SUPREME COURT OF NOVA SCOTIA
Citation: Bradley v. Canada (Correctional Service), 2011 NSSC 503

Date: 20111215
Docket: Amh. No. 357720
Registry: Amherst

Between:

James Bradley

Applicant

v.

Attorney General of Canada
(Correctional Service Canada)

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	December 15, 2011, at Amherst, Nova Scotia
Oral Decision:	December 15, 2011
Written Decision:	February 6, 2012
Counsel:	James Bradley, Applicant on his own behalf Sandra Doucette, for the Respondent

By the Court:

[1] I am going to render an oral decision today for two reasons. Firstly, this is a *habeas corpus* application and it is recognized that such matters should proceed quickly before the Court. Secondly, if I find in Mr. Bradley's favour, and it took me two, three, four or five weeks to write a decision, that does not do him much good to prove he was right, and to remain in administrative segregation for an unnecessary period of time. So as I have indicated, I am going to render an oral decision today. In the event that the decision is required to be transcribed, I reserve the right to make grammatical changes or to clarify or to expand upon points without changing the reasons or rational for the decision.

[2] I am going to start at the end result. Mr. Bradley is successful in relation to his *habeas corpus* application and I am going to spend some time now explaining the reasons for my decision.

JURISDICTION:

[3] I want to start by addressing the issue of jurisdiction. That was not a contested issue before this Court in terms of whether or not I should assume jurisdiction. I do want to explain briefly why this Court is assuming jurisdiction in this situation. I offer an explanation as there have been some recent decisions of the Supreme Court of Nova Scotia, most notably the decision of **Wilson v. The Attorney General**, 2011 NSSC 143, a decision of Justice Wright, where he declined to exercise this Court's concurrent jurisdiction with the Federal Court in a *habeas corpus* matter involving an inmate of Springhill Institution. The outcome of that decision was that the inmate should go to the Federal Court to have his matter dealt with by way of judicial review. More recently, I relied on the **Wilson** decision and declined jurisdiction in an unreported decision, **Blais v. The Attorney General of Canada**.

[4] The Respondent Crown has not asked this Court to decline jurisdiction. I do think it is important to clarify that this is not the type of situation that was presented to the Court in **Wilson** or **Blais** where the inmates in those particular situations were dealing with concerns relating to National Parole Board matters and the sufficiency of evidence before the Parole Board. In **May v. Ferndale Institution**, 2005 SCC 82, the Supreme Court of Canada has directed that superior provincial courts retain their concurrent jurisdiction with the Federal Court in a

number of matters, including penitentiaries, and in most instances, should exercise it. It was recognized however, that there may be circumstances where detailed procedures are available in other forums to hear a dispute, and if so, such would justify a superior court declining jurisdiction. Matters involving the National Parole Board have been viewed as one of those exceptions. That is not the case we are dealing with today, and I am accordingly exercising this Court's jurisdiction to hear the *habeas corpus* application.

BURDEN OF PROOF:

[5] I now want to deal with the burden of proof in relation to this application. I return again to **May v. Ferndale Institution**, ***supra***. There the Court writes at paragraph 71:

> 71 Finally, a writ of *habeas corpus* is issued as of right where the applicant shows that there is cause to doubt the legality of his detention: Sharpe, at p. 58. In contrast, on judicial review, the Federal Court can deny relief on discretionary grounds: D. J. Mullan, *Administrative Law* (2001), at p. 481. **Also, on *habeas corpus*, so long as the prisoner has raised a legitimate ground upon which to question the legality of the deprivation of liberty, the onus is on the respondent to justify the lawfulness of the detention:** *Sharpe*, at pp. 86-88. However, on judicial review, the onus is on the applicant to demonstrate that the "federal board, commission or other tribunal" has made an error: s. 18.1(4) of the FCA. (Emphasis added)

[6] The Crown acknowledges that the placement of Mr. Bradley in involuntary administration segregation was a deprivation of his liberty, therefore we go directly to the second question in the test as outlined in **May v. Ferndale Institution**. That is, was Mr. Bradley's detention lawful? The onus is on the Respondent Crown to establish that his detention was, and continues to be lawful. As I indicated at the outset, it is my determination that the Crown has failed with respect to that burden.

[7] As framed by the Respondent Crown in its brief, the consideration of whether the detention is lawful involves the consideration of whether the initial decision to segregate Mr. Bradley was lawful, as well as whether the continued detention in administrative segregation, in excess of 80 days, was lawful.

SCOPE OF REVIEW – WHAT IS LAWFUL?

[8] I now want to deal with the scope of this Court's review. What exactly can and should this Court consider as part of the determination of the lawfulness of the deprivation of liberty. What does "lawfulness" mean?

[9] This issue has been recently addressed by the British Columbia Court of Appeal in **Khela v. Mission Institution**, 2011 BCCA 450. There the Court

undertook an analysis of whether “lawfulness” was restricted only to the jurisdiction to make a decision, as was argued by the institution in that case, or alternately involved a wider scope of inquiry, namely whether the decision itself was reasonable. The Court, after reviewing various case authorities and academic writings, concluded that the scope is not confined to jurisdiction only.

[10] Referencing a recent text, ***The Law of Habeas Corpus*** written by Justice Sharpe and others, the Court states at paragraph of 77 through 79 of the decision:

> 77 At p. 61, the editors express their agreement with view of Professor Wade as expressed in *Habeas Corpus and Judicial Review*, (1997) L.Q.R. 55 at. p. 62:
>
> > Whether there is an 'underlying administrative decision' is quite irrelevant. The question is whether the prisoner's detention is lawful or unlawful. The prisoner ought to be able to rely on any ground, which, if made good, would entitle him to his release. To this he is entitled as of right, as has been clear law for centuries.
>
> 78 Wade also expresses agreement with the English Law Commission recommendation that the scope of review for *habeas corpus* and judicial review should be the same.
>
> 79 In language fully consistent with the words of the Supreme Court of Canada in *May* state, the editors of the third edition state at p. 63:
>
> > *Habeas corpus* nonetheless retains an important constitutional function above and beyond judicial review. It enables anyone in detention to have a case brought speedily to court and to seek release as of right whereas the law and procedures of judicial review are in their very essence discretionary. The liberty of the individual, and the principle that governments must be able to justify each and every detention of an individual, are core elements of constitutional democracies. It is to be hoped and expected that judges in democracies will protect liberty irrespective of the procedural route by which a case comes to court. But *habeas corpus* is a bulwark against arbitrary decision-making and, to this

> extent, it is a right too precious to remove from the constitutional framework in which it is embedded.
>
> I agree with these observations and see no basis for excluding a consideration of reasonableness from the scope of review of superior courts on an application for *habeas corpus*. In Canada, a person deprived of liberty should not be limited in the scope of review by his or her choice of forum.

[11] I agree with the above view as to the scope of *habeas corpus* and adopt the reasoning as expressed by Justice Chiasson in **Khela, *supra*.** It is important to confirm and acknowledge that **Khela** and authorities before it, stand for the proposition that decisions of administrators of penal institutions are entitled to considerable deference. I agree, and in considering this matter, and the decisions made, was very mindful of the deference owed.

THE PROCESS OF ADMINISTRATIVE SEGREGATION:

[12] I turn now to a consideration of the authority and process for the placement of an inmate in administrative segregation. This is described succinctly by Ms. Doucette in her brief at paragraphs 20 – 23:

> 20. The authority for placement of an inmate into Administrative Segregation comes from ss. 31 - 37 of the *Corrections and Conditional Release Act ("CCRA")* and ss. 19 - 23 of the *Corrections and Conditional Release Regulations ("CCRA Regs")*, along with Commissioner's Directive 709 ("Seg Directive).
>
> 21. The CCRA states that an inmate may be confined in Administrative Segregation where the inmate has acted in a manner that jeopardises the safety of any person or the security of the penitentiary and the continued presence of the inmate in the general population would jeopardise the safety of any person or the security of the penitentiary.

> 22. The Seg Directive states that the confinement should be subject to the least restrictive measures and for the shortest period necessary in accordance with a fair, reasonable and transparent decision-making process based on a review of all relevant information.
>
> 23. The *CCRA Regs* outline the reviews which are to take place during an inmate's confinement.

[13] I have also taken note of Section 4 of the *Corrections and Conditional Release Act*, there being three provisions in particular which are worthy of note in the present instance. Section 4 reads:

> 4. The principles that shall guide the Service in achieving the purpose referred to in Section 3 are:
>
> (d) that the Service use the least restrictive measures consistent with the protection of the pubic, staff members and offenders;
>
> (e) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;
>
> (g) that correctional decisions be made in a forthright and fair manner with access by the offender to an effective grievance procedure.

[14] The above noted statutory objectives are clearly carried over into a document entitled "*Commissioner's Directive 709 – Administrative Segregation*". This is seen, by way of example, in the "Policy Objectives" outlined in the document. Policy objective 2, states:

> To ensure that the administrative segregation of an inmate only occurs when specific legal requirements are met, subject to the least restrictive measures. It should be consistent with the protection of the public, staff members and inmates, for the shortest period necessary, in accordance with a fair, reasonable and transparent decision making process based on a review of all relevant information.

[15] In the same document, *Commissioner's Directive 709*, under the heading "Principles", paragraphs 8, 9 and 10 state:

> 8. All decisions related to administrative segregation placement and review of conditions of confinement that are adverse to the inmate will be consistent with and reflect the duty to act fairly.
>
> 9. An inmate placed in administrative segregation will be returned to the general population at the earliest appropriate time, notwithstanding prescribed dates for a review of his/her administrative segregation.
>
> 10. All options other than placement in administrative segregation will be explored and utilized.

[16] I have also noted a document entitled "*Segregation Placement/Admission Guidelines*", which is contained in "Annex B" of *Commissioner's Directive 709*. It provides direction to staff as to the information required to be considered and placed on the Offender Management System ("OMS) in relation to an inmate placed in administrative segregation. It has eight headings. Number two is particularly relevant and it reads in part:

> **2. Consideration of all alternatives to administrative segregation:**
>
> All reasonable alternatives to administrative segregation must be considered prior to making the decision to segregate. The following list, while not exhaustive, is a sample of suggested alternatives for consideration prior to placement in administrative segregation.
>
> Note: It is not enough to mention the options that are being considered, you must describe why the alternative is not viable. Indicating "Not Applicable" beside a listed option is not acceptable.

[17] That section goes on to give examples of other options, other than administrative segregation.

[18] A similar document exists at "Annex D" of *Commissioner's Directive 709* entitled "*Segregation Review Board Report - Content Guidelines*". The purpose of this document appears to be providing direction as to the considerations which must be made, and documented when an inmate's segregation status is reviewed. I note the following comments therefrom:

> **(4) OVERALL ASSESSMENT:**
>
> Validate the legitimacy (demonstrating reasonable grounds) for placement and continued maintenance of the inmate in administrative segregation.
>
> Validate alternatives or the lack of alternatives for voluntarily segregated inmates.
>
> Validate the pattern of behaviour for involuntarily segregated inmates.
>
> Validate if ongoing investigations, the implementation of SHU packages, waiting transfer, and other extended actions justify maintenance in administrative segregation - this justification must demonstrate that the inmate continues to pose a threat to the safety and security of the institution or continues to be threatened.
>
> RE-INTEGRATION PLAN
>
> There must be a documented, clearly defined, time framed plan of action being taken by the Case Management Team to move the inmate out of administrative segregation.

THE EVIDENCE:

[19] I turn now to consider the issue of Mr. Bradley's detention, and as such, will consider briefly the evidence that is before the Court. The Crown produced three affidavits. I made an earlier ruling today that the confidential affidavit filed in relation to this matter by Mr. MacLeod was appropriate pursuant to Section 27(3) of the *CCRA*. What was also filed were affidavits of Shaun MacLeod and Correctional Officer Bremner. These witnesses were called by the Respondent Crown to confirm their affidavits and be subject to cross-examination. Neither of the witnesses called were involved in the decision to either initially place Mr. Bradley in involuntary administrative segregation or upon mandatory review, to continue his placement in administrative segregation.

[20] Ms. Bremner testified as to the alleged incident as between herself and Mr. Bradley and she was not involved in any other way with respect to the segregation decisions as I have indicated. She testified that while on duty, she heard an individual, whom she identified as Mr. Bradley by the sound of his voice, as making a single threatening comment towards her.

[21] Mr. MacLeod was called. As the evidence was available to be placed in an affidavit well in advance of the hearing, and Mr. Bradley would only be hearing

the same for the first time in the course of the proceeding, I declined the Crown's request to permit Mr. MacLeod to provide testimony with respect to Mr. Bradley's ongoing detention, specifically, the nature of his 60 day review. Mr. MacLeod stated that he was not involved in the initial or the ongoing review decisions to maintain Mr. Bradley in segregation. As such, should I have exercised my discretion to permit him to testify as requested, I am doubtful given his evidence that he would be able to shed any light on why the decision has been made to maintain Mr. Bradley in administrative segregation.

[22] As I have noted, these affiants were not the decision makers in relation to Mr. Bradley's initial or ongoing segregation reviews. The record before the Court does provide however, some indication of the decisions made, when and by whom. Although Mr. MacLeod's affidavit references in paragraph 7 what documents comprise "the record" before the Court, the items listed are not attached to his affidavit. They are before the Court by virtue of tab 2, items 1 and 2 of the Respondent's brief. I would note that all of these documents are unsigned.

[23] When questioned by Mr. Bradley as there being reference to a Mr. Rick Melanson being involved with the involuntary segregation placement as stated in paragraph 7(a) of his affidavit, Mr. MacLeod testified that this was an error, that

the wrong name was put into the OMS system and that on the original documents generated, Mr. Bruce Megeney's name and signature were added and were apparent. Prior to being raised on cross-examination by Mr. Bradley, the Court had not been advised by the Respondent of any errors contained in the documents purporting to comprise the record before the Court. I do not, as part of the record provided by the Respondent, have a copy of an "Involuntary Segregation Placement" signed or purportedly completed by Mr. Megeney. I now understand from Mr. MacLeod's evidence that it was Mr. Megeney who made the initial decision to place Mr. Bradley into involuntary administrative segregation, but the name of Rick Melanson appears, in error, on the documents before the Court. One is left with a concern as to the completeness, and accuracy of the materials provided by the Respondent, in light of the evidence of its own witness.

[24] An unsigned copy of the "Involuntary Segregation Placement" is submitted as part of the record at B(1) of the Respondent's material. It follows the headings as outlined previously in *Commissioner's Directive 709*. Under heading 2, "Consideration of all alternatives to administrative segregation", it provides:

> This IM is confrontational, abrasive and extremely difficult to deal with. On several occasions unit staff have counselled, negotiated and directed this inmate to improve his behaviour all without success.

[25] Further at tab B(2) of the Respondent's material, the outcomes of the five-day and thirty-day working reviews are included. These purport to be signed by acting parole officer S. Morris. They state as of the 5th day working review:

> Mr. Bradley you made comments regarding a staff remember that were believed to be threatening in nature resulting in your placement in administrative segregation. CMT are continuing to investigate and review your security classification. Until an investigation and review have been completed, there is no other alternative other than you residing in segregation.

On the 30 day review it is written:

> No change. Mr. Bradley you made comments regarding a staff member that were believed to be threatening in nature resulting in your placement in administrative segregation. CMT are continuing to investigate and review your security classification. Until investigation and review have been completed, there is no other alternative other than you residing in segregation.

[26] I would note that this document is unsigned and I would also note that on both reviews, Mr. Morris references "comments" and "threats". It is clear from the evidence provided by Correctional Officer Bremner that there was only one purported statement made by Mr. Bradley in relation to her. Not a great deal turns on this observation, but I will note that should this document be an unsigned copy of the review prepared by Acting Parole Officer Morris, there is some indication that he may have been under the belief that there was more than one threat or more than one comment made allegedly by Mr. Bradley to Ms. Bremner. That is not accurate according to the evidence that is before the Court. Unfortunately, the

document was unsigned, and Mr. Morris did not provide evidence as to why, on review, he supported Mr. Bradley remaining in administrative segregation.

[27] At the same tab there is reference to the "Administrative Segregation Review Board Decision". It states:

> During today's segregation review board Mr. Bradley continued to deny making the threatening comments that placed him in segregation. He stated that he is aware of several offenders who have vouched for him and doesn't understand why no one believes them. Mr. Bradley was reminded that he does have a distinctive voice and it would be surprising if someone mixed him up with someone else. He stated that it was during lunch movement after being locked down all morning so there was a lot of chatter between inmates and therefore doesn't understand how it would be possible to hear anything from the office. Subject is aware that his CMT is reviewing his security classification and proposing involuntary transfer to Atlantic Institution and it would seem he has already contacted his lawyer until it is determined whether or not subject's case could be better managed in a maximum-security institution. It is recommended that he be maintained in administrative segregation.

[28] Again, that document is unsigned and there is no indication before the Court who the decision maker was other than a reference to Nancy Cormier at the bottom, Acting Manager Assessment Intervention. It is not clear from the evidence before the Court whether it was in fact Ms. Cormier who made that decision, or someone else. I also have concern with respect to the reference of threatening "comments" being in the plural when it is clear from the evidence of Correctional Officer Bremner that there was only one alleged comment made, which she attributes to Mr. Bradley. This gives rise to whether or not Officer

Bremner's evidence has been properly considered by the decision makers, or was somehow misunderstood. This would, in my view, be relevant as to whether the initial and continuing decisions to maintain Mr. Bradley in administrative segregation were reasonable.

[29] Having reviewed the evidence before me, I found little reference to whether initially less restrictive forms of a response to Mr. Bradley's alleged behaviour were considered, and if they were, why they were deemed to be inadequate in the circumstances. In other words, why was it necessary for Mr. Bradley to be placed in administrative segregation as opposed to other options? Could other options not appropriately address any security risk that his comments may have given rise to? This was not adequately addressed by the Respondent either in the written material in the record or within the *viva voce* evidence before the Court.

[30] This same apparent lack of consideration to the principle of the least intrusive infringement upon Mr. Bradley's liberty continues in the subsequent reviews of his status.

[31] This is of concern. It gives rise to at least two possible explanations: Firstly, alternate options other than involuntary administrative segregation were simply not

considered or not considered thoroughly by the decision makers involved in this case. A second option is that if the decision makers fully considered other options, which is clear that they are required to do not only by virtue of *Commissioner Directive 709*, but by virtue of Section 4 of the *CCRA*,the record certainly does not disclose this and more importantly, does not disclose why such options were not deemed to be suitable in the circumstances. That would be important information for an inmate in Mr. Bradley's circumstances to know. It would permit him, at subsequent reviews, to knowledgeably address the concerns that the institution may have about lesser-restrictive options to administrative segregation, with the hopes of his status being reconsidered. It does not appear that Mr. Bradley has had this opportunity afforded to him.

[32] Either of the above options do not bode well for the Respondent. If alternate, less-intrusive options were not considered, it is difficult to establish that the decision to place, and in particular maintain Mr. Bradley, was as required by legislation and policy, reasonable.

[33] On this point, I particularly note Mr. MacLeod's evidence. He testified that in his experience, "everyday" staff are threatened by inmates and "everyday people cycle through segregation". Although that comment was made in the context of

answering Mr. Bradley's concern as to why such an allegedly serious incident as him threatening the life of an officer would not prompt an attempt to obtain video footage if available, that response does suggest to the Court that Mr. Bradley's alleged comment, if it was made, may not be highly unusual in the environment in which he resides. If that is "usual", why then, no consideration of "cycling" Mr. Bradley out of segregation at some point, or considering a less-intrusive option?

[34] If there was consideration to less-intrusive options, this was not provided to Mr. Bradley or clearly documented to this Court. As established in **Khela, *supra***, such non-disclosure of information may give rise to a loss of jurisdiction by the decision maker, rendering the decision to initially segregate and to maintain that status, unreasonable.

[35] I want to finally address the lack of any material in relation to the 60 day review of Mr. Bradley's segregation. The Respondent's brief indicated that the review was undertaken on November 21, 2011. No material has been filed, from November 21 to date, as to document the outcome of that decision other than I know that Mr. Bradley is still in involuntary administrative segregation. There is nothing before this Court to address whether the decision made on November 21

during that review was reasonable. It is the Crown's obligation to establish that the decision made was lawful. It has provided nothing.

[36] In conclusion, I am not satisfied that the Crown has met its burden to establish that the initial detention was lawful, nor that the subsequent determinations to maintain Mr. Bradley in involuntary administrative segregation were lawful. The documentation provided to the Court disclose, in my view, that those individuals who determined that Mr. Bradley should be placed and maintained in involuntary administrative segregation, did not comply with the obligations contained within the *CCRA*, or the *Commissioner's Directive*.

[37] Accordingly, I will issue an order that Mr. Bradley be released forthwith from administrative segregation and be returned immediately to his prior living arrangements within the institution.

J.