Federal Court  Cour fédérale

**Date: 20120119**

**Docket: T-127-11**

**Citation: 2012 FC 79**

**[UNREVISED CERTIFIED ENGLISH TRANSLATION]**

**Ottawa, Ontario, January 19, 2012**

**PRESENT: The Honourable Madame Justice Bédard**

**BETWEEN:**

**EUGENIO REDA**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated December 29, 2010, by the Director of the Regional Reception Centre for Quebec (the Director) of the Correctional Service of Canada (CSC) ordering that the applicant be placed in a medium security penitentiary. The application is coupled with a conclusion in the nature of an application for mandamus in which the applicant is asking the Court to order his transfer to a minimum security institution.

[2] The application challenges the decision to place him in a medium security penitentiary (Cowansville Institution), but that decision is closely related to the decision to assign a medium security classification to him. These two decisions are separate, but they were made by the same person on the same day and are based on an Assessment for Decision that dealt with both the applicant's security classification and his penitentiary placement. No objection was raised regarding the fact that the only impugned decision pertains to the applicant's penitentiary placement although the applicant's primary arguments relate to the decision about his security classification. In the absence of a dispute and given that the two decisions are closely related, I will deal with the arguments related to both decisions.

[3] For the following reasons, the application is dismissed.

I. Background

[4] The applicant was convicted of participating in two conspiracies to import cocaine for the benefit of a criminal organization. At the time of the events that led to his conviction, he was working at the Montréal airport as the supervisor of operations for an airline. He participated in the drug importing operation at the request of his cousin who worked for the same company. His role in the operation was to monitor the flights identified by his cousin to determine whether they were under police surveillance. He also changed his cousin's work schedule to facilitate retrieving the drugs. His involvement lasted almost a year.

[5] The applicant was arrested on November 22, 2006, as part of the "Colisée" operation, which was aimed at combating Italian organized crime. He was then released, which continued until he

was sentenced on September 2, 2011. Since then, he has been serving a sentence of six years and nine months.

[6] Like any new inmate, the applicant was assessed to determine his security classification with a view to directing him to the institution that best suits his needs and best ensures the protection of the public.

[7] As part of this process, a CSC officer first completed the Custody Rating Scale, which led to a score corresponding to a medium security classification.

[8] On December 3, 2010, the applicant's Case Management Team reviewed his file and recommended in its Assessment for Decision that a medium security rating be assigned to him and that he be placed in Cowansville Institution.

[9] The Case Management Team also completed the applicant's criminal profile and prepared an initial Correctional Plan.

[10] On December 29, 2010, the Director adopted the Case Management Team's recommendation and assigned a medium security classification to the applicant. On the same day, she issued a second decision ordering that he be placed in Cowansville Institution.

II. Issues

[11] The issue in this application for judicial review is the reasonableness of the Director's decision ordering that the applicant be placed in the medium security institution at Cowansville.

[12] However, I will first examine whether it is appropriate that I exercise my judicial discretion to dispose of this application given that the applicant applied to this Court directly, without first pursuing the internal complaint and grievance process. The respondent had not raised this issue, and the parties addressed it at the hearing after I issued a direction to do so on November 28, 2011.

A. *Should the Court deal with this application for judicial review?*

[13] It has long been established that the Court may exercise its discretion to not hear an application for judicial review of a decision if an adequate alternative remedy exists that the applicant could have pursued before applying to Court (*Harelkin v University of Regina,* [1979] 2 SCR 561, 26 NR 364. In *C.B. Powell Ltd. v Canada* (*Border Services Agency*), 2010 FCA 61, 200 NR 367, the Federal Court of Appeal clearly set out the doctrine of exhaustion:

> **31** Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after

> they are completed, or until the available, effective remedies are exhausted.
>
> **32** This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, *e.g., Consolidated Maybrun, supra* at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)*, (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, *e.g., Consolidated Maybrun, supra* at paragraph 43; *Delmas v. Vancouver Stock*, (1994), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd, (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)*, (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.

[14] In this case, after I raised this preliminary issue, the respondent argued that I should decline to determine the application for judicial review because the applicant did not pursue the internal procedure for inmate grievances, which was an adequate alternative remedy. The respondent based his decision on the following cases: *St-Amand v Canada (Attorney General)* (2000), 147 CCC (3d) 48, (available on CanLII) (QC CA); *Bordage v Cloutier* (2000), 204 FTR 133, 104 ACWS (3d) 869 (FCTD) and *Marleau v Canada (Attorney General)*, 2011 FC 1149 (available on CanLII).

[15] For his part, the applicant maintained that he could file an application for judicial review of the Director's decision without having to file a grievance and follow the internal grievance process. He bases his proposition on section 81 of the *Corrections and Conditional Release Regulations*,

SOR/92-620 [the Regulations] and on the decision in *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809 [*May*]. He contends that the Supreme Court recognized in this case that section 81 of the Regulations gives inmates who are challenging a decision that affects their residual liberty, the choice to file a grievance or to challenge the decision directly before the Court. He also argues that the Supreme Court determined that the internal grievance procedure was not an adequate alternative remedy. The applicant added that his comments in response to the recommendation for decision prepared by the management team should be considered a complaint and that he was not required to go farther by filing a grievance.

[16] It is appropriate to review the grievance procedure available to inmates. Section 90 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act], provides for the establishment, by regulations, of a procedure to resolve grievances on matters within the jurisdiction of the Commissioner. The section states that it shall be "a procedure for fairly and expeditiously resolving offenders' grievances". Section 91 of the Act provides that all offenders must have complete access to the grievance procedure without negative consequences.

[17] The grievance procedure is outlined in sections 74 to 82 of the Regulations. It is an administrative process composed of four levels. An offender who is dissatisfied with an action or a decision by a CSC employee must first submit a complaint to that employee's supervisor. Where the employee's supervisor refuses to review the complaint or where the offender is not satisfied with the supervisor's decision, the offender may then submit a grievance. The grievance procedure consists of three levels, with the decision of the CSC Commissioner or his or her representative being the last level.

[18] The grievance procedure is also governed by *Commissioner's Directive 081* [the Directive]. Section 31 of the Directive prescribes that complaints and grievances are classified based on their level of priority. At each step in the procedure, priority grievances are processed within shorter time limits. Section 32 of the Directive provides that complaints or grievances that significantly impact or infringe on an offender's rights and freedoms are designated high priority.

[19] Section 30 of the Directive states that an offender who is not satisfied with the decision made at the end of the proceeding may seek judicial review before this Court:

> 30. Grievers who are not satisfied with the final decision of the complaint and grievance process may seek judicial review of this decision at the Federal Court within the time limits prescribed in subsection 18.1(2) of the *Federal Courts Act*.

[20] Section 81 of the Regulations, on which the applicant bases his argument, reads as follows:

> 81. (1) Where an offender decides to pursue a legal remedy for the offender's complaint or grievance in addition to the complaint and grievance procedure referred to in these Regulations, the review of the complaint or grievance pursuant to these Regulations shall be deferred until a decision on the alternate remedy is rendered or the offender decides to abandon the alternate remedy.

[21] The Directive defines "legal remedy" as follows:

> 18. Legal remedy: includes a proceeding before a court or an administrative tribunal (such as the Canadian Human Rights Commission) or a complaint to an oversight agency such as the Privacy, Access to Information or Official Languages Commissioners but does not include a complaint to the Correctional Investigator.

[22] Moreover, section 78 of the Directive informs grievers that certain tribunals or agencies may require that offenders first exhaust internal remedies. The section reads as follows:

> 78. Grievers should be advised that certain tribunals or agencies that provide alternate legal remedies may require that offenders exhaust internal remedies, including the complaint and grievance process, before the tribunal or agency will investigate or review the matter.

[23] The CSC grievance mechanism has traditionally been recognized by our Court as an appropriate remedy, and the Court has generally declined to deal with judicial review applications where an applicant has not first pursued the internal grievance procedure or has not exhausted this procedure. In *Giesbrecht v Canada*, 148 FTR 81, 10 Admin. L.R. (3d) 246 [*Giesbrecht*], Rothstein J., when he was at the Federal Court, dealt with a judicial review application in a context similar to the one in this case. The applicant was challenging his involuntary transfer from a medium security penitentiary to a maximum security penitentiary. He had filed a grievance and also sought judicial review of the decision ordering his transfer. The preliminary issue was whether the grievance procedure was an alternative remedy that must be exhausted before a judicial review application is filed. As in this case, the applicant submitted that section 81 of the Regulations gave him the choice of using either remedy. Rothstein J. dismissed this argument and decided not to hear the judicial review application. His reasoning is clearly explained in the following passage from the judgment:

> **10** On its face, the legislative scheme providing for grievances is an adequate alternative remedy to judicial review. Grievances are to be handled expeditiously and time limits are provided in the Commissioner's Directives. There is no suggestion that the process is costly. If anything it is less costly than judicial review and more simple and straightforward. Through the grievance procedure an inmate may appeal a decision on the merits and an appeal tribunal may substitute its decision for that of the tribunal appealed from. Judicial review does not deal with the merits and a favourable result to an inmate would simply return the matter for redetermination to the tribunal appealed from.

**11** Applicant's counsel submitted that the grievance procedure was not an adequate alternative remedy for the applicant because of subsection 81(1) of the Regulations:

. . .

Counsel submitted that with the filing of the judicial review application, the grievance filed with the Regional Deputy Commissioner was required to be deferred until a decision on the judicial review is rendered and therefore the grievance was not an adequate alternative remedy.

**12** In *Hutton* v. *Canadian Armed Forces (Chief, Defence Staff),* (1997), 135 F.T.R. 123, I found that a complaint filed with the Canadian Human Rights Commission required the internal armed forces grievance procedure to be suspended by reason of a provision similar to subsection 81(1) of the Regulations. In that case, I found that the complaint to the Human Rights Commission rendered the internal grievance procedure an inadequate alternative remedy to judicial review because the internal grievance procedure was temporarily precluded by the filing of the Human Rights complaint while judicial review was not. However, *Hutton* was an exceptional case and **I expressed the concern that an applicant should not be able to manipulate the requirement to exhaust adequate alternative remedies before seeking judicial review**.

**13** In the present case, it is the filing of the judicial review itself that precludes the grievance from proceeding by reason of subsection 81(1). However the judicial review is within the control of the Court, as contrasted with the Canadian Human Rights proceeding in *Hutton* over which the Court had no control. **It would be anomalous if an applicant, by filing a judicial review application, could arrogate to himself the determination of whether the grievance process constituted an adequate alternative remedy. That is a decision for the Court. Judicial review is a discretionary remedy and the Court cannot be precluded from determining that an adequate alternative remedy exists** simply because an applicant has filed a judicial review application. Subsection 81(1) of the Regulations is not intended to detract from the Court's discretion in this respect. It is simply a statutory stay of grievance procedures where another proceeding is commenced in order to avoid a multiplicity of concurrent proceedings involving the same matter. Subsection 81(1) does not act as a bar to the grievance proceeding should the Court find that procedure to be an adequate alternative remedy and thereby dismiss the judicial review. This argument of the applicant must therefore fail.

> **14 There is nothing before the Court that would indicate that the internal grievance procedure under the *Corrections and Conditional Release Act* and *Regulations* is not an adequate alternative remedy to judicial review. Of course judicial review would be available from a final decision in the grievance process.**
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> [Emphasis added]

[24] Applying the principles established in *Giesbrecht*, Pinard J. also declined to hear a judicial review application in *Condo v Canada (Attorney General)*, 2003 FCT 60 (available on CanLII); this judgment was affirmed by the Federal Court of Appeal in *Condo v Canada (Attorney General)*, 2003 FCA 99, 239 FTR 158, and the Court of Appeal adopted the principles in *Giesbrecht*.

[25] These judgments were issued prior to the *May* decision. The applicant bases his position on *May* and, as stated above, he submits that in that case the Supreme Court recognized that the CSC internal grievance procedure was not an appropriate alternative remedy and that section 81 of the Regulations allowed the applicant to pursue the remedy of his choice. In *May*, the applicants, who were all inmates serving life sentences, challenged their transfer from a minimum security institution to a medium security institution after their security classification was reassessed as the result of a new computerized assessment scale. The inmates challenged their transfer by way of an application to the British Columbia Supreme Court for *habeas corpus* with *certiorari* in aid directing CSC to transfer them back to a minimum security institution. They also grieved under the internal grievance procedure. A discussion ensued as to whether the British Columbia Supreme Court should have declined to exercise its *habeas corpus* jurisdiction and recognized the Federal Court's exclusive jurisdiction to review decisions of federal boards, commissions or other tribunals. Accordingly, it was a discussion on the concurrent *habeas corpus* jurisdiction of a provincial superior court and Federal Court jurisdiction on judicial review.

[26] The Supreme Court found that the inmates were challenging the legality of a decision affecting their residual liberty and that, therefore, they could challenge the legality of this type of decision either in the superior court by way of *habeas corpus* or in the Federal Court by way of judicial review. The Court determined that a superior court should not decline to exercise its *habeas corpus* jurisdiction because an alternative, more convenient remedy exists. At paragraph 50 of the reasons of the majority, the Court set out the only two circumstances in which a superior court should decline *habeas corpus* jurisdiction:

> . . . in accordance with this Court's decisions, provincial superior courts should decline *habeas corpus* jurisdiction only where (1) a statute such as the *Criminal Code*, R.S.C. 1985, c. C-46, confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be or (2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision.
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> [Emphasis added]

[27] The Court gave as an example of such a procedure the review scheme created for immigration matters, which was recognized as providing a process as broad and advantageous as a writ of *habeas corpus*. The Court found that that was not the case for the grievance procedure put in place in federal prisons. Accordingly, it held that the second exception to the superior courts' *habeas corpus* jurisdiction did not apply because Parliament had not enacted "a complete, comprehensive and expert procedure for review of a decision affecting the confinement of prisoners" (paragraph 51).

[28] In my view, the principles established in *May* do not give section 81 of the Regulations as broad a scope as the applicant gives it, nor do they give the applicant the choice of challenging an administrative decision by way of a judicial review application without first utilizing the grievance

procedure. It is important to keep in mind that the discussion in *May* dealt with the respective *habeas corpus* jurisdiction of superior courts and Federal Court jurisdiction in judicial review of decisions by federal agencies. The Supreme Court analyzed the prison grievance scheme and found that it did not have the requisite characteristics to justify superior courts declining to exercise their *habeas corpus* jurisdiction. The Court based its reasoning, *inter alia*, on the traditional importance of the *habeas corpus* remedy as the traditional means of challenging deprivations of liberty (paragraph 67). Reviewing section 81 of the Regulations, the Court determined that it was an indication that "it was not the intention of the Governor-in-Council, the regulator, to grant paramountcy to the grievance procedure over the superior courts' *habeas corpus* jurisdiction" (paragraph 60). The Court stated the following at paragraph 61:

> Section 81(1) makes it clear that the regulator contemplated the possibility that an inmate may choose to pursue a legal remedy, such as an application for *habeas corpus*, in addition to filing an administrative grievance under the *Regulations*. The legal remedy supersedes the grievance procedure. . . .

[29] In my opinion, this statement does not displace the exhaustion doctrine where an applicant does not choose the *habeas corpus* remedy but judicial review. If applicable, unless there are exceptional circumstances and unless the administrative remedy is not an appropriate remedy, an applicant must first exhaust his or her internal remedies before seeking judicial review; the application for judicial review must be directed to the decision made at the last level of the internal procedure, not the decision that could be challenged through internal mechanisms. In my view, Rothstein J.'s interpretation of section 81 of the Regulations in *Giesbrecht* is still valid, and *May* made no changes to it.

[30] In this regard, I concur with the statements made by Dawson J., when she was at the Federal Court, in *McMaster v Canada (Attorney General)*, 2008 FC 647, 334 FTR 240, who dealt with the same issue as this case does:

> **27** I agree that, generally, the internal grievance procedure ought to be exhausted before an inmate seeks judicial review. Strong policy reasons favor this approach. That said, I also agree that where there are urgent, substantial matters and an evident inadequacy in the grievance procedure, the Court may exercise its discretion to hear an application. See, for example, *Gates v. Canada (Attorney General)*, [2007] F.C.J. No. 1359 at paragraph 18 (QL).
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> **28** In the present case, counsel for Mr. McMaster argues that in *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, the Supreme Court of Canada effectively overruled the prior jurisprudence of this Court which held that there was a discretion in the Court to decline to exercise the Court's jurisdiction on judicial review when the internal grievance procedure was not exhausted. He also submits that the grievance procedure provides an inadequate remedy because it is too slow.
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> **29** In my view, counsel's reliance upon the *May* decision is misplaced. There, the issue was the availability of the remedy of *habeas corpus* from provincial superior courts when there was an existing right to seek judicial review in the Federal Court. The majority of the Supreme Court found that inmates may choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of *habeas corpus* or in the Federal Court by way of judicial review. **In so finding, the Supreme Court relied, at least in part, on the fact that historically, the writ of *habeas corpus* has never been a discretionary remedy. Unlike other prerogative relief, and declaratory relief, the writ of *habeas corpus* issues as of right. The *May* decision does not, in my view, alter the obligation of an inmate to pursue the internal grievance procedure before seeking discretionary declaratory relief on judicial review.**
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> **30** Particular reliance was placed by Mr. McMaster upon the reference by the majority of the Supreme Court, at paragraph 60 of their reasons, to subsection 81(1) of the Regulations. Subsection 81(1) provides:
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> . . .

> **31** Again, in my respectful view, neither subsection 81(1) itself, nor the reference to it by the majority the Supreme Court, assists Mr. McMaster.
>
> **32** **Subsection 81(1) operates to stay the grievance procedure while an inmate pursues an alternate remedy. That regulatory stay cannot operate to take away or limit the Court's discretion on judicial review. Similarly, the Supreme Court did nothing more than recognize that the existence of the grievance procedure did not preclude an inmate from pursuing a legal remedy. The Court did not alter existing jurisprudence concerning how a reviewing court would treat an application for judicial review where existing grievance procedures were not followed.**
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> **33** I find support for this interpretation of subsection 81(1) in the *Giesbrecht* decision, cited above.
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> . . .
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> **34** I also find support for this interpretation of the *May* decision in the subsequent cases of this Court which have continued to state that an applicant must utilize the grievance procedure. See, for example, *Collin v. Canada (Attorney General)*, [2006] F.C.J. No. 729 (QL), and *Olah v. Canada (Attorney General*, (2006), 301 F.T.R. 274.
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> **35** As for the submission that the grievance procedure is too slow, the evidence before the Court indicates that Mr. McMaster's prior complaints regarding allegedly inaccurate information in his file were considered "expeditiously," as required by section 90 of the Act:
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> . . .
>
> [Emphasis added]

[31] Other colleagues have issued judgments that came to the same conclusion (see *Ewert v Canada (Attorney General)*, 2009 FC 971, 355 FTR 170 (Lemieux J.) and *Spidel v Canada (Attorney General)*, 2010 FC 1028 (available on CanLII) (Phelan J.); *McDougall v Canada (Attorney General)*, 2011 FC 285 (available on CanLII) (Shore J.).

[32] In this case, there is no evidence that the grievance procedure was inadequate, ineffective or too slow. Accordingly, the grievance procedure was an appropriate remedy notwithstanding that the impugned decision affected the applicant's residual liberty. The applicant therefore should have pursued the grievance procedure before applying for judicial review. Nor can the applicant argue that he was not told that he could file a grievance. The CSC Commissioner's Directive that deals with security classification and penitentiary placement (Directive 705-7) clearly states that the offender may appeal the placement decision using the offender grievance process (section 57 of Directive 705-7), and both of the Director's decisions clearly stated that the applicant could challenge them by filing a grievance. Therefore, in principle, I should exercise my discretion and not deal with the judicial review application.

[33] If, however, I am wrong on this issue and since the respondent did not object to the Court exercising its jurisdiction, an issue that I myself raised shortly before the hearing, and since I heard the parties on the merits of the judicial review application at the hearing, I will, on an exceptional basis, rule on the merits of the application.

B. *Was the Director's decision unreasonable?*

[34] The respondent submitted, and I share his view, that the Director's decision should be reviewed on a reasonableness standard (*Kahnapace v Canada (Attorney General)*, 2009 FC 1246 at paragraph 34, 360 FTR 229; *Hiebert v Canada (Attorney General)*, 2005 FC 1719 at paragraphs 24-26, 285 FTR 37).

[35] The placement of a person in a given institution is determined at the conclusion of a well-defined process. Section 28 of the Act sets out the principle that the person is to be confined in the penitentiary that offers the least restrictive environment, taking into account three factors:

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| **28.** Where a person is, or is to be, confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which the person is confined is one that provides the least restrictive environment for that person, taking into account | **28.** Le Service doit s'assurer, dans la mesure du possible, que le pénitencier dans lequel est incarcéré le détenu constitue le milieu le moins restrictif possible, compte tenu des éléments suivants: |
| (*a*) the degree and kind of custody and control necessary for<br><br>(i) the safety of the public,<br><br>(ii) the safety of that person and other persons in the penitentiary, and<br><br>(iii) the security of the penitentiary; | *a*) le degré de garde et de surveillance nécessaire à la sécurité du public, à celle du pénitencier, des personnes qui s'y trouvent et du détenu; |
| (*b*) accessibility to<br><br>(i) the person's home community and family,<br><br>(ii) a compatible cultural environment, and<br><br>(iii) a compatible linguistic environment; and | *b*) la facilité d'accès à la collectivité à laquelle il appartient, à sa famille et à un milieu culturel et linguistique compatible; |
| (*c*) the availability of appropriate programs and services and the person's willingness to participate in those programs. | *c*) l'existence de programmes et services qui lui conviennent et sa volonté d'y participer. |

[36] The placement of inmates in a penitentiary is directly related to the security classification assigned to them.

[37] Under section 30 of the Act, the CSC assigns a security classification to inmates—minimum, medium or maximum—in accordance with criteria established by the Regulations. The assignment of a security classification is governed by sections 17 and 18 of the Regulations, which provide as follows:

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|---|---|
| 17. The Service shall take the following factors into consideration in determining the security classification to be assigned to an inmate pursuant to section 30 of the Act: | 17. Le Service détermine la cote de sécurité à assigner à chaque détenu conformément à l'article 30 de la Loi en tenant compte des facteurs suivants: |
| (a) the seriousness of the offence committed by the inmate; | a) la gravité de l'infraction commise par le détenu; |
| (b) any outstanding charges against the inmate; | b) toute accusation en instance contre lui; |
| (c) the inmate's performance and behaviour while under sentence; | c) son rendement et sa conduite pendant qu'il purge sa peine; |
| (d) the inmate’s social, criminal and, if available, young-offender history and any dangerous offender designation under the Criminal Code; | d) ses antécédents sociaux et criminels, y compris ses antécédents comme jeune contrevenant s’ils sont disponibles et le fait qu’il a été déclaré délinquant dangereux en application du Code criminel; |
| (e) any physical or mental illness or disorder suffered by the inmate; | e) toute maladie physique ou mentale ou tout trouble mental dont il souffre; |

(f) the inmate's potential for violent behaviour; and

f) sa propension à la violence;

(g) the inmate's continued involvement in criminal activities.

g) son implication continue dans des activités criminelles.

18. For the purposes of section 30 of the Act, an inmate shall be classified as

18. Pour l'application de l'article 30 de la Loi, le détenu reçoit, selon le cas:

(a) maximum security where the inmate is assessed by the Service as

a) la cote de sécurité maximale, si l'évaluation du Service montre que le détenu:

(i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or

(i) soit présente un risque élevé d'évasion et, en cas d'évasion, constituerait une grande menace pour la sécurité du public,

(ii) requiring a high degree of supervision and control within the penitentiary;

(ii) soit exige un degré élevé de surveillance et de contrôle à l'intérieur du pénitencier;

(b) medium security where the inmate is assessed by the Service as

b) la cote de sécurité moyenne, si l'évaluation du Service montre que le détenu:

(i) presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or
(ii) requiring a moderate degree of supervision and control within the penitentiary; and

(i) soit présente un risque d'évasion de faible à moyen et, en cas d'évasion, constituerait une menace moyenne pour la sécurité du public,
(ii) soit exige un degré moyen de surveillance et de contrôle à l'intérieur du pénitencier;

(c) minimum security where the inmate is assessed by the Service as

c) la cote de sécurité minimale, si l'évaluation du Service montre que le détenu:

(i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and

(i) soit présente un faible risque d'évasion et, en cas d'évasion, constituerait une faible menace pour la sécurité du public,

| | |
|---|---|
| (ii) requiring a low degree of supervision and control within the penitentiary. | (ii) soit exige un faible degré de surveillance et de contrôle à l'intérieur du pénitencier. |

[38] The CSC Commissioner also adopted Commissioner's Directive 705-7 ("Security Classification and Penitentiary Placement"), which governs the assignment of security classifications and provides for inmates' penitentiary placement.

[39] Under Directive 705-7, an inmate's penitentiary placement is determined on the basis of the security classification assigned to the inmate. An inmate's security classification is established following a decision-making process based on two factors: (1) the result of applying the Custody Rating Scale and (2) the CSC assessment of the inmate's institutional adjustment, escape risk and, in the event of escape, the risk to public safety. Directive 705-7 defines the offender security level and the Custody Rating Scale as follows:

> 8. Offender security level (OSL): a rating (minimum, medium or maximum) based on an assessment of the offender's institutional adjustment, escape risk and risk to public safety. This assessment, combined with the results of the Custody Rating Scale, enables the Correctional Service of Canada (CSC) to place an offender at an institution which will provide the appropriate regime of control, supervision, programs and services consistent with his or her assigned security classification.
>
> 9. Custody Rating Scale (CRS): a research-based tool to assist the Parole Officer/Primary Worker to determine the most appropriate level of security for the initial penitentiary placement of the offender or any subsequent readmission. The scale is completed by assigning scores to a number of factors on two dimensions: institutional adjustment and security risk.

[40] Section 43 of Directive 705-7 provides that the security classification of each inmate is determined at the time of initial placement "based on the results of the Custody Rating Scale,

clinical judgement of experienced and specialized staff and psychological assessments, where required." The CSC officers prepare an Assessment for Decision, which is forwarded to the person who makes the final decision.

[41] Section 47 of Directive 705-7 provides that a placement recommendation is included in the assessment covering the security classification decision and that the recommended institution will be the one that provides the least restrictive environment for the offender, taking into account, but not limited to, the following factors:

> a. the safety of the public, the offender and other persons in the penitentiary;
> b. the offender's individual security classification;
> c. the security classification of the institution (CD 006 – Classification of Institutions);
> d. accessibility to the offender's home community and family;
> e. the cultural and linguistic environment best suited to the offender;
> f. the availability of appropriate programs and services to meet the offender's needs;
> g. the offender's willingness to participate in programs.

[42] Section 52 of Directive 705-7 dictates, moreover, how the Custody Rating Scale measures each of the factors outlined in section 18 of the Regulations (institutional adjustment, escape risk and risk to public safety).

[43] Section 53 provides the parameters that apply to the final assessment process:

> The final assessment must address both the actuarial score and clinical factors. In the overall assessment of risk, clinical judgment will normally be anchored by the results of the Scale. Where variations occur (i.e. the actuarial measure is inconsistent with the clinical appraisal), it is important that the assessment specify why this is the case. The final assessment will conform with section 17 of the CCRR, by setting out the analysis under the three headings of institutional adjustment, escape risk and risk to public safety.

[44] On November 30, 2010, a parole officer completed the applicant's Custody Rating Scale; the applicant's institutional adjustment score was 0, and his risk to public safety score was 82, for an overall result corresponding to a medium security classification. On December 3, 2010, the same parole officer and a manager of assessment and intervention (the Case Management Team) prepared the Assessment for Decision, assigning him a security classification and providing for his penitentiary placement.

[45] The Assessment for Decision specified that the applicant's security classification had been determined based on the factors pertaining to his institutional adjustment, the escape risk he presented and the risk to public safety in the event of escape. The Case Management Team's assessment provided a detailed explanation for each of these factors.

[46] First, it concluded that the applicant required a low degree of supervision and control within the penitentiary. This finding was based on the following factors:

This is the applicant's first incarceration, and he has no juvenile or provincial record;

1. He has adopted conformist behaviour since his incarceration and has had no disciplinary breaches;
2. His relationships with the other inmates and the CSC staff are respectful;
3. He works as a cleaner in the cell block office, and his work and his attitude are beyond reproach;

4. There is no evidence to suggest that he is engaged in criminal activities at the institution or that he is associated with the criminal organization for whose benefit he committed the offences;
5. He has no enemies among the inmate population;
6. He does not present any psychological or physical problem.

[47] The Case Management Team then determined that the applicant's escape risk was low. It based this conclusion, *inter alia*, on the following factors:

1. The applicant is a Canadian citizen;
2. He has no pending court cases other than his sentence appeal;
3. Between his release on bail in December 2006 and his incarceration, he remained in the community and complied with all the conditions and rules imposed on him;
4. The CSC has no information to suggest that he would attempt to escape.

[48] Moreover, the Case Management Team concluded that, in the event of escape, the applicant would present a moderate risk to public safety. This conclusion was based on the following factors:

1. The applicant has no criminal record and is serving a first federal sentence for conspiracy to import drugs (cocaine) for the benefit of a criminal organization;
2. The applicant's crime was non-violent and was related to his employment;
3. He had a mid-level role in the organization;
4. He abused his employer's trust. At the request of his cousin, he changed the work schedules and carried out surveillance tasks for certain flights;
5. He knew a few members of the organization but had no contact with the leaders;

6. He let himself get caught up in greed through his cousin and his employment. Although he maintains that he derived no financial benefit from his activities, that was only a matter of time;
7. He is aware that his sentence weighs heavily on him and his family. He has deep-rooted family values; he now has a child, and the ordeal he is going through is a strong deterrent.
8. The fact that he now has a child will have a positive impact, and the Case Management Team believes that he will know how to make good choices in the future;
9. He is taking responsibility for his offences and wants to take advantage of his sentence to embark on a career change;
10. It will not be easy for him to remove himself from this type of activity especially because the people who are likely to influence him are family members;
11. The Case Management Team believes that the applicant will have to show tenacity and willpower to abandon his former associates;

[49] Taking into account these factors, the Case Management Team was of the opinion that the risk that the applicant would reoffend by committing the same type of offences was moderate. It also believed that the risk that the applicant would resort to violence was moderate. It based this conclusion on the following considerations:

> [TRANSLATION]
>
> Although the current offences were non-violent, they were committed for the benefit of a very structured network in which the subject played an important role. The criminal activities were significant in terms of drug trafficking, and they were very lucrative. We also considered the type and quantity of the drugs involved, the structure of the network, the sophisticated methods that were used in the network as well as the profits generated by these activities. With respect to the subject, we do not see any sign of a potential for

> violent behaviour. We are dealing with an individual who has always respected others. He is in control of himself and does not have any particular behavioural problem. Given the information we have, we have come to the conclusion that the risk that the subject would resort to violence is low.

[50] In terms of the overall assessment, the Case Management Team recommended that the applicant be placed in Cowansville Institution, a medium security penitentiary. The overall assessment indicates that the CSC is convinced that the recommended penitentiary placement is the least restrictive environment in accordance with the parameters prescribed in section 28 of the Act. This conclusion is supported as follows:

> [TRANSLATION]
>
> A minimum security institution offers the degree and kind of custody and control necessary for the safety of the public, the safety of that person and other persons in the penitentiary, and the security of the penitentiary. This type of institution also offers a cultural and linguistic environment compatible with Mr. Reda's. In addition, it offers programs and services regarding his identified contributing factors. Finally, there are no enemies or co-convicted offenders there. We took into consideration the seriousness of the offence, the fact that the subject was a member of a structured network associated with organized crime as well as the placement of the co-accused, before recommending Cowansville Institution. . . .
>
> [Emphasis added]

[51] It is clear from reviewing the entire Assessment for Decision that the reference in the conclusion to a minimum security institution is a clerical error and that the Case Management Team was referring to a medium security institution.

[52] The Case Management Team also prepared the applicant's criminal profile and established an initial Correctional Plan.

[53] The applicant received the Assessment for Decision, criminal profile and Correctional Plan before the Director made the final decisions, and he had the opportunity to submit his comments to the Director. That is what he did on December 24, 2010, noting the factors that, in his opinion, supported assigning him a minimum security classification.

[54] On December 29, 2010, the Director confirmed the medium security classification and the applicant's placement in Cowansville Institution. Her decision with respect to his security classification reads as follows:

> [TRANSLATION]
> In accordance with section 30 of the Act, taking into account the factors set out in the Assessment for Decision dated 2010-12-03, a MEDIUM security classification is assigned because the assessment shows that the inmate presents a MODERATE degree of supervision and control within the penitentiary, a LOW probability of escape and a MODERATE risk to the safety of the public in the event of escape.
>
> In my opinion, your role and your involvement points to a period of observation in a more structured environment as the CRS suggests, i.e. a medium institution.
>
> . . .

[55] On December 29, 2010, the Director also adopted the Case Management Team's recommendation to place the applicant in Cowansville Institution. The decision includes, *inter alia*, the following:

> [TRANSLATION]
> On 2010-12-24 you received your Correctional Plan, your criminal profile and your Assessment for Decision, which informed you of your security level and the reasons for your placement.
>
> As provided in section 12 of the CCRR, you then had 48 hours to submit comments justifying a review of your case, a right that you exercised on 2010-12-24. You want your security level to be revised to minimum. You refer to your conduct while awaiting sentencing and compare your case to some of your co-accused. You need to

> understand that each assessment is different based on each person's specific situation. In my opinion, your role and your personal involvement points to a period of observation in a more structured environment as the CRS [Custody Rating Scale] suggests, i.e. a medium institution.
>
> Given that your Case Management Team's recommendation is consistent with sections 30 and 28 of the CCRA with respect to the required secure environment and accessibility to programs, including:
>
> You are serving a first penitentiary term of 6 years, 9 months, 15 days for drug trafficking offences for the benefit of a criminal organization.
>
> The assessment of risks related to institutional adjustment, escape and public safety concluded a MEDIUM level.
>
> Taking into account your needs and the lack of enemies, I adopt your Case Management Team's recommendation and I advise you that your next placement will be at COWANSVILLE Institution.

[56] The applicant levels a number of criticisms at the Director's decisions. In my opinion, none of the criticisms renders the Director's decisions unreasonable.

[57] The applicant submits first that the decision assigning him a security classification is erroneous because the Director mistakenly states that the Assessment for Decision indicates that he presented a moderate need for control and supervision within the penitentiary whereas the Assessment for Decision indicates that he presented a low degree of supervision and control within the penitentiary. The applicant contends that this error vitiates the Director's entire reasoning and assessment.

[58] The respondent argues that this clerical error had no impact on assigning the applicant's security classification.

[59] I share the respondent's opinion. Section 18 of the Regulations provides that an inmate receives a medium security classification where the Service's assessment states that the inmate presents a low to medium probability of escape and a moderate risk to the safety of the public in the event of escape, regardless of the degree of supervision and control required. This is exactly the applicant's case. Given these results, the fact that the applicant requires a low or moderate degree of supervision and control within the penitentiary changes nothing and does not reduce his security classification to minimum. The error in the Director's decision therefore had no effect on the security classification assigned to the applicant.

[60] Secondly, the applicant argues that the Director's decision is unreasonable because she did not weigh the factors listed in section 17 of the Regulations and confined her assessment to the seriousness of the offence the applicant committed. The applicant also submits that, in his penitentiary placement, the Director did not consider the factors in paragraphs (b) and (c) of section 28 of the Act.

[61] The applicant also contends that the Director could not limit herself to adopting the Case Management Team's recommendations without explaining in her decision why she adopted the Case Management Team's recommendations.

[62] Last, the applicant maintains that, in the decision about his penitentiary placement, the Director stated that, in her view, his role and involvement in the operation pointed to a more structured period of observation as the Custody Rating Scale suggested, but she did not support this conclusion. Accordingly, the Director's decision was not intelligible.

[63] With respect, none of the applicant's arguments can succeed.

[64] First, it is clear from the Assessment for Decision that the management team thoroughly analyzed all the factors in section 17 of the Regulations when it recommended that a medium security classification be assigned. The security classification was also assessed by the Case Management Team, which complied with the process and parameters under section 18 of the Regulations and Directive 705-7. Applying the Custody Rating Scale, which is an objective analysis, produced a result corresponding to a medium security classification, and the assessment based on the Case Management Team's clinical judgment confirmed that assessment.

[65] The applicant specifically challenges the management team's finding that the applicant's risk to the safety of the public in the event of escape is moderate. The applicant's disagreement with the decision does not justify the Court's intervention. This finding by the management team is very well articulated in the Assessment for Decision and is entirely reasonable.

[66] The record also shows that the management team complied with the prescribed parameters when it recommended the applicant's penitentiary placement. It is evident from the record that the Case Management Team took into account the requirement to place the inmate in the least restrictive environment by considering the three factors listed in section 28 of the Act. These factors are repeated in section 47 of Directive 705-7, and it appears from the Assessment for Decision and the Correctional Plan that the Case Management Team considered all of them.

[67] I also do not share the applicant's view that the Director was required to explain in detail why she adopted the management team's recommendations in the Assessment for Decision. The Assessment for Decision was thorough and contained all the necessary details to enable the Director to make her own assessment of the applicant's case and to evaluate the appropriateness of the management team's recommendations. When she made her decisions, the Director also had in her possession the applicant's criminal profile, his Correctional Plan and the applicant's comments in response to the Assessment for Decision. The applicant submitted no authority to support his proposition that the Director could not confine herself to adopting the Case Management Team's recommendations.

[68] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 43-44, 174 DLR (4th) 193, the Supreme Court recognized that the notes of a subordinate reviewing officer were sufficient to constitute the reasons for decision:

> **43** In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. . . .
>
> **44** In my view, however, the reasons requirement was fulfilled in this case since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the

> requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.

[69] In this case, it is evident that the applicant received all the documents that the Director based her decisions on, and he had the opportunity to comment on them before the Director made her final decision. In my view, there is nothing to support a finding that it was unreasonable in this case for the Director to adopt the Case Management Team's recommendations and, in so doing, to adopt the Assessment for Decision. The Director's decision contains sufficient details, in the circumstances, for the applicant to understand the reasons for it.

[70] The Supreme Court recently dealt with the perspective in which the adequacy of reasons for decision should be considered in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (available on CanLII). The following passages appear to me to be highly relevant and applicable to this case:

> **15** In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> **16** Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[71] Finally, the Director's opinion that the applicant's role and involvement pointed to a period of observation in a more structured environment must be placed in context. First, the Director was responding to arguments that the applicant advanced on December 24, 2010, in his response to the Assessment for Decision. Moreover, this opinion was completely consistent with the results obtained in the Custody Rating Scale as well as the Case Management Team's assessment and recommendation. Based on the file as a whole, the Director determined that the applicant's role and involvement in the operation that led to his conviction pointed to a more structured period of observation than in a minimal security environment. I see nothing unintelligible or unreasonable in that opinion.

[72] The applicant disagrees with the Case Management Team's recommendations and the Director's decisions, and he is essentially asking the Court to reweigh the criteria in the Act and Regulations. That is not the Court's role. I therefore find that the Director's decision falls within a range of possible outcomes in respect of the facts and the law and does not provide any basis for the Court's intervention.

[73] The application for judicial review is therefore dismissed.

**JUDGMENT**

**THE COURT RULES that** the application for judicial review is dismissed with costs.

"Marie-Josée Bédard"
Judge

Certified true translation
Mary Jo Egan, LLB

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-127-11 |
| **STYLE OF CAUSE:** | EUGENIO REDA v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | December 5, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | BÉDARD J. |
| **DATED:** | January 19, 2012 |

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| Toni Abi | FOR THE RESPONDENT |

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