Federal Court  Cour fédérale

Date: 20161122

Docket: T-1709-15

Citation: 2016 FC 1293

[REVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 22, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

DEVEN SCHMIT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Deven Schmit is seeking an order to set aside a decision issued against him by an Independent Chairperson with respect to a serious disciplinary offence that he allegedly committed. At the time said offence was committed, Mr. Schmit was an inmate at a federal penitentiary in Donnacona, Quebec. The offence for which he was found guilty is documented in an "Inmate Offence Report and Notification of Charge" bearing number 008844. The only detail provided is that Mr. Schmit [TRANSLATION] "was reported for making a mask for himself." The

only description of the item that is given in the document is [TRANSLATION] "mask made with blue sheet and a piece of suede."

[2] The *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act], provides a definition of disciplinary offences. Here, the decision was made to lay a charge under paragraph (*m*) of section 40, which reads as follows:

Disciplinary offences	**Infractions disciplinaires**
40 An inmate commits a disciplinary offence who	40 Est coupable d'une infraction disciplinaire le détenu qui :
[…]	[…]
(m) creates or participates in	m) crée des troubles ou toute autre situation susceptible de mettre en danger la sécurité du pénitencier, ou y participe;
(i) a disturbance, or	
(ii) any other activity	
that is likely to jeopardize the security of the penitentiary;	

[3] Submitting that the decision is unreasonable and that breaches of procedural fairness were committed, the applicant is requesting judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of the decision by an Independent Chairperson that found him guilty.

I. Facts

[4] A fight took place in the institution's gymnasium on June 16, 2015. The applicant was present. Apparently, the authorities were unable to establish his participation in this incident because no charge was laid in this regard. Despite this, the applicant was placed in administrative segregation on June 16, 2015.

[5] On June 17, 2015, guards at the institution searched the applicant's cell and found an item among his clothes that were in the back of the cell occupied by Mr. Schmit. This is the item referred to in this case. As noted in form 008844, it is alleged that the item that was found is a mask. However, for a reason that was never adequately explained, the item was destroyed, and the penitentiary authorities did not take photographs of it before it was destroyed. The explanation given at the hearing by the official who presented the case to the Independent Chairperson is somewhat confusing. The following passage is at page six of the transcripts:

> THE ASSESSOR:
> Yeah. Okay. I can, -- I can tell that we, -- we don't have any pictures. We don't have the mask as we usually do with brew, alcohol, and some evidence that we don't need to keep for security purpose. We just destroy them and that mask has been destroyed. It has been shown at the first (1st) hearing. And right now we, -- we don't have the, -- the, -- the evidence with us. It's up to you, Mr. President…
>
> [TRANSLATION]
>
> L'ASSESSEUR:
> Oui, d'accord. Je peux, -- je peux vous dire que nous, -- nous n'avons pas de photographies. Nous n'avons pas le masque comme c'est généralement le cas avec la broue, l'alcool et certains éléments de preuve qu'il ne nous est pas nécessaire de conserver pour des raisons de sécurité. Nous les détruisons tout simplement et le masque a été détruit. Il a été montré à la première (1re)

> audience. Et maintenant nous, -- nous n'avons pas la, -- la, -- la preuve avec nous. C'est à vous de décider, M. le Président…

It now seems established that the item was not shown at a previous hearing, and it is difficult to understand how such an item could have been destroyed for security reasons. In fact, it is unclear from the passage quoted that security reasons were even cited. In any event, the result was that the Independent Chairperson had to be satisfied with the description of the item given by one of the officers who conducted the search in order to conclude that it was a homemade mask.

[6] The description given by the officer is not very clear. It would seem that the item is the insole of a boot about 10 inches long and black that was in [TRANSLATION] "a semi-leather fabric." The insole, which would be used inside shoes, was about four inches wide. It appears that strips made from sheets were attached to each side of the insole. The witness indicated that there was no hole pierced to enable the wearer to see, but rather: [TRANSLATION] "Um…to my recollection there were small holes like (inaudible) that are in insoles. Insoles of boots." (transcripts, page 17).

[7] At best, the evidence presented by the officer was that the applicant could have hidden his nose and mouth. In addition, I note that the officer's testimony was constantly [TRANSLATION] "improved" by the intervention of the assessor (the official who was to present the evidence), who corrected and enhanced the testimony of the officer who had conducted the search. That was, moreover, one of the criticisms made by the respondent.

[8] Despite the fact that counsel for the applicant stated at the hearing that her client did not intend to testify, the Independent Chairperson questioned him, insisting that he had the authority to do so and that he was acting within his discretion. Since his role was inquisitorial, he was authorized to question the applicant. In any event, the exchange produced only a denial by Mr. Schmit that he had been in possession of such an item ("I didn't have anything like that in my cell", transcripts, page 64). At most, the applicant stated that he had not been charged with participating in the fight and that, if he had had such a mask, he should have used it at that time to hide his identity (transcripts, page 73), thus attempting to show that he was not in possession of the mask.

II. Impugned decision

[9] The decision rendered at the hearing is difficult to read. Given orally, this resulted, as is often the case, in somewhat disjointed statements. In any event, the Independent Chairperson began by referring to "contraband," the definition of which is in section 2 of the Act (in French "*objets interdits*") and to items prohibited by a directive or a written order. It is not clear how this was pertinent to his decision other than to explain why the searches were performed. The Independent Chairperson did not attempt to explain why these provisions concerning prohibited possession were not used. The Independent Chairperson seemed to be satisfied that something similar to a mask had been identified by the only witness who testified that it was a mask (transcripts, page 84). Moreover, the Independent Chairperson was satisfied that the item as described could be characterized as a mask because it hid the face in whole or in part. Furthermore, the Independent Chairperson stated that the mask

> [TRANSLATION] . . .could be partial. It could be all kinds of things−it could take all kinds of forms, a mask. It is everything that can make−the simplest definition. It is anything that can make the identification of a person, through his face, difficult or sometimes impossible. A mask is−it's simply that. It's not−it's not complicated. It's not technical, it's something that−that is commonly recognized as an item that enables a person to hide his face partially or totally.
>
> (Transcripts, pages 85-86)

[10] Therefore, the Independent Chairperson stated that he was satisfied that the item was a mask and that the mask was found in the cell occupied by Mr. Schmit because inmates must, according to the Independent Chairperson, [TRANSLATION] "be responsible, they are automatically and without reservation, responsible for−objects that are inside their cells"; the applicant is therefore guilty.

[11] Being in administrative law, the Independent Chairperson added that this was not a case where *mens rea* must be present. He stated that [TRANSLATION] "this is not mens rea, I don't even need to discuss that. What I need to discuss is the facts. This is a factual matter" (transcripts, page 88). Thus, according to the Independent Chairperson, the only thing that has to be proved is the *actus reus*.

[12] It seems quite clear to me that what Mr. Schmit was found guilty of was being in possession of a mask and nothing more. The following appears at page 89 of the transcripts: "I find you guilty because I have no doubt in my mind that this thing was in, -- in your cell. Whether it was put there by you or not…". After being interrupted by counsel for the applicant, the Independent Chairperson continued:

I find you guilty. I don't, -- I'm, -- I'm not telling you that you were, -- you're the worst person in the world. I'm just telling you that you had something that was called a mask and that was found in your possession in the cell that you occupy and for which you have the full responsibility at all times... I don't have to be convinced that you had the intention of using it, That you did want to do something wrong with it or something like that. But something that was subse..., -- that could be used to do something of that nature was found and this is sufficient, according to the law that we, -- which is called kind of administrative law, it is, -- it is different. You don't have to be, -- have a, -- an intention, a bad intention about that. I don't know about that. I'm not, -- I'm not inquiring about that. It didn't know, -- I don't know what you wanted to do with that. I don't, -- I have no idea.

But what I know is that it was there. That it could be used in a way that was, -- that could be dangerous for the security of the institution. It could be used for that. I'm not saying that was your intention, but that could be done and this is the fact that I have to establish and those facts are established and that's why I find you guilty. [Emphasis added.]

[TRANSLATION]

Je vous déclare coupable. Je ne, -- Je, -- Je ne vous dis pas que vous avez été, -- vous êtes la pire personne au monde. Je vous dis simplement que vous aviez un objet appelé un masque et qui a été trouvé en votre possession dans votre cellule et pour laquelle vous êtes entièrement responsable en tout temps... Je n'ai pas à être convaincu que vous aviez l'intention de l'utiliser, que vous vouliez faire quelque chose de mal ou de semblable avec cet objet. Mais quelque chose qui était subse..., -- qui pouvait être utilisé pour faire quelque chose du genre a été trouvé et cela suffit, selon la loi que nous, -- que l'on appelle un genre de droit administratif, c'est, -- c'est différent. Vous n'avez pas à être, – à avoir, -- une intention, une mauvaise intention à ce sujet. Je ne sais pas ce qu'il en est. Je ne, -- Je ne me pose pas cette question. Il ne le savait pas, -- Je ne sais pas ce que vous vouliez faire avec cela. Je n'en ai, -- Je n'en ai aucune idée.

Mais ce que je sais c'est qu'il était là. Qu'il pouvait être utilisé d'une manière qui était, -- qui pouvait être dangereuse pour la sécurité de l'établissement. Il pouvait servir à cette fin. Je ne dis pas que c'était votre intention, mais que cela était possible et ce fait est celui que je dois établir et qui est établi et c'est pourquoi je vous déclare coupable. [Emphasis added.]

Essentially, the applicant was found guilty of being in possession of an item that the decision maker considered to be a mask without having seen it; such a mask could be used in a manner that could be dangerous for the security of the penitentiary.

III. Submissions of the parties

[13] The applicant submits that there are two types of error. He contends that the decision to find him guilty is unreasonable. He also argues that there was a breach of procedural fairness because (a) the physical evidence was destroyed; (b) the Independent Chairperson forced the applicant to answer his questions and (c) the assessor's repeated interventions breached procedural fairness.

[14] Recognizing that the reasonableness standard applies to questions other than procedural fairness, the applicant says that the *mens rea* required for the commission of the offence was not established. According to this argument, it would have been necessary to demonstrate that the applicant intended to jeopardize the security of the penitentiary. How can the insole of a boot jeopardize the security of the penitentiary? The item did not allow a person to see because it did not provide a hole for the eyes.

[15] The applicant, without citing any authority, argues that the intention to jeopardize the security of the institution is an essential element of the offence; the mere presence of contraband is not sufficient. Note also that paragraph 40(*j*) of the Act refers to possession of an item that is

not authorized by a Commissioner's Directive or by a written order of the institutional head, which is not the case in paragraph 40(*m*).

[16] As for the breaches of procedural fairness, the applicant does not provide any authority to support his arguments.

[17] The respondent submits that the issue to be resolved is whether the Independent Chairperson's decision is reasonable. Because the offence created would be a strict liability offence, it is not necessary to prove criminal intent, and the Independent Chairperson's decision was reasonable.

[18] Having indicated that the question before the Court was subject to the reasonableness standard, the respondent nonetheless admitted that questions of procedural fairness are subject to the correctness standard of review. The Independent Chairperson was correct about the three issues raised by the applicant. The evidence presented by the correctional officer regarding the item he allegedly seized was sufficient. Section 11 of the *Canadian Charter of Rights and Freedoms* (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, which constitutes Schedule B to the *Canada Act 1982* (UK), 1982, c 11) cannot be invoked in prison cases, and the respondent found shelter behind the inquisitory nature of the proceedings to conclude that procedural fairness was respected.

IV. Standard of review and analysis

[19] Questions of fact and questions of mixed fact and law are reviewed on a standard of reasonableness. The case law to this effect is abundant and unanimous (*Boucher-Côté v. Canada (Attorney General)*, 2014 FC 1065, and the case law cited therein; *Canada (Attorney General) v. Blackman*, 2016 FC 488). For questions related to procedural fairness, it is generally recognized that they are reviewed on a standard of correctness (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 SCR 502, at paragraph 79). But again these questions must relate to procedural fairness.

[20] The decision under review is a question of mixed fact and law. Is the applicant guilty of the alleged offence? In my opinion, this matter should be resolved in Mr. Schmit's favour. The charge laid against him under paragraph 40(*m*) does not correspond to the only facts that were established. The mere possession of a thing cannot create an activity that is likely to jeopardize the security of the penitentiary. In fact, the inmate was found guilty of the potential use of an item, which does not correspond to the wording of paragraph 40(*m*). Neither the evidence nor the reasons justify the conviction.

A. *Is the decision reasonable?*

[21] This decision is outside the bounds of reasonableness. When the decision under review is examined more closely, it is apparent that the offence for which Mr. Schmit was convicted is an offence of possession of an item that if used could create an activity that is likely to jeopardize the security of the penitentiary. The passage quoted in full at paragraph 12 of these reasons is

persuasive evidence of this. Moreover, this was the only evidence presented to the Independent Chairperson. Essentially, the Independent Chairperson did two things. He noted the possession of an item that he was satisfied was a mask. Then, he concluded that this was an item that could be used in a manner dangerous to the security of the penitentiary, without finding that the applicant had this malicious intent. That is not required to establish guilt.

B. *The conviction*

[22] Based on these facts alone, the Independent Chairperson concluded that the offence set out in paragraph 40(*m*) of the Act was proven. This is problematic on a number of fronts:

a) the mere possession of contraband is already an offence set out specifically elsewhere;

b) the behaviour prohibited in paragraph 40(*m*) cannot be mere possession. The wording of the paragraph is quite different. The English version of the text removes any ambiguity;

c) in examining the wording of paragraph 40(*m*), it is apparent that the essential elements of the offence were not demonstrated. Even if one wanted to assume that possession is prohibited in paragraph 40(*m*), it would still be necessary to prove that the possession created a disturbance or activity, which could in itself be difficult and was not done in this case. The inmate was not convicted of possession that in itself created a disturbance as indicated in paragraph 40(*m*). The inmate was convicted of having an item that "could be used in a way that was, -- that could be dangerous for the security of the institution. It could be used for that." Therefore, the applicant was convicted of behaviour that does not constitute the *actus reus* of the offence.

(a) Possession

[23] The first difficulty was to have found that there was possession in order to be satisfied that this could constitute the offence described in paragraph 40(*m*). However, the Act contains paragraphs where the possession of certain items is prohibited. That is not the case in paragraph 40(*m*).

[24] Paragraphs (*i*) and (*j*) of section 40 are the paragraphs in question:

Disciplinary offences	**Infractions disciplinaires**
40 An inmate commits a disciplinary offence who	40 Est coupable d'une infraction disciplinaire le détenu qui :
[…]	[…]
(i) is in possession of, or deals in, contraband;	i) est en possession d'un objet interdit ou en fait le trafic;
(j) without prior authorization, is in possession of, or deals in, an item that is not authorized by a Commissioner's Directive or by a written order of the institutional head;	j) sans autorisation préalable, a en sa possession un objet en violation des directives du commissaire ou de l'ordre écrit du directeur du pénitencier ou en fait le trafic;

The contraband referred to in paragraph (*i*) is itself defined in section 2, and it is the counterpart to the definition of the word "contraband". It reads as follows:

contraband means	**objets interdits**
(a) an intoxicant,	a) Substances intoxicantes;
(b) a weapon or a component thereof, ammunition for a weapon, and anything that is designed to kill, injure or disable a person or that is	b) armes ou leurs pièces, munitions ainsi que tous objets conçus pour tuer, blesser ou immobiliser ou modifiés ou assemblés à ces fins, dont la

altered so as to be capable of killing, injuring or disabling a person, when possessed without prior authorization,	possession n'a pas été autorisée;
(c) an explosive or a bomb or a component thereof,	c) explosifs ou bombes, ou leurs pièces;
(d) currency over any applicable prescribed limit, when possessed without prior authorization, and	d) les montants d'argent, excédant les plafonds réglementaires, lorsqu'ils sont possédés sans autorisation;
(e) any item not described in paragraphs (a) to (d) that could jeopardize the security of a penitentiary or the safety of persons, when that item is possessed without prior authorization; (*objets interdits*)	e) toutes autres choses possédées sans autorisation et susceptibles de mettre en danger la sécurité d'une personne ou du pénitencier. (*contraband*)

[25] One might have thought that paragraph (*e*) of the definition could have been the most likely to be used to try to establish the applicant's guilt under paragraph 40(*i*). The applicant was not charged with being in possession of contraband, which is defined in section 2. One could suspect that what discouraged the use of paragraph 40(*i*) is that, although the term *"objet interdit"* has a neutral meaning in French, the connotation of the English equivalent "contraband" is more charged, having this element of illegal, clandestine entry. For the limited purposes of the case under review, it suffices to see the difference between the wording of paragraph 40(*i*), which prohibits possession where an item has the characteristic of being likely to jeopardize the security of a penitentiary, and the wording of paragraph 40(*m*), which has a similar characteristic of jeopardizing the security of a penitentiary but does not deal with possession of an item. The possession of an item that is likely to jeopardize safety is prohibited

in paragraph 40(*i*). Therefore paragraph 40(*m*) must prohibit something other than possession likely to jeopardize safety.

[26] When Parliament wants to prohibit possession, it says so. What the applicant was charged with is creating a disturbance or activity that is likely to jeopardize the security of the penitentiary under paragraph 40(*m*), and not possession of contraband that is likely to jeopardize the security of the penitentiary under 40(*i*). Possession is specifically prohibited in paragraphs (*i*) and (*j*) of section 40.

(b) Paragraph 40(*m*) does not deal with possession.

[27] Paragraph 40(*m*) prohibits specific behaviour: the creation of a disturbance or the creation of any other activity that is likely to jeopardize the security of the penitentiary, or participating in such a disturbance or activity. Therefore, the mere possession of an item must be able to create such an activity. And it is this activity created by the inmate that must be likely to jeopardize the security of the penitentiary. The concept of creating an activity conflicts with the mere possession of an item. The English version of paragraph 40(*m*) refers to an "activity" or in French a *"situation"*. Thus, in English, it states "creates or participates in. . .any other activity" or in French *"crée. . .toute autre situation. . .ou y participe"*. The *Oxford Canadian Dictionary* (Canada: Oxford University Press, 2001) defines "activity" as "the condition of being active or moving about. (b) the exertion of energy; vigorous action" or in French as "le fait d'être actif ou de se mouvoir (b) le déploiement d'énergie; action vigoureuse." It seems to me that this is a far cry from the possession of an item, as in paragraphs 40(*i*) or (*j*), which is passive. What is referred to in paragraph 40(*m*) is clearly kinetic.

[28] In addition, the notion of "any other activity" or *"autre situation"* is associated with a "disturbance" or "troubles" in paragraph 40(*m*), which helps to articulate the concept (see *The Interpretation of Legislation in Canada* (Pierre-André Côté with the collaboration of Stéphane Beaulac and Mathieu Devinat), *Interpretation of Legislation in Canada*, 4th ed, (Montréal: Éditions Thémis, 2009), at paragraphs 1166 et seq., and *Sullivan and Driedger on The Construction of Statutes* (Ruth Sullivan), *Sullivan and Driedger on The Construction of Statutes*, 4th ed, (Markham: Butterworths Canada, 2002), on the subject of *noscitur a sociis*, pages 173 to 175). It is not any "activity" that the English version refers to but one that involves a "disturbance". In French, the other "situation" would consist of "troubles". The mere possession of a mask does not create an activity that consists of a disturbance.

[29] While the French and English versions could create some ambiguity about the real meaning, an attempt must be made to find the common meaning in the two versions. As the majority pointed out in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23, "[t]he shared meaning rule for the interpretation of bilingual legislation dictates that the common meaning between the English and French legislative texts should be accepted" (para 203; see also *R v. Daoust*, 2004 SCC 6, [2004] 1 SCR 217, and *R v. SAC*, 2008 SCC 47, [2008] 2 SCR 675).

[30] In this case, the common meaning, which is also the unequivocal meaning, is revealed by the word "activity" or in French "situation", itself associated with the word "disturbance" or in French "troubles". It is particularly true that the more passive meaning that is equivalent here to the mere possession of an item is rendered perfectly by paragraphs 40(*i*) and (*j*) of the Act. Thus,

the context of the section in question also results in giving the words "creates" or "participates in any other activity" an active meaning that the mere possession of an item does not provide.

[31] Both the common meaning of the two versions of paragraph 40(*m*) and the context in which it is found, where the possession of items is prohibited by different paragraphs, leads us to the conclusion that the meaning of the word "activity" or in French "situation" must take precedence. I could add that the text refers to creating or participating in a disturbance or activity, which again suggests that the mere possession of an item is not the creation of a disturbance and, even less, the participation in one.

[32] The Independent Chairperson's decision refers to an item that could be used in a dangerous manner. Nowhere did he conclude that mere possession could alone create an activity that is in itself likely to jeopardize security. Rather, he sought to find him guilty of being in possession of an item that if used could be dangerous. This statement seems to me to correspond more to paragraph 40(*i*) where the possession of the item must be likely to jeopardize the safety of persons or the security of a penitentiary. Both paragraph 40(*m*) and paragraph 40(*i*) require that the essence of the offence, possession in one case or the creation of or participation in an activity in the other, is likely to jeopardize security. However, in one case the possession of an item is at issue while in the other it is the creation of a disturbance or any other activity ("*situation*"). An inmate who is in possession of an item that is likely to jeopardize security will face a charge under 40(*i*); an inmate who creates a disturbance or other activity will be charged under 40(*m*). Where the only evidence is the possession of an item, without the creation of a disturbance or other activity, as required under paragraph 40(*m*), the charge under 40(*m*) is

invalid. Having an item that could be used to cause a disturbance or other activity is not creating a disturbance or other activity, which was the offence the applicant was charged with.

[33] Finally, I add that what the Act appears to prohibit in paragraph 40(*i*) is the possession of an item, an item that is itself likely to jeopardize the safety of persons or the security of the penitentiary. Here, the inmate was convicted of having an item that could be used to jeopardize security, according to the very words used by the Independent Chairperson.

(c) Creating a disturbance or other activity

[34] In fact, the conviction itself, with respect to the alleged facts, is the third difficulty in this case. Whether it is under 40(*i*), being in possession of an item that is likely to jeopardize security, or 40(*m*), creating a disturbance or jeopardizing security, the only facts alleged in this case are the possession of something that could be used for this purpose. This does not correspond to the wording under which the charge was laid, wording that constitutes the *actus reus* that Parliament chose to prohibit. The facts alleged must correspond to the behaviour prohibited by the legislation.

[35] If we focus on paragraph 40(*m*), which is the provision relied on in this case, we do not see an adequate link between the facts alleged and the offence in question. The only proven facts appear to be, in the decision maker's words, that the item could be used to jeopardize security. Therefore, it is the use of the item that could lead to a disturbance or other activity. We are thus quite far from the charge that was laid, which requires the creation of a disturbance or other activity. The only facts alleged are quite far from the offence that Parliament established. This is

not evidence of the alleged offence, which requires the very creation of a disturbance or an activity that is itself likely to jeopardize security, that was provided or, at least, that gave rise to the conviction. It is the potential use of this item. The activity ("*situation*") was not created. It would be created only if the item, the mask, was used. Being in possession of a mask is not the creation of a "situation", much less the creation of an activity. The *actus reus* that was found and demonstrated in this case is not the *actus reus* of the alleged offence.

[36] I have reproduced numerous passages from the Independent Chairperson's decision to establish that the applicant was convicted of the possession of an item that could be used. As indicated previously, if someone is charged with being in possession of contraband or of an item that is prohibited by a Commissioner's Directive or an order of the institutional head, it is necessary that that is the offence that is alleged. That is not the case here. Moreover, the mere possession of an item is not the creation of a disturbance or other activity that must be likely to jeopardize the security of the penitentiary. Possession of an item that could be used to create a disturbance corresponds even less to the wording establishing the offence. In other words, the simple possession that the Independent Chairperson noted was not the subject of the possible specific offence with regard to simple possession (paragraphs 40(*i*) and (*j*)), and this simple possession does not create a disturbance or other activity under 40(*m*). Possession of an item that can potentially be used to create a disturbance or activity is also not prohibited by paragraph 40(*m*).

C. *Mens rea*

[37] The discussion around the possible *mens rea* could originate from the confusion that emerged around the very nature of the offence that was alleged. The assessor attempted to justify the charge that was laid in these terms:

> All right, Mr. President, I will not have too much to say. The, -- the only thing I don't wanna clarify, -- I just wanna clarify is the reason why I have put the accusation under 40M. Usually that kind of thing would be, -- would have probably been put under 40J. That was, -- that would be a non-authorized object, but because of the situation that, -- that happened the day before, because Mr. Schmit was involved in that situation, it means to me and the ipso, -- and ipso, Mr. President, is an investigator in here. So with the, -- with what we, -- the meeting what, -- that I had with them, I took two (2) days to put the accusation just to make sure that I, -- I make up my mind on that, 40M means that he created trouble or could create trouble that cause a problem for the security purpose, and the security of the institution:
>
> > "Create or participate in a disturbance or any activity that could jeopardize the security of the penitentiary or the institution, the facility."
>
> So that means that probably that mask was to create or was supposed to help to create a situation. And we think that Mr. Schmit wanted to have that mask for the sit…, -- to use during the situation that happened the day before. That's why the accusation is under 40M instead of 40J. And for the, -- the rest of the, -- my allocution there, is the testimony of Mr. Villeneuve was pretty clear. He clar…, -- he clearly explained what he sees and what he saw and the mask was probably found, -- was surely found in that cell. And that's all. [Emphasis added.]
>
> [TRANSLATION]
>
> D'accord, M. le Président, je n'ai pas grand-chose à dire. La, -- la seule chose que je ne veux pas préciser, -- Je veux simplement préciser la raison pour laquelle j'ai fondé l'accusation sur l'alinéa 40 m). Généralement, ce type d'accusation aurait été, -- aurait probablement été fondé sur l'alinéa 40 j). C'était, -- cela aurait été pour un objet non autorisé, mais en raison de la situation qui, -- qui s'est produite la veille, parce que M. Schmit a participé à cette

> situation, cela signifie pour moi et l'ASPE, -- et l'ASPE, M. le Président, est un enquêteur ici. Donc après, -- après ce que nous, -- la rencontre quoi, -- que j'ai eu avec eux, j'ai pris deux (2) jours pour formuler l'accusation simplement pour m'assurer que je, -- Je décide que, l'alinéa 40 m) signifie qu'il a créé des troubles ou pouvait créer des troubles causant un problème lié à la sécurité, et à celle de l'établissement :
>
> > « Crée des troubles ou toute autre situation susceptible de mettre en danger la sécurité du pénitencier ou de l'établissement, de l'installation, ou y participe. »
>
> Donc cela signifie probablement que le masque visait à créer ou devait aider à créer une situation. Et nous sont d'avis que M. Schmit voulait avoir le masque pour la sit…, -- pour l'utiliser pendant la situation qui s'est produite la veille. C'est pourquoi l'accusation est fondée sur l'alinéa 40 m) plutôt que sur l'alinéa 40J. Et pour le, -- le reste de, -- mon allocution, est le témoignage de M. Villeneuve a été très clair. Il a préc…, -- il a clairement expliqué ce qu'il voit et ce qu'il a vu et le masque a probablement été trouvé, -- a sûrement été trouvé dans cette cellule. Et c'est tout. [Emphasis added.]
>
> (Transcripts, pages 79-80)

[38] Mr. Schmit did not appear in disciplinary court for the "activity" that occurred on June 16, 2015. He was not charged with participating in the fight that took place in the institution's gymnasium. The mask, if that is what it is, has nothing to do with the fight that occurred the day before Mr. Schmit's cell was searched. If Mr. Schmit had participated in the fight, he could have been charged. The record does not indicate why no charge was laid, but it could be surmised from the assessor's statements that it was because the available evidence was insufficient.

[39] What emerges from the assessor's statements is that an attempt was being made to sanction the applicant in some way because the mask "was to create or was supposed to help to create a situation." We do not know on what basis the assessor made this statement, but this

appears to be at the heart of the concerns that led to the charge under paragraph 40(*m*). Even more serious is the fact that possession of an item that could be prohibited is confused with the offence Mr. Schmit was charged with, which is to create a disturbance or an activity ("*situation*") that itself is likely to jeopardize the security of the penitentiary. What is prohibited is the creation of the activity ("*situation*"). This statement could only perpetuate the confusion. It was not indicated at the hearing before the Independent Chairperson or before this Court how an item as rudimentary as the one described by the witness could create a disturbance or any other activity that is likely to jeopardize the security of the penitentiary. In any event, this does not constitute the alleged offence. What had to be shown was that the applicant had "create[d] a disturbance or any activity". As the assessor and the Independent Chairperson said, the mask could have been used when a disturbance or other activities were created. This proves that the mask in itself creates nothing.

[40] Both the assessor and the Independent Chairperson knew intuitively that there was a problem. The assessor argued that the mask "was to create or was supposed to create a situation". However, the wording of the offence requires the direct creation of an "activity that is likely to jeopardize the security of the penitentiary". The Independent Chairperson concluded that the mask could be used in a manner that could be dangerous for security. In both cases, they intuitively recognize that mere possession falls short. The possession of something does not create anything, much less an activity ("*situation*").

[41] It is important to keep in mind that the legislation requires that guilt be established beyond a reasonable doubt based on the evidence presented at the hearing (subsection 43(3) of the Act). The fact that the

[42] assessor stated "[a]nd we think that Mr. Schmit wanted to have that mask for the sit… -- to use during the situation that happened the day before" was not part of the evidence presented at the hearing. Rather, it is conjecture. In fact, and I say this with respect, this is the expression of a misunderstanding of the scope of paragraph 40(*m*).

[43] It is this confusion about the scope of paragraph 40(*m*) that led to a discussion that was ultimately fruitless regarding the presence of *mens rea*. The Independent Chairperson simply stated that he only had to be satisfied as to the possession of an item in order to find its potential use dangerous to the security of the institution. We will never know how or why this item constitutes an activity that is likely to be dangerous. Under that theory, many items could qualify. In my opinion, it was unreasonable to equate the mere possession of an item and the potential creation of a dangerous activity. The *actus reus* of the offence as worded is quite different. One cannot move from the passive to the active so easily.

[44] If I understand the argument presented on behalf of the applicant, again it would be necessary to demonstrate specifically that the inmate had intended to create an activity that jeopardized the security of the penitentiary (applicant's memorandum of fact and law, paragraph 26). That would be going too far.

[45] Once paragraph 40(*m*) is better understood, one sees that the *actus reus* is the creation of a disturbance or an activity (or the participation in these events) that is likely to jeopardize security. This disturbance or other activity ("*situation*") must be serious enough to be likely to jeopardize the security of the penitentiary. This is not the *mens rea* proposed by the applicant. It is not necessary to intend to create an activity in order to jeopardize the security of the penitentiary. It is sufficient that the activity is likely to do so.

[46] The respondent argued instead that the disciplinary offences set out in the Act do not require that *mens rea* be demonstrated: they are strict liability offences (respondent's memorandum of fact and law, paragraph 37). This is a surprising statement because a number of paragraphs in section 40 include expressions that typically fall under the highest *mens rea*: "wilfully" (paragraphs (*c*) and (*r*) of section 40), "for the purpose of" (paragraph 40(*n*)), "knowingly" (paragraph 40(*r*.1)). In addition, the section prohibits theft (paragraph 40(*d*)), assaults (paragraph 40(*h*)) and offering bribes (paragraph 40(*o*)), all common law offences with criminal intent. To contend, as the respondent does, that all the offences are against the public welfare, within the meaning of *R v Sault Ste Marie*, [1978] 2 SCR 1299, was simply not demonstrated.

[47] I am far from being persuaded that all the offences established by section 40 of the Act are without a *mens rea*. But I am also far from being persuaded that the applicant is correct that the *mens rea* in this case, if there must be one, is the specific intention to jeopardize the security of the institution.

[48] This is the result. The applicant claims a *mens rea* that goes well beyond the text. No support can be found anywhere in paragraph 40(*m*) for inferring that an offender must intend to jeopardize the security of the penitentiary. Moreover, one can see the burden that this would represent for the institution. The respondent, probably claiming the presumption in public welfare that these types of offences do not require evidence of an actual *mens rea* (*Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec inc.*, 2006 SCC 12, [2006] 1 SCR 420, at para 16), states that the various offences described in section 40 of the Act are all covered by the presumption. It is sufficient to establish the acts committed, and the accused must then establish that he or she exercised due diligence to avoid conviction. This also does not seem accurate for all the paragraphs in section 40.

[49] As we have seen, some of the offences include expressions that indicate the need to prove a specific *mens rea*. That is not the case with paragraph 40(*m*). Did Parliament give other indications that there is an obligation to prove *mens rea*?

[50] In the absence of any discussion in this regard by the parties, and because I have concluded that the *actus reus* of the offence has not been reasonably proven in this case, it would not be appropriate to elaborate on the interpretation to give to the wording of paragraph 40(*m*). Presumably, this offence is important to maintain order and security within a penitentiary. A ruling should be made only on the basis of established facts where the issue of *mens rea* really arises (*La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, 2013 SCC 63, [2013] 3 SCR 756).

[51] Setting aside the interpretation problems that are by no means resolved by the respondent's interpretation, there is also the potential absurdity and arbitrariness that this interpretation creates. As the Independent Chairperson noted, everything can become a mask: a shirt sleeve, a tee shirt, a piece of fabric, a scarf.…The mere fact that such an object is found in an inmate's cell, for example a tee shirt, could therefore be sufficient to establish a charge that the inmate created "a disturbance or any other activity likely to jeopardize the security of the penitentiary". Everything and nothing become the creation of an activity. What creates an activity is obviously the use of the thing, not the thing itself.

D. *Reasonableness standard*

[52] It should be noted that an administrative tribunal is entitled to deference when it interprets the legislation it is charged with applying. Previously in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, the Court set the tone by stating that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (para 54). This rule has become a presumption that the interpretation of this type of statute warrants deference (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, at para 34).

[53] In this case, the administrative tribunal did not seek to give its interpretation of section 40 by isolating a question of law. It simply acted as if paragraph 40(*m*) dealt with possession or, at best, that if the inmate had an object that could be used to create an activity likely to jeopardize the security of the institution, the offence in 40(*m*) was committed beyond a reasonable doubt.

[54] The administrative decision maker is in a better position to choose among multiple reasonable interpretations of the same text. It may be that general policy considerations lead to one outcome over another (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 [*McLean*], at para 33). As the decision in *McLean* illustrates, it is possible that two interpretations of the same text are reasonable.

[55] But again there must be another reasonable interpretation. If one exists, it was not provided to us. The principles of statutory interpretation continue to apply, even for the administrative decision maker (*Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 SCR 300, at para 19). Here, the rules of interpretation, including the golden rule that "[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Elmer A Driedger, *Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983, at page 87), cannot justify a conviction under paragraph 40(*m*) where the only evidence is the possession of an item.

[56] As I have tried to explain, the ordinary and grammatical sense of the words, including in their French and English versions, their comparison with other paragraphs of section 40 to understand the scheme of the Act and the obligation in the Act to prove beyond a reasonable doubt that the disciplinary offence was committed, preclude ruling on the reasonableness of a conviction for creating a disturbance or other activity where the only evidence is the possession of an object that is said to be a mask. The only facts that were proven do not correspond to the alleged offence. Mere possession does not create a disturbance ("*troubles*") or any other activity

("*situation*") likely to jeopardize the security of the penitentiary. Possession is prohibited elsewhere. If the applicant's possession could not result in a charge under 40(*i*) and 40(*j*), I cannot see how this possession could correspond to the wording of 40(*m*).

[57] In any event, the behaviour for which the applicant was found guilty is being in possession of an object whose potential use could create an activity that is likely to jeopardize the security of the penitentiary. This does not correspond to the behaviour prohibited under paragraph 40(*m*).

E. *Allegations of breach of procedural fairness*

[58] With respect to the applicant's other allegations, which fall under breach of procedural fairness, I do not understand how procedural fairness could have been affected by the fact that the evidence was provided through an individual's testimony, which constitutes direct evidence, rather than the production of the item itself. The use of evidence that some would characterize as inferior, that is testimony rather than the object itself, may be a source of reasonable doubt, especially if the testimony does not provide a clear description of the item. But that falls under reasonable doubt, not procedural fairness. In these cases, the onus is on the applicant to demonstrate that not having reasonable doubt is in itself unreasonable.

[59] In criminal cases, for example, it happens quite often that the evidence the Crown would like to have is not available. It can nonetheless prove its case in other ways, for example, through circumstantial evidence (*R v. Monteleone*, [1987] 2 SCR 154, at page 164), insofar as this

evidence will establish guilt beyond a reasonable doubt (*R v. Charemski*, [1998] 1 SCR 679). Here, it was not argued before the Court that the absence of the object in itself raised reasonable doubt with respect to the quality of the object alleged to have been in Mr. Schmit's possession. I would add that the situation could have been different, stemming from a different logic and different legal principles, if the material evidence had been destroyed and inferior evidence had been substituted, perhaps inferior but more difficult to rebut because it was based on testimony. Such an approach is abusive. But these issues were not raised.

[60] As for the assessor's repeated interventions while a witness was testifying, I agree that disciplinary procedures in a prison setting must be flexible in order to deal with issues in a timely manner. It would have been preferable, in my opinion, to let the witness present his evidence without the intervention of an assessor to add to or correct the testimony. However, it was not demonstrated before this Court that this was harmful to the applicant because the facts of this case are very simple. The assessor's interventions were marginal. They could be more significant in other contexts. In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339, the Supreme Court acknowledged that while procedural issues are to be reviewed on a standard of correctness, it remains that "[r]elief. . .is governed by common law principles, including the withholding of relief when the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice" (para 43). That is the case here.

[61] The same is true of the Independent Chairperson's intervention to question the applicant when his counsel had indicated that he did not want to testify. I note article 38 of Commissioner's Directive 580, "Discipline of Inmates":

38. An inmate who gives evidence may be subject to questioning by the Chairperson.	38. Un détenu qui dépose un témoignage peut être interrogé par le président.

In this case, the applicant simply stated that he was not in possession of the seized object and that if he had been, he could have used it during the fight. The more fundamental question of the right to silence that article 38 could perhaps recognize, according to one interpretation, was not pleaded adequately before the Independent Chairperson, and it would be imprudent to examine it without the requisite factual basis and the informed arguments of the parties. I would add that the Federal Court of Appeal seemed to recognize the right to question an accused person in *Ayotte v. Canada (Attorney General)*, 2003 FCA 429:

> [10] For the chairperson of the tribunal, who is obliged to conduct a full and impartial hearing, the non-adversarial nature of the prison disciplinary process can give rise to the obligation to question witnesses, including the prisoner charged with the offence: *Re Blanchard and Disciplinary Board of Millhaven Institution and Hardtman*, [1983] 1 F.C. 309 (F.C.T.D.).

V. Conclusion

[62] Therefore, the Court concludes that the applicant's conviction was unreasonable. In *Mission Institution v. Khela*, cited above, paragraph 74 reads as follows:

> [74] As things stand, a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion, although I do not foreclose the possibility that it may also be unreasonable on other grounds. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.

Here, the charge that was laid does not correspond to the evidence that was provided. At best, the Independent Chairperson found the applicant guilty because he had in his possession an object that could be used for purposes dangerous to the institution. This offence does not correspond to the language of the alleged offence. The evidence does not support the finding. The decision is therefore unlawful because it is unreasonable.

[63] The applicant did not request costs. Accordingly, no costs will be awarded (*Exeter v. Canada (Attorney General)*, 2013 FCA 134).

JUDGMENT

THE COURT'S JUDGMENT is that:

1. The Independent Chairperson's decision issued on September 9, 2015, is set aside; it is not appropriate in this case to refer the matter back for redetermination because the charge itself is deficient;

2. Any reference to this conviction must be redacted from the applicant's file;

3. No costs are awarded since the applicant requested that his motion be without costs.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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