine whether it actually relates to a serious offence.

[56] Moreover, the principle of deference to joint recommendations, which was emphasized by the applicant, generally applies in the context of sentencing in criminal law or of sanctions concerning ethics and standards of professional conduct. It is precisely this principle which is

codified in paragraph 34(*g*) of the Regulations. Moreover, almost all the authorities cited by the applicant concerned cases where joint submissions related to recommendations regarding the sanction. In my view, it is also relevant to note that in this case, the applicant did not ask the ICP to amend the charge in exchange for pleading guilty to a minor offence. He simply asked the ICP to amend the charge so that it related to a minor offence rather than serious offence.

[57] Nonetheless, I find that in this case, the intent of Parliament is clear and that it is not necessary to resort to precedents in criminal or disciplinary matters. I therefore believe that the ICP rendered a reasonable decision when he stated that he was not bound by the recommendation of the applicant and the assessor at the Institution. My decision would still be the same if the ICP's decision in this regard had to be analyzed on the basis of the rule of correctness.

b) *Did the ICP err in ruling on the category of the disciplinary offence in question before even hearing the evidence?*

[58] It seems clear to me that the ICP could rule on the category of the offence in question without hearing the evidence. Subsection 30(3) of the Regulations clearly indicates that the ICP must review the category of the offence in question before the hearing, so this review would have to occur before the evidence is presented. The role of the ICP at this stage is not to determine whether the evidence shows that the applicant committed the offence, but to determine whether the alleged actions do indeed correspond to a serious disciplinary offence.

c) *Did the ICP err in his interpretation of CD 580?*

[59] I will now look at whether the ICP complied with the provisions of CD 580 in deciding to consider the offence in question as a serious offence rather than a minor offence.

[60] In his decision, the ICP did not refer to subsection 30(3) of the Regulations and the provisions of CD 580 in explaining why he felt that the offence in question was not a minor offence. However, I believe that it can be assumed that the ICP took both the Regulations and CD 580 into consideration and that his decision resulted from an implicit interpretation of the relevant provisions of CD 580. In my opinion, the remarks by Justice Lebel in *Agraira*, at paragraphs 55-57 are directly applicable to this case:

> [55] The meaning of the term "national interest" in s. 34(2) of the *IRPA* was central to the Minister's exercise of discretion in this case. As is plain from the statute, the Minister exercises this discretion by determining whether he or she is satisfied by the applicant that the applicant's presence in Canada would not be detrimental to the national interest. The meaning of "national interest" in the context of this section is accordingly key, as it defines the standard the Minister must apply to assess the effect of the applicant's presence in Canada in order to exercise his or her discretion.
>
> [56] The Minister, in making his decision with respect to the appellant, did not expressly define the term "national interest". The first attempt at expressly defining it was by Mosley J. in the Federal Court, and he also certified a question concerning this definition for the Federal Court of Appeal's consideration. We are therefore left in the position, on this issue, of having no *express* decision of an administrative decision maker to review.
>
> [57] This Court has already encountered and addressed this situation, albeit in a different context, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. In that case, Rothstein J. held that a decision maker's decision on the merits may imply a particular

> interpretation of the statutory provision at issue even if the decision maker has not expressed an opinion on that provision's meaning.

[61] In my opinion, the ICP's decision was not unreasonable, in light of the provisions of CD 580. Annex A of CD 580 provides the following definitions for each category of offence:

> **Serious Offence**: when an inmate commits, attempts, or incites acts that are serious breaches of security, violent, harmful to others, or repetitive violations of rules.
>
> **Minor Offence**: negative or non-productive inmate behaviour that is contrary to institutional rules.

[62] Section 8 of CD 580 states that the institution head can lay a charge for a minor or serious offence depending on the severity of the alleged misconduct and any aggravating or mitigating factors. I find that section 8 and the definitions provided in Annex A of CD 580 are written in terms that are sufficiently broad enough to allow the ICP a certain degree of discretion.

[63] In this case, the applicant was accused of triggering the alarm in his cell without valid reason. The applicant maintains that the offence corresponds to a charge of conduct contrary to institutional rules, in this case, section 4 of the Institutional Regulations, and that this clearly involves a minor offence as defined in CD 580 because it was the first violation of an institutional rule. I agree that the applicant was accused of adopting behaviour that was contrary to the Institutional Regulations and that this was not a first offence. Nonetheless, I do not find that the definitions are so restrictive that it must be concluded that any behaviour that is contrary to the rules of the institution constitutes a minor offence when it is also a first offence. On the contrary, serious offences could also involve actions which clearly constitute violations of the

rules of the institution but are much more serious, even without necessarily being repeat offences.

[64] In his decision, the ICP explained why he felt that the offence in question constituted a serious offence, and his explanations show that he considered the action committed by the applicant to raise issues related to safety and emergencies. Below is an excerpt of the reasons presented to the parties:

> [TRANSLATION]
>
> It is not a minor offence because there are consequences. First, the alarm is there for everyone's protection. If it is activated abusively and is triggered for any reason, including reasons which have nothing to do with safety, which have nothing to do with health, or which have nothing to do with emergency situations, then we will find ourselves in a situation where, ultimately, everyone will be rushing around to get information, as was the case here.
>
> When an alarm is triggered, we do not know why it was activated. Is there a fire somewhere? Is someone in poor physical condition? Is someone experiencing health problems? Does someone need immediate and urgent assistance? That is what it is for—that is what the alarm is for.
>
> When it is triggered for any other reason, this is not a minor thing because it has major consequences in terms of staff deployment, the use of staff, and levels of stress felt by everyone, and this is not a minor thing, far from it. . . .

[65] Given the actions that the applicant is accused of committing, namely, pressing the alarm button in his cell, which is only supposed to be done in emergency situations, it was not unreasonable to conclude, in light of the definitions provided for each category of offence, that the offence which the applicant is accused of committing constituted a major offence. Indeed, triggering an emergency alarm without a valid reason could be viewed as a serious safety breach.

Triggering the alarm in a cell is reserved for emergency situations, and trivializing the importance of limiting its use to emergency situations could compromise the safety of inmates and staff. I therefore find that, considering the nature of the action that the applicant is accused of committing, the ICP's interpretation of CD 580 was reasonable.

(2) Did the ICP err in concluding that the evidence demonstrated beyond a reasonable doubt that the applicant had committed the offence with which he was charged?

a) *Did the ICP breach his duty of procedural fairness by refusing to allow the applicant's application for non-suit?*

[66] The applicant maintains that the ICP breached procedural fairness by denying his application for non-suit. In the applicant's opinion, Mr. Bonneau's testimony was clearly insufficient to conclude that he had in fact triggered the alarm in his cell without valid reason, because Mr. Bonneau could not provide any testimony on his reasons for triggering the alarm. Mr. Bonneau could only recall that he had been informed by the CX-4 officer, whose identity he could not remember, that there was no justification for triggering the alarm.

[67] In order to find an inmate guilty of a disciplinary offence, the ICP must be convinced beyond a reasonable doubt, based on all the evidence, that the inmate committed the offence he is accused of committing (subsection 43(3) of the Act and *Ayotte v Canada (Attorney General)*, 2003 FCA 429, at paragraph 14, [2003] FCJ No 1699 [*Ayotte*]).

[68] However, disciplinary charges in a correctional setting are heard in the context of an administrative proceeding which must be adaptable and flexible, and the ICP assumes an

inquisitorial role. In *Forrest*, at paragraph 16, the Court adopted the principles which govern discipline in a correctional setting and which have been recognized by our Court for a number of years:

> [16] The nature of the standard of review for a disciplinary court in a penitentiary was set out in *Canada (Correctional Services)* v. *Plante*, [1995] F.C.J. No. 1509 (F.C.T.D.) per Pinard J.:
>
> > 6 The nature and functions of the disciplinary court in question were well summarized by my colleague Denault J. in *Hendrickson* v. *Kent Institution Disciplinary Court (Independent Chairperson)* (1990), 32 F.T.R. 296, at 298 and 299:
> >
> > The principles governing the penitentiary discipline are to be found in Martineau (No. 1) (supra) and Martineau v. Matsqui Institution Disciplinary Board (1979), 30 N.R. 119; 50 C.C.C. (2d) 353 (S.C.C.); Blanchard v. Disciplinary Board of Millhaven Institution (1982), 69 C.C.C. (2d) 171 (F.C.T.D.); Howard v. Stony Mountain Institution Inmate Disciplinary Court (1985), 57 N.R. 280; 19 C.C.C. (3d) 195 (F.C.A.), and may be summarized as follows:
> >
> > 1. A hearing conducted by an independent chairperson of the disciplinary court of an institution is an administrative proceeding and is neither judicial nor quasi-judicial in character.
> >
> > 2. Except to the extent there are statutory provisions or regulations having the force of law to the contrary, there is no requirement to conform to any particular procedure or to abide by the rules of evidence generally applicable to judicial or quasi-judicial tribunals or adversary proceedings.
> >
> > 3. There is an overall duty to act fairly by ensuring that the inquiry is carried out in a fair manner and with due regard to natural justice. The duty to act fairly in a disciplinary court hearing requires that the person be aware of what the allegations are, the evidence and the nature of the evidence against him and be afforded a reasonable opportunity to respond to the evidence and to give his version of the matter.

> 4. The hearing is not to be conducted as an adversary proceeding but as an inquisitorial one and there is no duty on the person responsible for conducting the hearing to explore every conceivable defence, although there is a duty to conduct a full and fair inquiry or, in other words, examine both sides of the question.
>
> 5. It is not up to this court to review the evidence as a court might do in a case of a judicial tribunal or a review of a decision of a quasi-judicial tribunal, but merely to consider whether there has in fact been a breach of the general duty to act fairly.
>
> 6. The judicial discretion in relation to disciplinary matters must be exercised sparingly and a remedy ought to be granted "only in cases of serious injustice" (Martineau No. 2, p. 360).

[69] These principles are also adopted in *Ayotte*, at paragraph 9, and more recently in *Gendron*, at paragraph 15.

[70] Section 37 of CD 580 also sets out the flexible approach to be taken to the presentation of evidence:

> 37. The rules of evidence in criminal matters do not apply in disciplinary hearings. The Chairperson conducting the disciplinary hearing may admit any evidence he/she considers reasonable or trustworthy.

[71] In this case, and in response to the applicant's application for non-suit, the ICP gave the following reasons for denying the application:

> Well, I've heard Monsieur Bonneau, and Monsieur Bonneau has spoken to the officer who went to the cell, and he saw Mr. Swift. Mr. Swift, from what he saw, appeared perfectly normal, there was no reason to . . . and he didn't . . . I have no . . . nothing that can lead me to believe that Mr. Swift requested any kind of medical

> service or aid, and the officers who went to check in Mr. Swift's cell came back to the Control Room and told Mr. Bonneau that there was nothing to . . . worry about, that everything was normal, and that the alarm could be stopped.
>
> And that was the end of that as far as they were concerned, there was . . . and I have nothing to make me believe that there was an urgency, an emergency, or call it whatever you want . . . of any kind, and I'm sure that the . . . the report came . . . was written on this basis, that there was no emergency, and I have not the beginning of one little proof that it was contrary to that in any kind of proof before me, so I reject your request.

[72] Given the level of flexibility which the ICP is allowed in conducting the hearing and in admitting the evidence, I do not believe that the ICP failed to honour his duty to act fairly when he denied the application for non-suit.

[73] While it is accurate to say that, at that point in the investigation, the applicant's actual reason for triggering the alarm in his cell was unknown, Mr. Bonneau had nevertheless stated that he had received a report from the CX-4 officer indicating that no emergency situation had been noted and that, in fact, no additional intervention was required for the applicant. The ICP is not bound by the rules of evidence in civil and criminal matters, and he accepted Mr. Bonneau's testimony that the CX-4 officer had clearly reported that there was no emergency and that there was therefore no justification for triggering the alarm.

[74] I do not need to make a final determination on whether Mr. Bonneau's testimony was sufficient to support a finding of guilt beyond a reasonable doubt, because the applicant subsequently opted to testify. The applicant maintains that the ICP's decision somehow forced him to testify. With respect, there is nothing in the transcript of the hearing which leads me to

believe that the applicant was forced to testify. The applicant could very well have chosen not to testify and to await the final decision of the ICP, which would then have been rendered on the basis of the evidence that had been presented up to that point. However, in deciding to testify and in explaining why he chose to trigger the alarm in his cell, it was the applicant himself who provided the missing piece of evidence. Consequently, the applicant's testimony allowed the ICP to learn and appreciate the applicant's reasons for triggering the alarm in his cell.

b) *Did the ICP err in concluding that the offence had been proven beyond a reasonable doubt?*

[75] The stenographer's notes clearly show that the ICP weighed all of the evidence, including the explanations provided by the applicant, and that the ICP did not consider the reasons provided by the applicant to be valid reasons that would justify triggering the emergency alarm. It is not the Court's position to substitute its own assessment of the evidence for the ICP's assessment, and in my opinion it was not reasonable to conclude that triggering the emergency alarm in order to obtain non-essential medication did not constitute a valid reason. The ICP clearly indicated that, in his opinion, the offence had been committed beyond a reasonable doubt, and he clearly explained the basis for his decision.

[76] The applicant maintains that the ICP should not have limited his analysis to an "emergency" situation and should also have considered whether the applicant had engaged in abusive and unnecessary use of the alarm. In this regard, he claims that he had a medical reason to justify triggering the alarm and that his use of the alarm was therefore not abusive and unnecessary.

[77] With respect, the second paragraph of section 4 of the Institutional Regulations clearly indicates that triggering the alarm in the cell unnecessarily could lead to disciplinary measures. The act of triggering the alarm without a valid reason is clearly tantamount to triggering the alarm unnecessarily. The reasons provided by the ICP also clearly indicate that he believed that the applicant had triggered the alarm without having a valid reason to do so. As regards the medical reason claimed by the applicant, the ICP held that the circumstances did not justify triggering the alarm in the cell.

[78] The applicant further claims that the ICP should have made a determination on whether he had acted wilfully as opposed to just recklessly. With respect, the evidence clearly shows that the applicant triggered the alarm wilfully. He gave clear testimony on this point. He triggered the alarm because he wanted to speak to a corrections officer in order to obtain medication. The applicant deemed that the situation justified triggering the alarm, and he never stated that he had acted recklessly. Based on the evidence, one can easily infer from the ICP's decision that he believed that the applicant had acted wilfully.

(3) Did the ICP err in disregarding the joint recommendation on sentencing proposed by the parties?

[79] The applicant faults the ICP for failing to accept the parties' joint recommendation on sentencing. Inmates found guilty of a disciplinary offence may be subject to various sanctions which are listed under subsection 44(1) of the Act, including loss of privileges and segregation. Section 34 of the Regulations sets out the factors which must be considered during sentencing:

34. Before imposing a sanction described in section 44 of the	34. Avant d'infliger une peine visée à l'article 44 de la Loi, la

Act, the person conducting a hearing of a disciplinary offence shall consider	personne qui tient l'audition disciplinaire doit tenir compte des facteurs suivants :
(a) the seriousness of the offence and the degree of responsibility the inmate bears for its commission;	*a)* la gravité de l'infraction disciplinaire et la part de responsabilité du détenu quant à sa perpétration;
(b) the least restrictive measure that would be appropriate in the circumstances;	*b)* ce qui constitue la mesure la moins restrictive possible dans les circonstances;
(c) all relevant aggravating and mitigating circumstances, including the inmate's behaviour in the penitentiary;	*c)* toutes les circonstances, atténuantes ou aggravantes, qui sont pertinentes, y compris la conduite du détenu au pénitencier;
(d) the sanctions that have been imposed on other inmates for similar disciplinary offences committed in similar circumstances;	*d)* les peines infligées à d'autres détenus pour des infractions disciplinaires semblables commises dans des circonstances semblables;
(e) the nature and duration of any other sanction described in section 44 of the Act that has been imposed on the inmate, to ensure that the combination of the sanctions is not excessive;	*e)* la nature et la durée de toute autre peine visée à l'article 44 de la Loi qui a été infligée au détenu, afin que l'ensemble des peines ne soit pas excessif;
(f) any measures taken by the Service in connection with the offence before the disposition of the disciplinary charge; and	*f)* toute mesure prise par le Service par rapport à cette infraction avant la décision relative à l'accusation;
(g) any recommendations respecting the appropriate sanction made during the hearing.	*g)* toute recommandation présentée à l'audition quant à la peine qui s'impose.

[80] A recommendation by the parties constitutes one of the factors that the ICP is required to consider, but it is not the only relevant criterion. The ICP must also consider the seriousness of the offence and all relevant aggravating and mitigating circumstances. I therefore find that section 34 of the Regulations clearly shows that the ICP is not bound by a joint recommendation

proposed by the parties. In this case, the parties had suggested a suspended sentence of three days in segregation without privileges. The ICP deviated slightly from this recommendation by increasing the number of days to five, and the ICP clearly explained why he was imposing a sentence of five days:

> What bothers me here, I see that you're suggesting something that . . . you're doing that with the administration and by . . . with this . . . the assessor, and on the other hand, I'm bothered by the fact . . . and I'll tell you what bothers me, is that Mr. Swift, from what he says, does not realize that it is a serious offence, and an offence that cannot be repeated.
>
> I will accept the suggestion. I will accept the suggestion, but that will not be three (3) days, that will be five (5) days. My concern is that this is not repeated.

[81] There is nothing unreasonable in the ICP's reasoning here or in the sentence imposed on the applicant.

[82] For all these reasons, I find that there is no justification for the Court's intervention in this case.

JUDGMENT

THIS COURT'S JUDGMENT IS that the application for judicial review is dismissed with costs.

"Marie-Josée Bédard"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-711-14
STYLE OF CAUSE:	MICHEAL SWIFT v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	OCTOBER 6, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	BÉDARD J.
DATED:	DECEMBER 1, 2014

APPEARANCES:

Rita Magloé Francis	FOR THE APPLICANT
Claudia Gagnon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rita Magloé Francis Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT