

*Federal Court of Appeal*



*Cour d'appel fédérale*

**Date: 20161130**

**Docket: A-49-16**

**Citation: 2016 FCA 306**

**[ENGLISH TRANSLATION]**

**CORAM: NOËL C.J.  
TRUDEL J.A.  
BOIVIN J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Appellant**

**and**

**MATHIEU L'ESPÉRANCE**

**Respondent**

Hearing held at Montréal, Quebec, on November 30, 2016.

Judgment delivered from the Bench at Montréal, Quebec, on November 30, 2016.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**TRUDEL J.A.**

Federal Court of Appeal



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**REASONS FOR JUDGMENT OF THE COURT**  
(Delivered from the bench at Montréal, Quebec, on November 30, 2016.)

**TRUDEL J.A.**

[1] The Attorney General of Canada (or the appellant) is appealing from a judgment of the Federal Court (2016 FC 19) that allowed the respondent's application for judicial review of a decision by the independent chairperson of the disciplinary tribunal of the Drummond Institution.

[2] While an inmate at the Drummond penitentiary, the respondent was found guilty of a disciplinary offence, that is, having in his possession, without prior authorization, the ingredients necessary for the production of illicit spirits, specifically four gallons of a liquid ready to be fermented (paragraph 40(j) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20).

[3] Even before the issuance of the offence report and the notification of charge, the respondent went to the Institution's health services centre and requested voluntary administrative segregation. He told the authorities at the penitentiary that, following a visit by two fellow inmates, he had been forced to allow his cell to be used in the production of alcohol as payment for a debt that he had incurred while at another institution. He stated that he feared for his physical safety.

[4] At his disciplinary hearing, the respondent acknowledged having been in possession of the prohibited liquid mixture, and then raised duress as his defence, but in vain. The independent chairperson found the respondent guilty beyond a reasonable doubt of the offence set out in the notification of charge.

[5] The respondent applied for judicial review of the decision, alleging that the independent disciplinary tribunal had erred in his analysis of his defence. A judge of the Federal Court agreed. We are of the view that the Federal Court erred in making that finding and that this appeal must be allowed.

[6] In her very detailed judgment, the judge did not consider the applicable standard of review in the case. This is where, in our opinion, she took the wrong avenue by reviewing the independent chairperson's decision more according to the standard of correctness than to the standard of reasonableness. Decisions of the independent chairperson involving questions of mixed fact and law must be treated with deference by the reviewing court (*Swift v. Canada (Attorney General)*, 2014 FC 1143, at paragraphs 31-33, affirmed *Swift v. Canada (Attorney General)*, 2016 FCA 43, at paragraph 2; *Breton v. Canada (Attorney General)*, 2016 FC 76, at paragraph 34). Therefore, findings of the independent chairperson in relation to a common law rule—here, the defence of duress raised by the respondent—will be upheld if they are reasonable and have a basis in the evidence accepted by the independent chairperson.

[7] In our opinion, the judge could not have intervened if she had analyzed the decision of the independent tribunal according to the standard of reasonableness, as she was required to do.

[8] In *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14 [*Ryan*], the Supreme Court of Canada set out six elements for the common law defence of duress. The third component is of particular interest in this case, that is, that there must be “no safe avenue of escape” (at paragraph 81).

[9] According to the respondent, the independent chairperson failed to assess this element according to the modified objective standard by asking whether [translation] “a reasonable person in the same situation as the respondent and with the same personal characteristics and experience as him would conclude that there was no safe avenue of escape” (Respondent's

Memorandum of Fact and Law at paragraph 33). The independent chairperson also allegedly erred by not analyzing the last three criteria. We disagree.

[10] The independent chairperson reasonably applied the modified objective standard to the respondent's conduct. The respondent knew the solution, but disregarded it at the time when he was forced to break the Institution's rules by keeping the prohibited liquid mixture in his cell. The independent chairperson found that the respondent knew that he could talk about what had happened and seek protection because that is exactly what he did, after the seizure.

[11] As stated in paragraph 65 of *Ryan*, “[i]f a reasonable person similarly situated would think that *there was* a safe avenue of escape, the requirement is not met” [emphasis in original]. This is what the independent chairperson concluded in this case after reviewing the respondent's conduct against the prescribed standard.

[12] Having reached that conclusion, the independent chairperson was no longer required to continue his analysis to examine the last three elements of the defence of duress. He cannot be faulted for that omission. He was also convinced beyond a reasonable doubt that the respondent had committed the alleged offence. The intervention of this Court is therefore not warranted.

[13] Consequently, this appeal will be allowed; the Federal Court's decision will be set aside; and, rendering the decision that the Federal Court should have rendered, the respondent's application for judicial review of the decision by the disciplinary tribunal of the Drummond Institution will be dismissed with costs in both courts.

“Johanne Trudel”

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J.A

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-49-16

**STYLE OF CAUSE:** ATTORNEY GENERAL OF  
CANADA v. MATHIEU  
L'ESPÉRANCE

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** NOVEMBER 30, 2016

**REASONS FOR JUDGMENT OF THE COURT BY:** NOËL C.J.  
TRUDEL J.A.  
BOIVIN J.A.

**DELIVERED FROM THE BENCH BY:** TRUDEL J.A.

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