Federal Court of Appeal  Cour d'appel fédérale

Date: 20190726

Docket: A-463-16

Citation: 2019 FCA 212

[ENGLISH TRANSLATION]

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

BETWEEN:

UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA – CSN (UCCO-SACC-CSN)

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

PRIVACY COMMISSIONER OF CANADA

Intervener

Heard at Montréal, Quebec, on February 20, 2019.

Judgment delivered at Ottawa, Ontario, on July 26, 2019.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] The Union of Canadian Correctional Officers (the appellant or the Union) is appealing from a decision rendered by the Honourable Justice St-Louis of the Federal Court (the Federal Court) on November 23, 2016, (2016 FC 1289) (Federal Court decision). In its decision, the Federal Court dismissed the appellant's application for judicial review of the Treasury Board's adoption of the *Standard on Security Screening* (2014 Standard) and the adoption by the Correctional Service of Canada (CSC) of *Commissioner's Directive 564-1 – Individual Security Screening* (the Commissioner's Directive). The Commissioner's Directive governs the implementation of the 2014 Standard requirements at CSC.

II. Background

[2] On October 20, 2014, the Treasury Board adopted the 2014 Standard. The 2014 Standard applies to all departments unless they are exempted by a statute, regulation or order, which is not the case for CSC. The 2014 Standard replaced the *Personnel Security Standard*, which had been in effect since 1994. The 2014 Standard sets out two types of screening: standard and enhanced screening. The 2014 Standard also recognizes three different security screening levels: (i) reliability status; (ii) Secret security clearance; and (iii) Top Secret security clearance.

[3] Screening requirements are determined by "the duties to be performed and by the sensitivity of information, assets or facilities to be accessed" (Appendix B).

[4] Under the previous Standard of 1994, standard screening for obtaining reliability status did not require a financial inquiry. A financial inquiry was required only for a security assessment or for an enhanced reliability check “when the duties or tasks to be performed require it or in the event of a criminal record based on the type of offence” (article 2.3.2).

[5] The 2014 Standard introduced a new requirement for standard reliability status screening to include a mandatory financial inquiry (Appendix B). The constitutionality of that requirement is at the heart of this dispute.

[6] On February 9, 2015, the Commissioner’s Directive came into effect to extend the financial inquiry to security screening for renewing the reliability status of CX-I and CX-II correctional officers employed by CSC. In practice, those employees must consent to having their credit report sent to their employer, and the employer will then obtain the report from the appropriate private agency and analyze its results. Subsequently, the employee is given the opportunity to explain any adverse information that CSC obtains.

[7] On April 30, 2015, the Union, which represents all CX-I and CX-II correctional officers at CSC, filed an application for judicial review against Appendix B of the 2014 Standard and paragraph 3(d) of the Commissioner’s Directive. According to the Union, the obligation imposed on all correctional officers who require reliability status to consent to a credit check is contrary to section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, 1982, c. 11 (U.K.) (the Charter). The Union submits that this requirement also violates section 4 of the *Privacy Act*, R.S.C., 1985, c. P-21 (the PA),

under which a government institution shall not collect personal information unless it "relates directly to an operating program or activity of the institution."

III. The Federal Court decision

[8] On November 23, 2016, the Federal Court rendered its decision on the Union's application for judicial review. Noting that the dispute concerning the 2014 Standard and the Commissioner's Directive relates to discretionary administrative decisions, the Federal Court stated that it was of the view that the reasonableness standard of review applied in this case (Federal Court decision at paragraph 94). First addressing the constitutional challenge, the Court ruled, regarding in particular the objective of the impugned provisions and their degree of intrusiveness, that they do not conflict with section 8 of the Charter and that the decision to adopt them was therefore reasonable (Federal Court decision at paragraph 126). The Federal Court subsequently analyzed the consistency of the impugned decisions with section 4 of the PA, having initially dismissed the objection raised by the Attorney General of Canada (the respondent) (Federal Court decision at paragraph 129) on the ground of prematurity. On the merits, the Federal Court stated that it was of the opinion that section 4 of the PA does not contain a "necessity test" but rather, the obligation to establish a "direct, immediate relationship" between the required information and the government's activities (Federal Court decision at paragraph 141). In this case, the credit report would meet that criterion (Federal Court decision at paragraph 143). Consequently, the Federal Court dismissed the application for judicial review.

[9] This is an appeal filed by the Union against the Federal Court's decision. Although I do not support the Federal Court's analysis in its entirety and am of the opinion that it erred in

certain regards in determining the standard of review, it nevertheless drew the appropriate conclusions. Consequently, I would dismiss the appeal with costs.

IV. Relevant provisions at issue

[10] As previously mentioned, Appendix B of the 2014 Standard, reproduced as an appendix to these Reasons, provides that a financial inquiry must be performed in order to grant reliability status, for both standard and enhanced screenings.

[11] Paragraph 3(d) of the Commissioner's Directive applies the requirements of the 2014 Standard and provides as follows:

Responsibilities	**Responsabilités**
3. The Departmental Security Officer has the following responsibilities:	3. L'agent de sécurité du Ministère a les responsabilités suivantes :
(*d*) ensure that criminal record checks, credit checks, law enforcement record checks, open source inquiries and Canadian Security Intelligence Service (CSIS) security assessments, as appropriate, are conducted at the national level	*d*) veiller à ce que des vérifications du casier judiciaire, des vérifications du crédit, des vérifications des documents sur le respect de la loi, des enquêtes de sources ouvertes et des évaluations de la sécurité par le Service canadien du renseignement de sécurité (SCRS), selon le cas, soient effectuées à l'échelle nationale
[Emphasis added.]	[Je souligne.]

[12] Section 8 of the Charter, on which the appellant bases its argument, reads as follows:

8. Everyone has the right to be secure against unreasonable search or seizure.	**8.** Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

[13] Section 4 of the PA, which the appellant also cites, provided that:

4. No personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution.	**4.** Les seuls renseignements personnels que peut recueillir une institution fédérale sont ceux qui ont un lien direct avec ses programmes ou ses activités.
[Emphasis added.]	[Je souligne.]

V. Issues

[14] This appeal raises the following issues:

(A) What is the appropriate standard of review in this case?

(B) Are the 2014 Standard and the Commissioner's Directive in conflict with section 8 of the Charter?

(C) Did the Federal Court err in determining whether paragraph 3(d) of the Commissioner's Directive was contrary to section 4 of the PA?

(D) Does paragraph 3(d) of the Commissioner's Directive concerning credit checks conform with section 4 of the PA?

VI. Analysis

A. *What is the appropriate standard of review in this case?*

[15] When deciding on an appeal from a Federal Court decision on an application for judicial review, this Court must step into the shoes of the Federal Court and focus on the administrative decision (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraph 46 [*Agraira*]). The question is therefore whether the Federal Court chose the correct standard of review and applied it properly (*Agraira* at paragraph 47).

[16] As previously mentioned, the Federal Court discussed the question of whether the 2014 Standard and the Commissioner's Directive are in conflict with section 8 of the Charter and whether the Commissioner's Directive was contrary to section 4 of the PA under the reasonableness standard (Federal Court decision at paragraph 94). In support of its finding, the Federal Court referred to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 53 [*Dunsmuir*]; *Thomson v. Canada (Attorney General)*, 2015 FC 985, [2015] F.C.J. No. 984 (QL) at paragraph 38 [*Thomson FC*], confirmed by our Court: 2016 FCA 253, [2016] F.C.J. No. 1150 (QL) at paragraph 24, leave to appeal to SCC refused, 37351 (March 30, 2017). The Federal Court then summarily concluded that the reasonableness standard applied "even if section 8 of the Charter is engaged."

[17] The parties do not attack the Federal Court's conclusion that the applicable standard of review in this case is that of reasonableness (appellant's memorandum of fact and law at paragraph 33 (A.M.); respondent's memorandum of fact and law at paragraph 52 (R.M.)). I

conclude that the Federal Court did err in choosing the standard with regard to the constitutionality issue, under section 8 of the Charter, of the 2014 Standard and the Commissioner's Directive. With respect, it is the correctness standard that is applicable.

[18] *Thomson FC*, which the Federal Court cites in support of the application of the reasonableness standard, is distinguishable from this case. In *Thomson FC*, Justice Denis Gascon referred to *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 at paragraph 36 [*Doré*]; and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 [*Loyola*]. Those cases establish the principle that when Charter values are applied to an individual administrative decision, as opposed to a law, they are being applied in relation to a particular set of facts. Such circumstances warrant a certain level of deference by the reviewing court (*Doré* at paragraph 36).

[19] Based on that doctrine, Gascon J. applied the reasonableness standard to the question of whether the Veterans Review and Appeal Board Appeal Panel's interpretation of the legislative provisions on compensation led to a discriminatory result that violates section 15 of the Charter (*Thomson FC* at paragraphs 38–40). I consider Gascon J.'s analysis to be relevant in illustrating how *Thomson FC* is distinguishable from the case at bar:

> [38] With respect to his Charter argument, Mr. Thomson made no specific written submissions regarding the applicable standard of review, but his approach at the oral hearing suggests that he views the standard of review as being correct. However, the Charter issue raised by Mr. Thomson in this case is not a constitutional challenge to the validity of the law; instead, it relates to the discretionary administrative decision made by the Appeal Panel that involves interpreting a statutory FACR provision in light of the Charter, and the application of the Charter to the particular facts of Mr. Thomson. In addition, the Supreme Court recently confirmed that the courts should not adopt a correctness standard in every case that implicates Charter values. In circumstances where the

> discretion of a decision-maker is involved, the standard of reasonableness applies to the review of administrative decisions that engage Charter protections (*Doré v Barreau du Québec*, 2012 SCC 12 at paras 36, 45 [*Doré*]; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 39-42 [*Loyola*]; *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 504 at para 20).
>
> [39] Deference is therefore in order where a tribunal acting within its specialized area of expertise interprets the Charter and applies the Charter's provisions to the particular facts of a given case in order to determine whether a claimant has been discriminated against (*Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 46).
>
> [40] In light of the foregoing, I find that the applicable standard of review on the Charter issue raised by Mr. Thomson in this application should also be reasonableness as the matter involves determining whether the interpretation of legislative provisions within the expertise of the Appeal Panel results in discriminatory treatment in violation of a Charter provision. As stated by the Supreme Court in *Doré*, the task for the Court on judicial review of such decisions involving Charter issues is to decide whether, "in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play" (at para 57). In both the recent *Doré* and *Loyola* cases, the Supreme Court reviewed the tribunal's decisions using this reasonableness and proportionality framework.
>
> [Emphasis added.]

[20] At the hearing before this Court, the respondent relied heavily on *Doré* to support the application of the reasonableness standard in this case. I would point out that, in *Doré*, the issue was whether the decision of the Disciplinary Council of the Barreau du Québec to impose a disciplinary measure on Mr. Doré for breaching article 2.03 of the *Code of ethics of advocates*, R.R.Q., 1981, c. B-1, r. 1, violated Mr. Doré's freedom of expression, protected under paragraph 2(b) of the Charter. Therefore, it was the Disciplinary Council's application of article 2.03 of the *Code of ethics of advocates* in a particular situation, and not the provision itself, that was the subject of the constitutional challenge in *Doré* (see paragraph 60).

[21] The case at bar is a completely different situation: the appellant is not challenging an individual administrative decision based on a provision of the 2014 Standard or the Commissioner's Directive that was interpreted by a decision-maker. Instead, the appellant is challenging their adoption in their entirety. Thus, the Union is attacking head on the constitutionality of the 2014 Standard and the Commissioner's Directive themselves. It follows that the analytical framework described in *Doré* does not apply and that it is therefore inappropriate to apply the reasonableness standard. The appellant's application for judicial review is more akin to a challenge of the constitutionality of a legislative or regulatory provision. Such a challenge is typically subject to the correctness standard of review (*Dunsmuir* at paragraph 58).

[22] However, since I am generally in agreement with the respondent's arguments, and since the Federal Court decision can be upheld, notwithstanding the applicable standard, this is not a case where the standard of review has a decisive influence on the outcome of the appeal. Therefore, I will not further address the analysis of the standard regarding the review of the constitutionality of the 2014 Standard and the Commissioner's Directive.

[23] With regard to the conformity of the Commissioner's Directive with section 4 of the PA, that issue is subject to the reasonableness standard (see, similarly, *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635).

B. *Are the 2014 Standard and the Commissioner's Directive in conflict with section 8 of the Charter?*

[24] Since the respondent did not dispute at trial that the credit check was a search within the meaning of section 8 of the Charter, the Federal Court limited its analysis to the issue of whether that search was abusive (Federal Court decision at paragraphs 95–98; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145).

[25] For that purpose, the Federal Court methodically applied the criteria set out by the Supreme Court of Canada in *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250 [*Goodwin*] and the criteria described by our Court in the *Reference re Marine Transportation Security Regulations (CA)*, 2009 FCA 234, [2009] F.C.J. No. 1266 (QL) [*Marine Reference*]. In the present case, the criteria in question can be described as follows: (i) the objective of the 2014 Standard and the Commissioner's Directive; (ii) the nature of those schemes; (iii) the mechanism for conducting the search, including the degree of intrusiveness; and (iv) the subsequent review and possible redress for overseeing the search.

(1) The objective of the 2014 Standard and the Commissioner's Directive

[26] The primary objective of the 2014 Standard and the Commissioner's Directive is to contribute to national security, which the appellant does not dispute (Federal Court decision at paragraphs 31 and 37). More specifically, the objective of the credit check is to assess the risk a public servant may present on the basis of financial pressure or a history of poor financial

responsibility, as well as to ensure the reliability of employees. Even the appellant admits that this is a commendable objective (Federal Court decision at paragraphs 106–107).

[27] However, the appellant criticizes the Federal Court for basing its reasoning on hypothetical evidence of potential threats and manipulations. As the respondent correctly points out on the basis of *Marine Reference*, [TRANSLATION] "the fact that the risk has not been presented in the past is not a guarantee that it will not occur in the future" (R.M. at paragraph 65). As the Federal Court explained, correctional officers are "the main point of contact for inmates" and are "likely to be the subject of attempted bribery, threats and manipulation" because they literally hold "the keys to the prison" (Federal Court decision at paragraphs 110–111). The evidence of record very clearly demonstrates the security imperatives specific to the correctional environment, as well as the particular role that correctional officers play in that environment (Appeal Book, vol. III, at pages 571–572, 577–578). The respondent also draws the Court's attention to a British study, reproduced in the record, indicating that the lure of gain is one of the main motivations reported (47%) for an employee to commit a security breach (Appeal Book, vol. XVII, at page 3579).

[28] Given the wide array of omnipresent risks that correctional officers face in their work environment, the fact that they do not handle money or a budget is of no relevance to this case, contrary to what the appellant submits. Therefore, the Federal Court was justified in finding that the information collected during the credit check serves the objectives of the 2014 Standard and the Commissioner's Directive (Federal Court decision at paragraphs 106, 110, 111 and 113).

(2) The nature of the 2014 Standard and the Commissioner's Directive

[29] The 2014 Standard and the Commissioner's Directive are administrative, rather than criminal, in nature. The case law is uniformly clear: the resulting searches are thus considered less intrusive than those performed in a criminal investigation (Federal Court decision at paragraph 114, citing *Marine Reference* at paragraph 52; *Goodwin* at paragraph 60). Therefore, it was appropriate for the Federal Court to conclude that this factor supports the reasonableness of the search at issue. In addition, since they are part of a regulated workforce, the correctional officers in this case have a relatively low expectation of privacy with respect to personal information that is reasonably related to an assessment of the extent to which they pose a threat to security (*Marine Reference* at paragraph 50).

(3) The mechanism for conducting the search

[30] With regard to how the search is conducted, contrary to the appellant's submissions, the Federal Court did not err. The Federal Court noted that the employee gives prior consent to the employer obtaining a credit report by signing a form (Federal Court decision at paragraph 116). That form indicates namely how CSC will use the information obtained, where the information will be retained, when it will expire and all of the laws protecting the information (Appeal Book, vol. XXI, at page 4320). It should also be noted that the information collected does not include the employee's credit score or deposits and withdrawals, so it does not reveal details about their lifestyle (Federal Court decision at paragraph 119). Moreover, the employee is entitled to verify the accuracy of the information that will be obtained before it is disclosed and provide explanations if necessary (Federal Court decision at paragraph 120). In addition, a problematic credit report will not necessarily have negative consequences because it is one factor among others that are considered in the renewal of reliability status (Affidavit of Nick Fabiano, Appeal

Book, vol. III, at page 585). Therefore, it was open to the Federal Court to conclude that such a request for documents is one of the least intrusive forms of search, and that this consideration supports the reasonableness of the search (*Marine Reference* at paragraphs 51 and 61).

[31] It is also relevant to note that the Commissioner's Directive provides at paragraph 4(h) that "managers will provide the individual with an opportunity to explain any adverse information." Although paragraph 4(h) is not the subject of this judicial review proceeding, the Federal Court noted, without necessarily delving into the issue, that, given this wording, it would be "possible and likely" that managers will be provided with their employees' financial information. However, the unequivocal evidence on this point is that a correctional officer's superior will never have access to the credit report at the interview stage (Appeal Book, vol. III, at page 523 and vol. XX, at page 4217 at paragraphs 20–23). Although the wording of paragraph 4(h) would not be sufficient in itself to invalidate the 2014 Standard and the Commissioner's Directive, it should be amended and clarified as soon as possible to reflect the evidence submitted before the Federal Court.

(4) Review of the relevance of possible remedies

[32] Upon examining the last criterion, that is, the subsequent review and possible remedy, the Federal Court stated that the employee subject to the credit check will have the opportunity to provide explanations for any adverse information (Federal Court decision at paragraph 123; Appeal Book, vol. XX, at page 4217 and vol. I, at page 216). Moreover, a well-defined procedure exists for contesting the refusal or revocation of reliability status or a security clearance (see *Bergey v. Canada (Attorney General)*, 2017 FCA 30, [2017] F.C.J. No. 142 (QL)

at paragraphs 25 and 71, leave to appeal to SCC refused, 37657 (February 15, 2018)), including the possibility of judicial review before the Federal Courts and, eventually, a complaint with the Human Rights Commission (Federal Court decision at paragraph 124). These factors are undeniably relevant in assessing the reasonableness of the search (*Marine Reference* at paragraph 60; *Goodwin* at paragraph 71).

[33] In fact, the appellant's arguments to attack the Federal Court's reasoning are based essentially on a disagreement with the Court's analysis and findings, which is insufficient to warrant intervention from our Court. On the basis of the record and the evidence presented, the Federal Court did not commit an error warranting the intervention from our Court in concluding that the 2014 Standard and the Commissioner's Directive did not conflict with section 8 of the Charter. In accordance with that conclusion, the Federal Court correctly concluded that it was unnecessary to determine whether the conflict was justified under the first section of the Charter.

C. *Did the Federal Court err in determining whether paragraph 3(d) of the Commissioner's Directive was contrary to section 4 of the PA?*

[34] The respondent submits that the Federal Court should not have examined the issue of whether the adoption of the Commissioner's Directive was contrary to section 4 of the PA. In support of that argument, the respondent refers a case decided by the Supreme Court, *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49 [*Auditor General*]. In that case, the Auditor General was denied the possibility of filing an application for judicial review of a denial of access to information on the grounds that the PA

provided that his only remedy was to submit a report to the House of Commons in the event of such denial.

[35] Although the respondent concedes that that case pertained to a specific context, he insists that the Federal Court erred by not following the same reasoning. According to the respondent, the appropriate remedy in this case would be a complaint to the Privacy Commissioner of Canada (the Privacy Commissioner) under paragraph 29(1)(h) of the PA. This argument cannot be accepted.

[36] For one, the Supreme Court of Canada clearly reiterated at page 110 regarding its decision in *Auditor General* that its scope was limited:

> . . . Further, the holdings in this case should be viewed as limited to the interpretation of a unique statute as informed by the particular role played by the Auditor General. The above analysis shall not be taken to detract from the fundamental principle that the courts should not readily decline to grant remedies for rights recognized by the laws of Canada.

[37] Furthermore, although paragraph 29(1)(h) of the PA provides a mechanism whereby an individual can file a complaint with the Privacy Commissioner relating to the collection of personal information by a government institution, the Commissioner's findings are not binding. Therefore, the complaint procedure provided for in the PA would not be considered an adequate alternative remedy as conceived by the Supreme Court in *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713 at paragraphs 40–42, which would have the effect of precluding the appellant from filing an application for judicial review and at the same time discharging the Federal Court's supervisory authority. Under the circumstances, I agree with the Federal Court's reasons in this regard (Federal Court decision at paragraph 129). The Federal

Court did not err by addressing the issue concerning an alleged conflict with section 4 of the PA, particularly since the issues pertaining to that section were to some extent related to those raised for the challenge based on section 8 of the Charter.

D. *Does paragraph 3(d) of the Commissioner's Directive concerning credit checks conform with section 4 of the PA?*

[38] In section 4, the PA limits the federal government's ability to collect individuals' personal information. According to that provision, a government institution may collect only information that "relates directly to an operating program or activity of the institution." In the context of judicial review proceedings, the Federal Court interpreted the phrase "relates directly" (in French: "lien direct") in section 4 of the PA and determined that, contrary to the appellant's submissions, "relates directly" is not a synonym of "necessity test." The Federal Court interpreted section 4 of the PA as follows:

> [141] However, the Court finds that the ordinary meaning of the words *relates directly* is clearly not *necessary*. Because the words must be given their ordinary meaning and because it would have been easy for Parliament to use the word *necessary* and to create a necessity test, the Court finds that that was not Parliament's intent. Despite the arguments of the Union and the Commissioner, the Court finds that section 4 does not contain a necessity test, but a less onerous test of establishing a direct, immediate relationship with no intermediary between the information collected and the operating programs or activities of the government. This interpretation considers the purpose of the Act, which is to protect the personal information of individuals within defined parameters, specifying the circumstances in which that information can be collected (*Lavigne* at para 27). The parameters are defined in section 4, which allows government institutions to collect personal information "that relates directly to an operating program or activity of the institution", and not "that is necessary" to an operating program or activity of the institution.
>
> [Citation omitted.]

[39] Although the appellant recognizes that such a “necessity test” is not described explicitly by section 4 of the PA, it nevertheless submits that the Federal Court’s interpretation is erroneous. In support of his submission, the appellant argues that the purpose of the PA is to limit the government’s collection of individuals’ personal information to that which is “necessary.” The appellant also submits that the legislative history demonstrates that Parliament’s intent was to include a “necessity test” in that provision. On that point, the appellant’s position is supported by the Privacy Commissioner, who states that the Federal Court disregarded that intent and that its use of dictionary definitions failed to eliminate the ambiguity of the phrase “relates directly.”

[40] However, contrary to the submissions of the appellant and the Privacy Commissioner, I consider that the Federal Court’s reasoning is sound and that the words “relates directly” do not clearly mean “necessary” and that it would have been easy for Parliament to incorporate this stricter burden if it wished to do so. I base this primarily on the unequivocal wording of the provision. Although the Treasury Board’s various administrative interpretations (guidelines or directives) seem to indicate that the PA has always been interpreted as containing a “necessity test,” these are not definitive and not binding on the Court (*9056-2059 Québec Inc. v. Canada*, 2011 FCA 296, 425 N.R. 314 at paragraph 35; *Canada v. Stantec Inc.*, 2009 FCA 285, 394 N.R. 133 at paragraph 13). I find it difficult to give such interpretations all the weight that the appellant and Privacy Commissioner are attempting to give them.

[41] The ambiguity that exists today seems to have always been present, to the extent that the Privacy Commissioner recommended in 2009 and again in 2016 that section 4 be amended to

include an explicit "necessity test" (Appeal Book, vol. XXII, at page 4556; vol. XXIV, at page 4955). Clearly, that recommendation has not been followed. By asking this Court a few years later to interpret the words "relates directly" as meaning "necessity," the appellant and the Privacy Commissioner are asking us essentially to take the place of Parliament and rewrite section 4 of the PA to add a "necessity test." That is not the role of the Court (*Canada v. Cheema*, 2018 FCA 45, [2018] 4 F.C.R. 328; *Hillier v. Canada (Attorney General)*, 2019 FCA 44, [2019] F.C.J. No. 228 (QL)).

[42] However, it is important to note that the previous position taken by a representative of the respondent before a House of Commons committee, who suggested that the wording of the PA undoubtedly contained an implicit "necessity test" and, consequently, that an amendment to include one explicitly was unnecessary, is puzzling (Appeal Book, vol. XXII, at page 4537). However, this obvious contradiction between the respondent's alleged position before the committee and that argued before this Court is not sufficient to convince me that the words "relates directly" in section 4 of the PA must be interpreted as containing a "necessity test." Unlike the Privacy Commissioner, I am of the opinion that the [TRANSLATION] "specific absence" of the word "necessary" in section 4 of the PA is fatal to that argument.

[43] Moreover, it is interesting to note that most, if not all, of the provincial equivalents of this provision contain explicit references to the notion of necessity (see *Act respecting Access to documents held by public bodies and the Protection of personal information*, C.Q.L.R., c. A-2.1, section 64; *Freedom of Information and Protection of Privacy Act*, L.R.O. 1990, c. F.31, subsection 38(2); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165,

paragraph 26(c); *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, paragraph 24(1)(c); *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2, paragraph 61(c)). Some of these provisions even refer both to the notion of "relates directly" and to that of "necessity"; hence, these are distinct notions.

[44] Having concluded that section 4 of the PA did not contain a "necessity test," the Federal Court also did not err in finding that it was reasonable for the CSC Commissioner to adopt paragraph 3(d) of the Directive because the information CSC collects during the financial inquiry "relates directly" to the determination of correctional officers' reliability. In addition to referring the reader to the evidence discussed in paragraph 27 of these Reasons, it is sufficient to reiterate here that, since the previous Standard was adopted in 1994, the physical and operational environment of public servants has changed considerably, namely with regard to the use of interconnected information technologies in their daily tasks. I would add that several significant changes have also occurred since 1994, such as the September 11, 2001, attacks on the World Trade Center, and that the 2014 Standard was developed and adopted to respond to the new security issues Canada faces.

[45] As previously mentioned, the requirement of an inquiry into an individual's financial situation is intended to determine whether that person poses a security risk on the basis of financial problems. That inquiry is part of public service employment and one of the ways for the employer to determine a correctional officer's reliability. Furthermore, I agree with the respondent that the Federal Court had a number of admissions by the appellant indicating that it was reasonable for CSC to collect financial information in order to assess a correctional officer's

reliability. Under the circumstances, the Federal Court was justified in finding that the information collected "relates directly" to CSC's activities:

> [143] . . . Correctional officers are in direct daily contact with individuals located inside penitentiaries and out in the community. These two groups are likely to put pressure on correctional officers. The information in correctional officers' credit reports thus contributes to assessing their trustworthiness and vulnerability.

[46] The Federal Court did not commit a reviewable error in finding that the adoption of the Commissioner's Directive is reasonable and does not violate section 4 of the PA.

[47] For all these reasons, I would dismiss the appeal with costs.

"Richard Boivin"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
Marianne Rivoalen J.A."

Certified true translation

François Brunet, Revisor

APPENDIX B — SECURITY SCREENING MODEL AND CRITERIA

1. Security Screening Model

Security screening requirements are determined by the duties to be performed and by the sensitivity of information, assets or facilities to be accessed, and in accordance with the Position Analysis tool and guidance issued by the Secretariat.

Standard screening is conducted for all duties or positions in the federal government and for any other individuals with whom there is a need to share or provide access to sensitive or classified information, assets or facilities, when responsibilities do not relate to security and intelligence functions.

Enhanced screening is conducted in limited and specific circumstances, and in accordance with the following criteria:

- When duties or positions involve, or directly support, security and intelligence (S&I) functions, including access to sensitive law enforcement or intelligence-related operational information, (i.e., sources or methodologies);
- When duties or positions involve direct joint operational activity with S&I departments or agencies;
- When duties or positions involve the provision of services to S&I departments or agencies that include management of, or access to, an aggregate of S&I information; or
- When duties or positions, and related access to sensitive information, create a high risk that an individual may be influenced by criminal or ideologically motivated persons or organizations.

There are three levels of security screening: reliability status, Secret security clearance, and Top Secret security clearance. Whenever the terms “status” or “clearance” are used, they encompass both standard and enhanced screening, unless otherwise specified.

The following table describes the standard and enhanced security screening activities.

Reliability Status	**Secret Clearance**	**Top Secret Clearance**
• 5-year background information • Verification of identity and background • Verification of educational and professional credentials • Verification of personal and professional references • Financial inquiry (credit check) • Law enforcement inquiry (criminal record check)	10-year background information • Reliability Status • CSIS security assessment	10-year background information + foreign travel, foreign assets, character references, education, military service • Reliability status / Secret clearance • CSIS security assessment
• Enhanced • Law enforcement inquiry (Law enforcement record check (LERC)) • Security questionnaire and/or security interview • Open source inquiry		Enhanced • Security questionnaire and/or security interview • Open source inquiry • CSIS security assessment • Polygraph examination
• Validity Period • 10 years	Validity Period 10 years	Validity Period 5 years

ANNEXE B — MODÈLE ET CRITÈRES DE FILTRAGE DE SÉCURITÉ

1. Modèle de filtrage de sécurité

Les exigences en matière de filtrage de sécurité sont déterminées compte tenu des tâches à exécuter et du caractère délicat des informations, des biens ou des installations auxquels l'accès est requis, et conformément à l'outil d'analyse des postes et des orientations émis par le Secrétariat.

Le filtrage ordinaire est effectué pour toutes les fonctions ou tous les postes au sein du gouvernement fédéral et à l'égard de tout autre particulier à qui il faut communiquer ou donner accès à des informations délicates, des biens ou des installations, lorsque les responsabilités ne se rapportent pas à des fonctions de sécurité ou de renseignement de sécurité.

Le filtrage approfondi est effectué dans des circonstances précises et limitées, conformément aux critères suivants :

- lorsque les fonctions ou les postes impliquent des activités liées à la sécurité et au renseignement de sécurité (S et R) ou appuient directement celles-ci, y compris l'accès à des informations opérationnelles de nature délicate liées à l'exécution de la loi ou au renseignement de sécurité (sources ou méthodologies);

- lorsque les fonctions ou les postes comportent des activités opérationnelles conjointes et directes avec des ministères ou organismes de S et R;

- lorsque les fonctions ou les postes impliquent la fourniture de services aux ministères et organismes de S et R qui comportent la gestion d'ensembles de renseignements de S et R, ou l'accès à ceux-ci; ou

- lorsque les fonctions ou les postes, et l'accès à des informations délicates, entraînent un risque élevé qu'un particulier soit susceptible d'être influencé par des personnes ou organisations criminelles ou qui ont des motivations idéologiques.

Il existe trois niveaux de filtrage de sécurité : la cote de fiabilité, l'autorisation de sécurité de niveau Secret et l'autorisation de sécurité de niveau Très secret. À moins d'indication contraire, les termes « cote » ou « autorisation » désignent le filtrage ordinaire et le filtrage approfondi.

Le tableau suivant décrit les activités de filtrage de sécurité ordinaire et approfondi.

Cote de fiabilité	**Autorisation de niveau Secret**	**Autorisation de niveau Très secret**
Contexte de cinq ans • Vérification de l'identité et des antécédents • Confirmation des titres de scolarité et des désignations professionnelles • Vérification des références personnelles et professionnelles • Enquête sur la situation financière (vérification de crédit) • Enquête sur l'exécution de la loi (vérification du casier judiciaire)	Contexte de 10 ans • Cote de fiabilité • Évaluation de la sécurité par le SCRS	Contexte de 10 ans + déplacements, biens à l'étranger, références morales, études, service militaire • Cote de fiabilité/Autorisation de niveau Secret • Évaluation de la sécurité par le SCRS
Approfondi • Enquête sur l'exécution de la loi (vérification des documents sur le respect de la loi) • Questionnaire sur la sécurité et/ou entrevue sur la sécurité • Enquête de sources ouvertes		Approfondi • Questionnaire sur la sécurité et/ou entrevue sur la sécurité • Enquête de sources ouvertes • Évaluation de la sécurité par le SCRS • Test polygraphique
Période de Validité 10 ans	Période de Validité 10 ans	Période de Validité 5 ans

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-463-16
STYLE OF CAUSE:	UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA – CSN (UCCO-SACC-CSN) v ATTORNEY GENERAL OF CANADA AND PRIVACY COMMISSIONER OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 20, 2019
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. RIVOALEN J.A.
DATED:	JULY 26, 2019

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