Federal Court of Appeal | Cour d'appel fédérale

Date: 20191104

Docket: A-75-18

Citation: 2019 FCA 272

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
RIVOALEN J.A.

BETWEEN:

JEAN GUÉRIN
JARROD SHOOK
JAMES DRUCE
JOHN ALKERTON
MICHAEL FLANNIGAN
JEFF EWERT

Appellants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montréal, Quebec, on June 13, 2019.

Judgment delivered at Ottawa, Ontario, on November 4, 2019.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Jean Guérin *et al.* (the Appellants) are appealing the judgment of the Federal Court (the Honourable Mr. Justice Roy), rendered on January 29, 2018 (the Decision), denying their applications for judicial review. These applications challenged the legality and constitutionality

of *Correctional Service Commissioner's Directive No. 730*, *Correctional Service Commissioner's Directive No. 860* (Directive 730 and Directive 860 respectively, or the Directives) and amendments to the *Corrections and Conditional Release Regulations*, SOR/92-620 (the Regulations), which provide for increased deductions from inmate pay and the elimination of additional incentive pay.

[2] For the reasons that follow, I am of the opinion that the appeal should be dismissed, without costs.

I. Factual and procedural background

A. *Statutory and factual context*

[3] Inmates in Canadian penitentiaries have long received remuneration for their work, but until 1981 the amounts paid to them were considered a reward for good conduct (Inmate Pay Program, Correctional Service of Canada, April 1981, p. 1; Appeal Book [AB], p. 861). Following the recommendations of a parliamentary subcommittee, in 1981 the Correctional Service of Canada (the Service) was authorized to pay inmates and it decided to exercise that option. This remuneration was intended to be paid to inmates according to the work they were performing. Inmates who participated in employment programs such as agricultural work, institutional services, industrial production or other recognized programs were thus paid on the basis of their work (Inmate Pay Program, above, AB, p. 864). The pay levels were based on the amount of money remaining for the average unmarried Canadian worker who was being paid the minimum wage and spent 85% of his income on basic necessities such as food, clothing and

shelter. As the federal minimum wage at the time was $3.50 an hour, inmate pay levels ranged from $3.15 to $7.55 per day.

[4] When the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act) was adopted, Parliament chose to change the philosophy regarding payments to offenders. Section 76 of the Act provides that the Service "shall provide a range of programs designed to address the needs of offenders and contribute to their successful reintegration into the community." Offenders' objectives as regards their participation in these programs are set out in their respective correctional plans (s. 15.1 of the Act). Under section 15.2 of the Act, the Service is also empowered to "provide offenders with incentives to encourage them to make progress towards meeting the objectives of their correctional plans." Inmate pay is one such incentive. Subsection 78(1) of the Act now provides that the Commissioner may authorize payments to offenders for the purpose of "encouraging offenders to participate in programs [. . .] or providing financial assistance to offenders to facilitate their reintegration into the community." It should be noted that this section does not provide for pay for "work" performed.

[5] The levels of pay set by the Treasury Board are currently $6.90 per day for level A, $6.35 per day for level B, $5.80 per day for level C and $5.25 per day for level D. Compensation is also paid to inmates who are authorized to be absent from their program, or who are unable to participate for reasons beyond their control, or who refuse any program assignment or are in segregation for disciplinary reasons. The determination of an inmate's level of pay is also based on the achievement of the inmate's rehabilitation objectives (affidavit of Gregory Hall dated November 17, 2014, at para. 8, AB, pp. 2937 and 2938; affidavit of Michael Bettman, at paras.

39 to 43, AB, pp. 2348 and 2349; Directive 730, at paras. 15 and 34 and Appendix B, AB, pp. 2957–2960, 2969 and 2970).

[6] Since 1995, subsection 78(2) of the Act also provides that in cases where an inmate receives a payment or income from a prescribed source, the Service may (a) make deductions from that payment in accordance with the regulations and (b) require the inmate to pay to Her Majesty an amount, not exceeding thirty per cent of the amounts received as payment or income, to reimburse the costs incurred for the inmate's food and accommodation. That provision reads as follows:

78(2) Where an offender receives a payment referred to in subsection (1) or income from a prescribed source, the Service may	78(2) Dans le cas où un délinquant reçoit la rétribution mentionnée au paragraphe (1) ou tire un revenu d'une source réglementaire, le Service peut :
(*a*) make deductions from that payment or income in accordance with regulations made under paragraph 96(*z*.2) and any Commissioner's Directive; and	*a*) effectuer des retenues en conformité avec les règlements d'application de l'alinéa 96*z*.2) et les directives du commissaire*;*
(*b*) require that the offender pay to Her Majesty in right of Canada, in accordance with regulations made pursuant to paragraph 96(*z*.2.1) and as set out in a Commissioner's Directive, an amount, not exceeding thirty per cent of the gross payment referred to in subsection (1) or gross income, for reimbursement of the costs of the offender's food and accommodation incurred while the offender	*b*) exiger du délinquant, conformément aux règlements d'application de l'alinéa 96*z*.2.a), qu'il verse à Sa Majesté du chef du Canada, selon ce qui est fixé par directive du commissaire, jusqu'à trente pour cent de ses rétribution et revenu bruts à titre de remboursement des frais engagés pour son hébergement et sa nourriture pendant la période où il reçoit la rétribution ou tire le revenu

was receiving that income or payment, or for reimbursement of the costs of work-related clothing provided to the offender by the Service.	ainsi que pour les vêtements de travail que lui fournit le Service.

[7] Paragraphs 96(z.2) and (z.2.1) referred to in subsection 78(2) authorize the Governor in Council to make regulations, firstly, prescribing the purposes for which deductions may be made and prescribing the amount or maximum amount of any deduction, or authorizing the Commissioner to fix these amounts by Commissioner's directive and, secondly, providing for the means of collecting such amounts. In accordance with the authority thus conferred, subsection 104.1(1) of the Regulations lists the sources of income with respect to which deductions may be made pursuant to subsection 78(2) of the Act:

104.1(1) The following sources of income are prescribed for the purposes of subsection 78(2) of the Act :	104.1(1) Les sources de revenu visées pour l'application du paragraphe 78(2) de la Loi sont les suivantes :
a) employment in the community while on work release or conditional release;	*a*) un emploi dans la collectivité pendant que le délinquant bénéficie d'un placement à l'extérieur ou d'une mise en liberté sous condition;
b) employment in a penitentiary provided by a third party;	*b*) un emploi dans un pénitencier fourni par un tiers;
c) a business operated by the offender;	*c*) une activité commerciale exercée par le délinquant;
d) hobby craft or custom work; and	*d*) un passe-temps ou un travail exécuté sur commande;
e) a pension from a private or government source.	*e*) une pension versée par une entreprise privée ou une administration publique.

[8] Subsection 104.1(2) of the Regulations sets out, moreover, the possible uses to which these deductions may be put. More specifically, it provides that the deduction amounts may be used for the purpose of reimbursing:

(a) the costs of food, accommodation and work-related clothing provided to the offender by the Service; and	a) des frais engagés pour l'hébergement et la nourriture du délinquant, ainsi que pour les vêtements de travail que lui fournit le Service;
(b) the administrative costs associated with the access to telephone services provided to the offender by the Service.	b) des frais d'administration associés à l'accès aux services téléphoniques que fournit le Service au délinquant.

[9] Subsection 104.1(4) of the Regulations provides that the Commissioner of the Service "is authorized to fix, by Commissioner's Directive, the amount or maximum amount of any deduction made pursuant to paragraph 78(2)(a) of the Act and the amount to be reimbursed, by percentage or otherwise, pursuant to paragraph 78(2)(b) of the Act."

[10] The details of the Inmate Pay Program are set out in two Commissioner's Directives: Directive 730 entitled "Offender Program Assignments and Inmate Payments" and Directive 860 entitled "Offender's Money". These Directives, whose adoption is provided for in sections 97 and 98 of the Act, deal with (1) inmate program assignments, (2) the levels of payment adopted by the Treasury Board, (3) the criteria for determining levels of payment, which include inmate performance within the program as well as broader criteria such as institutional behaviour or affiliation with a security threat group, (4) deductions from payments, and (5) transfers of funds between inmates' current and savings accounts.

[11] Lastly, subsection 104.1(7) of the Regulations provides for a discretionary exception to deductions:

104.1(7) Where the institutional head determines, on the basis of information that is supplied by an offender, that a deduction or payment of an amount that is referred to in this section will unduly interfere with the ability of the offender to meet the objectives of the offender's correctional plan or to meet basic needs or family or parental responsibilities, the institutional head shall reduce or waive the deduction or payment to allow the offender to meet those objectives, needs or responsibilities.	104.1(7) Lorsque le directeur du pénitencier détermine, selon les renseignements fournis par le délinquant, que des retenues ou des versements prévus dans le présent article réduiront excessivement la capacité du délinquant d'atteindre les objectifs de son plan correctionnel, de répondre à des besoins essentiels ou de faire face à des responsabilités familiales ou parentales, il réduit les retenues ou les remboursements ou y renonce pour permettre au délinquant d'atteindre ces objectifs, de répondre à ces besoins ou de faire face à ces responsabilités.

[12] It is this Inmate Pay Program and, in particular, the Regulations and Directives that are the subject of this appeal.

[13] Six applications for judicial review were filed with the Federal Court by nine applicants, some of whom are before us on appeal. These challenges relate to the amendments to the Regulations and Directives made in October 2013, the effect of which was to reduce the inmates' available pay.

[14] More specifically, the *Regulations Amending the Corrections and Conditional Release Regulations* (SOR/2013-181) adopted on October 9, 2013 added the possibility of deducting from inmates' pay the administrative costs relating to the telephone system for inmates (see para. 104.1(2)(b) above). Following the adoption of this amendment, Directive 860 was amended

on October 24, 2013 to add an 8% deduction for telephone service costs. Directive 860 had already been amended on October 1, 2013 to set the food and accommodation deduction at 22% of payments to offenders, thus bringing total deductions to the maximum 30% set by the Act.

[15] Furthermore, Directive 730 provided that inmates could receive additional incentive pay for participating in CORCAN correctional programs. CORCAN is a special operating agency within the Service that also provides third-party-certified vocational training in business lines that are generally in demand in the community (cross-examination of Lynn Garrow, question 3, and CORCAN's constituting documents, AB, pp. 3858 and 3862–3973). On October 1, 2013, Directive 730 was amended to eliminate additional incentive payments.

[16] The applicants raise four main grounds for review of these measures. They submit that the Regulations and Directives are (i) *ultra vires* of the Act and (ii) contrary to sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the Charter), in addition to being (iii) inconsistent with various international instruments. It is further submitted that there was (iv) an employer-employee relationship between the inmates and the Service and that the decrease in the payments to offenders therefore constituted a "constructive dismissal" for the purposes of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code).

B. *Federal Court decision*

[17] On January 29, 2018, the Federal Court dismissed the underlying applications for judicial review. The judge held that insofar as section 78 of the Act was not being challenged, the

statutory instruments adopted "in strict accordance" with that section could not be *ultra vires* (Decision, at para. 138, and at paras. 37–52). The judge likewise rejected the Charter grounds. On the one hand, he found that the payments at issue—and their reduction—did not constitute cruel and unusual treatment within the meaning of section 12 of the Charter (at paras. 61–75). On the other hand, he stated that he was not persuaded that the impugned measures had an impact on any interest protected under section 7 of the Charter, much less that the principles of fundamental justice were violated (at paras. 76–108). The international instruments invoked by the Appellants in this case, wrote the judge, were not sufficient to demonstrate the existence of such a principle (at paras. 93–108). Finally, the judge rejected the Appellants' argument regarding constructive dismissal, relying in particular on the fact that paragraph 167(1)(*d*) of the Code expressly excludes government departments as defined in the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*Financial Administration Act*). The Service is explicitly mentioned as one of the divisions or branches of the federal public administration that are referred to in the definition of "department" in that Act.

[18] In this Court, only the judge's findings regarding section 7 of the Charter, the international instruments and the applicability of the Code to the Appellants are in dispute.

C. *Issues*

[19] This appeal raises the following four issues:

a) Did the Federal Court correctly identify the applicable standards of review?

b) Are the amendments to the Regulations and Directives contrary to section 7 of the Charter?

c) Are the amendments to the Regulations and the Directives invalid because they are contrary to section 76 of the *United Nations Standard Minimum Rules for the Treatment of Prisoners* and Convention No. 29 concerning forced or compulsory labour of the International Labour Organization?

d) Is there an employer-employee relationship between the Appellants and the Service?

[20] In considering the last issue, I will address the preliminary issues of whether the Federal Court has jurisdiction with respect to the application of the Code and whether it may hear an action for constructive dismissal based on an employer-employee relationship outside the federal legislative framework. These two issues were the subject of a directive to the parties prior to the hearing and also the subject of written submissions provided after the hearing at the Court's request.

II. Analysis

A. *Did the Federal Court correctly identify the applicable standards of review?*

[21] When this Court hears an appeal from a Federal Court decision on an application for judicial review challenging the legality of a regulation or other type of delegated legislation, the applicable analytical framework is the one described in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 [*Agraira*], not the one described in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. As this Court pointed out in *Canada v. Canada (Council for refugees)*, 2008 FCA 229, [2008] F.C.J. No. 1002:

> [55] Until 1990, the procedure for attacking the *vires* of a regulation promulgated under the authority of Parliament was by way of declaratory action initiated by way of a statement of claim. Since then (see the amendment to the *Federal Court Act* brought by S.C. 1990, c. 8, s. 4), the procedure for controlling the legality of subordinate legislation has been streamlined, and judicial review under section 18 of the *Federal Courts Act* (as renamed in 2002) became the means of controlling

> decisions of administrative bodies as well as the *vires* of subordinate legislation. [Citations omitted.]
>
> See also: *Canada (Attorney General) v. Mercier*, 2010 FCA 167, [2010] F.C.J. No. 816, at paragraphs 78–81.

[22] It is in fact this analytical framework, not the one in *Housen*, that the Supreme Court has used in its recent decisions concerning the legality of the exercise of a delegated legislative power: see, *inter alia*, *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635; *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360. This Court must therefore consider whether the Federal Court judge identified the proper standard of review in this case, and whether he applied it appropriately: *Agraira*, at paragraph 46.

[23] In the present case, the Federal Court did not rule on the applicable standard of review. We have therefore to consider this question for the first time. Regarding whether the Regulations and Directives violate section 7 of the Charter, I am of the opinion that the standard of correctness must apply. It is settled law that constitutional questions must be examined rigorously and without deference in the context of judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraph 30; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 58 [*Dunsmuir*]; *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, [2019] F.C.J. No. 186 at para. 30; *Begum v. Canada (Citizenship and Immigration)*, 2018 FCA 181, [2018] F.C.J. No. 1007, at para. 36, leave to appeal to the SCC denied, 38439 (April 18, 2019), [2018] S.C.C.A. No. 506 [*Begum*]; *Canada (Attorney General) v. Association of Justice Counsel*, 2016 FCA 92, [2016] F.C.J. No. 304, at para. 23.

[24] The same standard of correctness applies to the question of whether the Regulations and the Directives violate international law. Here again, this is an issue relating to the very jurisdiction to adopt the impugned measures, and not just to their reasonableness.

[25] With respect to the last question, this Court must first determine whether the judge could rule without an inspector having first been involved. The question arises insofar as the Code provides that an inspector and, ultimately, a referee, must normally decide a wage recovery claim. In deciding that it could intervene without this first step having been completed, the Federal Court did not exercise its power of judicial review and its decision therefore does not bring into play the standard of review. There is no doubt that if an inspector had ruled on whether there was an employer-employee relationship between the Appellants and the Service, great deference toward the inspector's decision would have been required on the part of the judge and this Court: see, *inter alia*, *Déménagements Tremblay* at para. 15; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, at para. 34; *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 54. If, however, it is accepted that the judge could consider this question without an inspector having previously answered it, the standard of palpable and overriding error applicable on appeal must instead be applied.

B. *Are the amendments to the Regulations and Directives contrary to section 7 of the Charter?*

[26] Determining whether there was a violation of section 7 of the Charter involves a two-step analysis. The applicant bears the burden of showing (i) that a provision infringes his or her right to life, liberty or security and (ii) that such infringement is not in accordance with the principles

of fundamental justice (see *Begum*, at paragraph 93; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 68).

[27] In the first step of this analysis, the applicant has to demonstrate that one of the listed interests is engaged and that there is a sufficient causal connection between the alleged harm and the government action that is being challenged (*Begum*, at para. 94). As the Supreme Court pointed out in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paragraph 47 [*Blencoe*]:

> [. . .] before it is even possible to address the issue of whether the respondent's s. 7 rights were infringed in a manner not in accordance with the principles of fundamental justice, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7. [. . .]

[28] In my opinion, the judge was correct in entertaining "serious doubts" about the right to liberty that would be infringed in this case. Even if a broad interpretation of the right to liberty were adopted and inmates were recognized as having a residual liberty, that right is not unlimited and only comes into play where "state compulsions or prohibitions affect important and fundamental life choices" (*Blencoe*, at para. 49). Only choices that can be characterized as "fundamentally or inherently personal" are encompassed by the right to liberty (*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, [1997] S.C.J. No. 95, at para. 66).

[29] Before the Federal Court, the Appellants had argued that their right to liberty was at issue insofar as their refusal to work would create limitations on their freedom of movement within the institution. In their view, the fact that program participants are allowed to move around during activity hours, while the others are not, constitutes a violation of section 7. Although he

ultimately disposed of the question on the basis of the principles of fundamental justice, the judge nevertheless expressed some reservations about these submissions, with good reason, in my opinion.

[30] On the one hand, as the Respondent pointed out, it is not the inmates' pay level that leads to their confinement to cell, but their decision not to participate in the programs. In a prison context, restrictions on movement are the rule. When an inmate does not participate in any activities based on his correctional plan, it is only normal that the inmate must stay in his cell. It is true, as the judge pointed out, that an inmate's residual liberty will be affected if the inmate is, as it were, put in a prison within the prison, or if the inmate is transferred to a higher-security institution, as was the case in *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 [*Khela*]. The evidence that such a consequence could result from the refusal to work was, however, "very tenuous," as the judge noted, and he was justified in dismissing that argument. Indeed, the Appellants did not reiterate the argument in this Court nor did they indicate how the judge had erred in that regard.

[31] Rather, they argue that the judge erred in considering only restrictions placed on their freedom of movement within the institution in the event that they refused to work. They contend that refusal to work will also have an impact on their correctional plan, which will result in their being kept under more restrictive detention conditions because the lowering of their risk level will be delayed as a consequence, and the chances of being granted releases into the community (temporary absence with and without escort, day parole and full parole) will be affected. Consequently, their refusal to work will limit the residual liberty that the Supreme Court

recognized them as having in *Khela*, at paragraph 34. The Appellants also argue that, as a result of the changes to the payment and deduction scheme, they will find themselves, on being released, without savings and burdened with debt, which will cause serious psychological harm that can only jeopardize their right to security.

[32] As attractive as this argument may appear, one cannot but recognize that it is not based on any supporting evidence. It is founded only on speculation unsupported by any factual data. At most, the Appellants refer, in a footnote, to sections 15, 101 and 102 of the Act, which deal with making a correctional plan and the principles guiding the granting of parole. However, these provisions are not at issue in this case. Furthermore, the Appellants have not explained how these provisions, in and of themselves, give substance to this argument.

[33] At the hearing, counsel for the Appellants referred us to the allegations of two of the Appellants as summarized by the judge in Appendix A of the Decision (at 81–82). One of the appellants (Jarrod Shook) indicated that he had participated in the consultations on the changes with respect to pay, saying that [TRANSLATION] "they would negatively affect his transfer to a lower-security institution and his rehabilitation" and that [TRANSLATION] "some have continued to work for fear of a negative impact on future transfers to lower-security institutions or on releases". Another Appellant (Michael Flannigan) said that his request to the institutional head to reduce the deductions or payments under subsection 104.1 (7) of the Regulations had been denied and that he had been warned by a manager of the negative impact that stopping working because of the pay cuts could have on his correctional plan.

[34] Although these allegations have not been contradicted, they are not sufficient in themselves to enable the Appellants to discharge their burden of establishing a violation of their right to liberty. The allegations are essentially based on their perceptions and sometimes constitute hearsay. The fears about which they testified are in no way corroborated by evidence demonstrating that those fears were justified. In fact, no evidence was adduced that would allow one to make a connection between refusal to work and the negative consequences referred to by the Appellants. Without casting doubt on the Appellants' good faith, the fact is that their testimony does not meet the requirements for establishing an infringement of their right.

[35] With respect to their right to security, the Appellants argued that they are no longer able to save money and pay their debts as a result of the cuts imposed on them and that the prospect of being released into a situation of extreme precariousness is causing them serious psychological harm. Relying on *Blencoe*, they argue that their right to security is therefore compromised.

[36] It is true that in *Blencoe* the Supreme Court recognized that security of the person covers both the physical and the psychological integrity of the individual. However, the Supreme Court specified that the state-imposed psychological stress must be serious in order for one to be able to invoke section 7:

> 57 Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" [. . .] The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be <u>state imposed</u>, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be <u>serious</u>.

> Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations. [. . .] [Emphasis added.]

[37] The evidence that the Appellants filed in support of their submissions is based essentially on their affidavits, in which some of the Appellants state that they have lost their motivation to work, that they have difficulty saving for their release and that they are worried about their future release because of their debts. While these concerns may be real, they do not appear to me to cause the same kind of serious psychological harm as that resulting from the acts of the state that the Supreme Court considered a violation of the right to security. To understand the level of psychological stress required in order to bring into play the right to security and to understand the gulf between such situations and the case at bar, one has only to consider the stress and anguish caused when the state intervenes by depriving a woman of the choice to terminate her pregnancy (*R. v. Morgentaler*, [1988] 1 S.C.R. 30, [1988] S.C.J. No. 1), by removing a child from its parents' custody (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, [1999] S.C.J. No. 47) and by preventing a person from getting the help he or she needs to end his or her life when the person is no longer able to do so alone (*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, [1993] S.C.J. No. 94).

[38] In fact, the Appellants are not seeking the invalidation of a state measure that would violate a right guaranteed to them by the Charter. Rather, they contend that their right to security imposes positive economic obligations on the State. In other words, they are seeking to persuade this Court that the Charter imposes a minimum level of pay for inmates. However, Canadian courts have never gone that far and have routinely refused to place such economic obligations on the state.

[39] As the Respondent rightly noted, the Appellants can succeed only in the event that this Court were to arrive at the conclusion that section 7 of the Charter imposes on the state a positive obligation to pay inmates a certain minimum remuneration for the work they perform or the training they take. Supreme Court case law, however, has never gone that far, and that Court's decision in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 [*Gosselin*] seems to militate against the existence of a positive obligation on the state to uphold life, liberty and security of the person through economic measures. While the majority in that case did not rule out such a possibility in other circumstances in the future, the Appellants have not persuaded me that their situation is sufficiently different from those of the welfare recipients in *Gosselin* to warrant arriving at a different conclusion: also see *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538, 91 O.R. (3d) 412, at paragraphs 101, 106 and 108.

[40] Be that as it may, I find that the judge was correct in concluding that the Appellants had not demonstrated how the impugned measures ran counter to the principles of fundamental justice. On appeal before us, the Appellants argued for the first time that the Regulations and Directives were overbroad and produced disproportionate consequences insofar as fundamental rights cannot be infringed on the basis of strictly budgetary considerations.

[41] In my view, this argument cannot succeed. On the one hand, it was not raised at first instance and was not even mentioned in the notice of appeal. As the judge pointed out, the Appellants did not present in their memorandum any argument regarding this issue; they merely put forward at the last minute, at the hearing, an argument based on international law (Decision, at paragraphs 90 and 92). As the Supreme Court noted in *Guindon v. Canada*, 2015 SCC 41,

[2015] 3 S.C.R. 3, at paragraph 22: “The test for whether new issues should be considered is a stringent one.” The Appellants have not provided any compelling reason for this Court to consider this new argument.

[42] Furthermore, the Appellants have not even attempted to explain how the measures at issue would be overbroad or produce consequences disproportionate to their object. To demonstrate a violation of the principles of fundamental justice, it is not sufficient to assert that there has been such a violation; it must also be proven. I fail to see how the discretionary payment of an amount of money, whatever that amount might be, can be overbroad or have disproportionate consequences. In the absence of any obligation in that regard on the state, such a payment cannot be considered as anything other than economic benefit for the recipient. Finally, I note that the Appellants do not dispute the judge’s finding that the impugned measures do not violate section 12 of the Charter because they do not constitute disproportionate or excessive constraints inconsistent with human dignity. Since the degree of gross and excessive disproportionality required for the purposes of section 12 of the Charter is the same as that required with respect to the principles of fundamental justice under section 7 (*R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at paragraph 160), the Appellants are precluded from raising this argument before us.

[43] For all of the foregoing reasons, I am therefore of the view that the Appellants’ argument based on section 7 of the Charter must be rejected.

C. *Are the amendments to the Regulations and the Directives invalid because they are contrary to section 76 of the United Nations Standard Minimum Rules for the Treatment*

of Prisoners and Convention No. 29 concerning forced or compulsory labour of the International Labour Organization?

[44] The Appellants contend that the judge erred in rejecting their arguments based on public international law. They maintain essentially that the rules constituting the United Nations *Standard Minimum Rules for the Treatment of Prisoners* (the Minimum Rules) have been implemented by Canada and that, even if they have not been implemented, they are persuasive authorities in the interpretation of domestic law in the same way as Convention No. 29 concerning forced or compulsory labour of the International Labour Organization (the Forced Labour Convention).

[45] Here again, the judge quite properly rejected these submissions. On the one hand, as he indicated, the Minimum Rules provide at most that inmates are to receive "equitable" remuneration for their work, without further details; they do not place obligations on signatory countries and do not include any enforcement mechanisms. Moreover, the Appellants acknowledged at trial that this instrument merely expresses "aspirations", which falls well short of creating a norm of customary international law. As for the Forced Labour Convention, it is, it seems to me, difficult to apply it to the Appellants' situation since it excludes "any work or service exacted from any person as a consequence of a conviction in a court of law." Furthermore, it has not been shown that the work performed by inmates is compulsory or forced. Rather, the evidence in the record reveals that the only consequence of refusing to work is not getting paid.

[46] On the other hand, it is well established in Canadian law that international instruments are not binding in the absence of implementing legislation. As the Supreme Court pointed out in *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, at para. 149 [*Kazemi*]:

> [. . .] Canada remains a dualist system in respect of treaty and conventional law. This means that, unless a treaty provision expresses a rule of customary international law or a peremptory norm, that provision will only be binding in Canadian law if it is given effect through Canada's domestic law-making process. The Appellants have not argued, let alone established, that their interpretation of art. 14 reflects customary international law, or that it has been incorporated into Canadian law through legislation. [Citations omitted.]
>
> See also: *Sin v. Canada*, 2016 FCA 16, [2016] F.C.J. No. 61, at para. 14.

[47] Yet, the Appellants have in no way demonstrated that the international instruments invoked in this case are part of domestic law. The mere fact that the Minimum Rules are mentioned in a publication of the Service ("Inmate Pay Program", above, AB, at 863) is not sufficient for them to be considered to have been incorporated into Canadian law.

[48] The Appellants' argument based on the presumption of a statute's conformity with Canada's international obligations cannot be accepted either. The presumption simply does not apply in this context. As the Supreme Court stressed in *Kazemi* at para. 60:

> [. . .] International law cannot be used to support an interpretation that is not permitted by the words of the statute. Likewise, the presumption of conformity does not overthrow clear legislative intent. Indeed, the presumption that legislation will conform to international law remains just that — merely a presumption. This Court has cautioned that the presumption can be rebutted by the clear words of the statute under consideration. [. . .] Canada's domestic legal order, as Parliament has framed it, prevails. [Citations omitted.]
>
> See also: *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, [2019] F.C.J. No. 186, at para. 44.

[49] The wording of subsection 78(2) of the Act, a provision whose constitutionality is moreover not disputed by the Appellants, is as clear as can be. It explicitly recognizes that deductions not exceeding thirty per cent may be made from any payments to inmates. This wording is unambiguous and the international instruments are therefore of no use for the purpose of clarifying its meaning, let alone modifying its scope.

[50] In short, I am of the opinion that this ground of appeal must be rejected.

D. *Is there an employer-employee relationship between the Appellants and the Service?*

[51] The Appellants contend that the Federal Court erred in finding that they were not covered by Part III of the Code because paragraph 167(1)(d) excludes departments within the meaning of the *Financial Administration Act*. If they cannot claim protection pursuant to the Code because the Service is a department under Schedule I.1 of the *Financial Administration Act* and if they also cannot avail themselves of the legal scheme that applies to employees of the State because they are not in an employment relationship with a department, inmates will find themselves in a kind of legal vacuum. To avoid this situation, they submit, inmates must be considered to be employed in a "federal work, undertaking or business" in accordance with paragraph 167(1)(a) of the Code.

[52] Before considering this issue, it should be determined whether the Federal Court had jurisdiction to deal with it. Although the parties did not address the issue at trial, this Court is of the view that it cannot be ignored. It is precisely for that reason that the parties were asked to make submissions with regard thereto before us.

[53] In my opinion, an inspector designated under subsection 249(1) of the Code and, if applicable, a referee appointed under subsection 251.12(1) of the Code to hear the appeal would have had jurisdiction to rule on the scope of the Code. There is no indication that Parliament intended to exclude this issue from the inspector's jurisdiction.

[54] Indeed, paragraph 251.01(1)(a) of the Code provides that any employee may make a complaint to an inspector if the employee believes that the employer has contravened a provision of Part III. Such a complaint may be rejected if the inspector is satisfied that the complaint is not within the inspector's jurisdiction (subparagraph 251.05(1)(a)(i)). In such a case, the complainant may request that the Minister review the inspector's decision (subsection 251.05 (3)), and the Minister may then either confirm the inspector's decision or rescind it and direct an inspector to deal with the complaint (subsection 251.05(4)).

[55] Specifically with respect to wage recovery applications, subsection 251.101(1) of the Code provides that an inspector's decision ordering the payment of the amounts claimed or finding that the complaint is unfounded may be reviewed by the Minister at the request of one of the parties. The Minister's decision on such review, rendered under subsection 251.101(3), may be appealed on a question of law or jurisdiction (subsection 251.11(1) of the Code). Under subsection 251.12(1), the Minister is to appoint any person that the Minister considers appropriate as a referee to hear and adjudicate such an appeal and is to provide that person with the decision being appealed and the request for appeal. The referee has broad investigative powers and may make any order that is necessary to give effect to the decision

(subsections 251.12(2) and (4) of the Code). The decision rendered is thereafter protected by a privative clause (subsections 251.12(5) to (7)).

[56] In the event that one of the parties is not satisfied with the referee's final decision in this regard, that party may make an application for judicial review of that decision. This, among other things, is what happened in *Déménagements Tremblay Express Ltée v. Gauthier*, 2018 FC 584, [2018] F.C.J. No. 595. In that recent case, the referee declared that he had jurisdiction to hear the complaint. He found that the employer did not pay the employee the salary to which he was entitled under Part III of the Code, determined the difference between the amount owing and the amount paid (subsection 251(1) of the Code), and ultimately issued a payment order to the employer (section 251.1 of the Code). The application for judicial review of that decision was ultimately dismissed.

[57] In my view, this is the avenue that the Appellants should have taken in this case (see *inter alia*: *Services Maritimes Desgagnés Inc. v. Dufour*, 2011 FC 1020, [2011] F.C.J. No. 1257; *Canada (Attorney General) v. Schwark*, 2011 FC 211, [2011] F.C.J. No. 359; *Guérin v. Autocar Connaisseur Inc.*, [2000] F.C.J. No. 819, 2000 CanLII 15623; *Tokmakjian Inc. v. Achorn*, 2017 FC 1057, [2017] F.C.J. No. 1117). It should moreover be noted in this regard that the question of whether a person is an "employee" under another part of the Code (Part I) is also left to a specialized administrative decision-maker, the Canada Industrial Relations Board: see, *inter alia*, *Conseil de la Nation Innu Matimekush-Lac John v. Association of Employees of Northern Quebec (CSQ)*, 2017 FCA 212, [2017] F.C.J. No. 997; *Syndicat des agents de sécurité Garda, Section CPI-CSN v. Garda Canada Security Corporation*, 2011 FCA 302, [2011] F.C.J.

No. 1546. Similarly, the determination of the scope of the provisions of Part III of the Code relating to unjust dismissal is left to an inspector or an adjudicator appointed by the Minister under sections 240 and 242: see, for example, *Riverin c. Conseil des Innus de Pessamit*, [2016] D.A.T.C. 124, 2016 CanLII 35702, reversed by 2017 FC 934, [2017] F.C.J. No. 970, reversed by 2019 FCA 68, [2019] F.C.J. No. 389; *Waldman v. Eskasoni Band Council*, [2001] F.C.J. No. 1228; *Beothuk Data Systems Ltd., Seawatch Division v. Dean*, [1997] F.C.J. 1117; *Norway House Indian Band v. Canada (T.D.)*, [1994] 3 F.C. 376, [1994] F.C.J. No. 328.

[58] In the written submissions that they filed with the Court following the hearing, the Appellants argued that we should exercise our discretion and rule on this issue, even though it was not previously submitted to the administrative decision-makers (the inspector and the adjudicator), because they do not possess sufficient expertise to rule on the issue. However, this statement is unsupported and not based on any evidence. Furthermore, other specialized administrative decision-makers have already ruled on similar issues. For example, the Canada Industrial Relations Board has had to determine whether Part I of the Code applied to inmates working for the same organization (CORCAN) within the Service as that to which the Appellants in this case are attached, and whether those inmates could use the certification and collective bargaining regime provided for by the Code: see *Canadian Prisoners' Labour Confederation v. Correctional Service Canada*, 2015 CIRB 779 (*Canadian Prisoners' Labour Confederation*). Likewise, the question of whether inmates could be considered "employees" within the meaning of the *Public Service Labour Relations Act*, R.S.C. 1985, c. P-35 (now the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2) has been disposed of by the Public Service Labour Relations Board: see *Jolivet v. Treasury Board (Correctional Service of Canada)*, 2013

PSLRB 1. This Court dismissed an application for judicial review of that decision in *Jolivet v. Canada (Correctional Service)*, 2014 FCA 1, [2014] F.C.J. No. 11.

[59] In view of the foregoing, I am of the opinion that the Federal Court should have declined to rule on whether the Code applied, because the Appellants had not exhausted their administrative remedies. The inappropriateness of the proceeding appears all the more glaring when one considers the remedy sought by the Appellants, namely, that this Court order the Service [TRANSLATION] "to retroactively correct the wages" paid to the inmates (Appellants' memorandum, at paragraph 93). Even assuming that the Code could apply, that request should have been made instead through a wage-recovery complaint to an inspector under sections 251.01 and 251.1.

[60] In any event, and for the sake of completeness, I would add that the Appellants' argument must be dismissed on the merits. As the Respondent rightly notes, the fundamental flaw in their argument is that they do not identify the "federal work, undertaking or business" of which they claim to be employees under paragraph 167(1)(a) of the Code. In their written submissions, the Appellants merely refer to CORCAN. CORCAN, however, is not a federal work, undertaking or business. It is, rather, a program within the Service. In his reasons, the judge described this program as follows:

> [20] CORCAN is a program within the Correctional Service of Canada that aims to rehabilitate offenders (affidavit from Lynn Garrow, Chief Executive Officer). It is set up as a special operating agency within CSC, a designation within the government that allows it to be exempt from certain government policies so that it can be managed on more of a business model to fund its operations. This special operating agency is still a part of CSC. It produces goods and services sold mainly to federal departments (e.g. office furniture, textiles), but also to other organizations.

[61] This description is consistent with the evidence in the record (see the affidavit of Lynn Garrow, AB vol. 14, at 3720) and with the conclusion that the Canada Industrial Relations Board arrived at in *Canadian Prisoners' Labour Confederation* (at paras. 17 and 25). Consequently, the judge was correct in finding that the Appellants, even to the extent that they could be considered employees, are excluded from the application of Part III of the Code. Because CORCAN is merely a program within the Service, it is not excluded from the definition of "department" in paragraph 2(a.1) and Schedule I.1 of the *Financial Administration Act*.

[62] The question remains whether the Appellants can be considered to have an employer-employee relationship at common law, rather than within the federal legislative framework. Once again, it is important to determine whether the Federal Court had the necessary jurisdiction to rule on this issue before even considering on the merits the Appellants' argument that they had been constructively dismissed.

[63] In my opinion, the question raised by the Appellants is a matter of private law relationships more than of the State's exercise of its public authority. The Appellants should therefore have proceeded by means of an action brought under section 17 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, rather than by way of an application for judicial review under section 18.1 of that same Act.

[64] In *Dunsmuir*, the Supreme Court clearly reaffirmed the principle that the Crown's relationship with its employees is governed by contract law. The Court wrote that, when the

Crown acts as an employer, it "is merely exercising its private law rights as an employer" (at paragraph 103). In this regard, the Court added:

> [105] [. . .] where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.
>
> [106] Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. A public authority cannot contract out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.

[65] The Supreme Court recently reiterated this principle in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750:

> [14] Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature — such as renting premises and hiring staff — and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347 [. . .] at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (*ibid*.). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

[66] I am therefore of the view that the Federal Court was not empowered to deal with this issue on an application for judicial review, and this Court cannot, at this stage of the proceedings, remedy the fact that the Appellants did not pursue this part of their application as an action under section 17. I note, moreover, that, in their brief written submissions filed with the Court after the hearing, the Appellants recognize that an application for judicial review "may not be the best approach to establishing rights in the context of the common law".

[67] However, I would add, again for the sake of completeness, that the Appellants have not demonstrated that they were in an employer-employee relationship with the Service. As the Respondent notes, labour relations in the public service are not assessed in light of the facts or the application of the usual common law criteria. The judge was correct in finding that the Public Service Commission has exclusive authority under subsection 29(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (*Public Service Employment Act*), to make appointments to the public service (Decision, at paras. 117 and 127).

[68] The Supreme Court's decision in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, affirming [1989] 2 F.C. 633 (FCA), [1989] F.C.J. No. 56, establishes that the concept of "de facto" public servant does not exist in federal law. As Justice Sopinka noted on behalf of the majority, in the federal scheme of labour relations "there is just no place for a species of de facto public servant who is neither fish nor fowl" (at 633). According to that logic and the wording of subsection 29(1) of the *Public Service Employment Act*, participation in a program offered to inmates cannot constitute an appointment to a position in the public service; indeed, the Appellants have not argued that participation in any of the programs offered by the Service constitutes an appointment within a department, and thus within the public service.

[69] Moreover, the judge rightly found that the true purpose of the programs offered by the Service is rehabilitation and not employment (Decision, at para. 134). Subsection 78(1) of the Act in fact allows the Commissioner to pay inmates only for the purpose of encouraging them to participate in programs provided by the Service or providing them with financial assistance to

facilitate their reintegration into the community. There is no mention of payment for work performed. The evidence actually shows that inmates who refuse to participate in programs are also entitled to compensation, albeit in a lesser amount (see affidavit of Michael Bettman, at para. 43, above). In addition, the level of an inmate's pay is based on criteria different from those underlying the salary normally paid a worker (e.g., the inmate's involvement in his or her correctional plan, overall institutional behaviour or affiliation with a security threat group): see Decision, at para. 132; Directive 730, at paras. 34, 35 above; affidavit of Michael Bettman, at para. 39, above.

[70] In short, the Appellants did not demonstrate to me that the judge erred in finding that they had not established the existence of an employer-employee relationship resulting from their participation in the programs made available to them by the Service. That being the case, I need not consider the issue of constructive dismissal.

III. Conclusion

[71] For all of the foregoing reasons, I am of the opinion that the appeal should be dismissed. Since the Respondent has not sought costs, none shall be awarded.

"Yves de Montigny"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-75-18
STYLE OF CAUSE:	JEAN GUÉRIN, JARROD SHOOK, JAMES DRUCE, JOHN ALKERTON, MICHAEL FLANNIGAN, JEFF EWERT v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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CONCURRED IN BY:	GAUTHIER J.A. RIVOALEN J.A.
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