SUPREME COURT OF NOVA SCOTIA

Citation: *Ping v. Canada (Attorney General)*, 2020 NSSC 309

Date: 20201029
Docket: 500530
Registry: Amherst

Between:

Stephen Ping

Applicant

v.

Canada (Attorney General) and Springhill Institution (Warden)

Respondents

Decision

Judge: The Honourable Justice Peter Rosinski

Heard: October 23, 2020, in Amherst, Nova Scotia

Counsel: Grace MacCormick, for the Applicant
Shauna Hall-Coates, for the Respondents

By the Court:

Introduction

[1] Mr. Ping has a history of criminal offences dating back to the 1970s and served one previous term of federal incarceration. Then he murdered his wife by killing her with a blast from a shotgun to the face and chest on January 28, 1988. On December 14, 1989, he was sentenced to life imprisonment for having committed second-degree murder (with 16 years parole in-eligibility).

[2] In the summer of 2020, he made two applications to the Parole Board of Canada for: a 72-hour unescorted temporary absence (UTA), to be followed by a 60-day UTA. At the time he was a medium security classification inmate at Springhill Institution in Nova Scotia. He had the support of his Case Management Team (CMT) and the Community-Based Residential Facilities (CBRF).

[3] He was involved in an incident with the Springhill Institution staff member on August 27, 2020 which caused him to be immediately placed on a five-day Restricted Movement protocol. On September 2, 2020, Springhill Institution laterally transferred him on an emergency involuntary basis to Dorchester

Institution in New Brunswick which is 70 km away. Thereafter, he no longer had the support of his CMT or the CBRFs.

[4] On October 15, 2020 Mr. Ping's parole applications were denied. He attributes the denial to the circumstances of the August 27, 2020 incident, and argues that the incident was not fairly investigated, the facts thereof were presented in an unchallenged manner, and in the interim caused deprivations of his residual liberty due to the imposition of an RM protocol and the involuntary emergency transfer to Dorchester, which ultimately prevented him the opportunity to appear in a better light before the Parole Board.

[5] He makes an application for *habeas corpus* to this Court, to have him returned to Springhill Institution as a medium-security classification inmate.

[6] While I understand that Mr. Ping feels that the effect of what he considers as a relatively minor incident has unfairly had disproportionate negative consequences for him, the processes were carried out lawfully and in a fair manner, and outcomes herein were reasoned and reasonable responses by staff of the Correctional Service of Canada ["CSC"].

[7] In my opinion, there is no serious dispute about the material facts. Based upon them, and the binding or persuasive jurisprudence, I must dismiss his application. I do so on a without costs basis.

Background

[8] He was being housed as a minimum-security inmate at the Dorchester, NB, Institution, when he was reassessed to medium security, and involuntarily transferred to Springhill Institution in November 2017. He has been in Springhill Institution since then, and on August 27, 2020 was being housed in Unit 51 (general population).

[9] "Following his placement at Springhill in November 2017, Mr. Ping demonstrated institutional adjustment issues in his interpersonal relations with Springhill staff members. In October 2018, Mr. Ping made a verbal threat towards a female nurse at Springhill to the effect that he would kill her. Mr. Ping admitted to making the statement to the nurse but denied any actual intent to harm her. In following months, Mr. Ping was involved in further inappropriate comments in relation to healthcare workers, was verbally challenging with staff, and made perceived veiled threats when speaking with an officer. At the same time while incarcerated at Springhill Mr. Ping also demonstrated a positive and sustained

commitment towards his reintegration efforts and in working collaboratively with his CMT [Case Management Team].” (affidavit Jaimie Ryan, Parole Officer for Mr. Ping).

[10] Mr. Ping had applied for approval from the Parole Board for two unescorted temporary absences at the time of the incident of August 27, 2020. His last Day Parole releases from custody in 2006 and in 2010 both ended in him being suspended and revoked due to a return to substance abuse – in 2006 he was at large without permission for 18 days before he turned himself in. He did not reoffend nor were there any violent incidents on either occasion. (Tab 2 p. 3 Ryan affidavit).

[11] Given his lengthy sentence, he was understandably very interested in being approved for the unescorted temporary absences.

[12] On August 27, 2020, he was working in the Institution’s laundry room along with three other inmates with a female staff member who was supervising them. He became involved in a heated incident with her.

[13] As a result, that same day he was placed on a Restricted Movement (RM) protocol, in Unit 5-A Range (a substitute for an actual transfer to a Structured Intervention Unit – which had only been notionally created and available throughout federal Canadian correctional institutions since December 2019,

however none then existed at the Springhill Institution) until an investigation into the incident could be completed.[1]

[14] On September 2, 2020, as a result of the investigative findings and conclusions drawn therefrom, he was transferred on an involuntary emergency basis from Springhill (where he was classified as medium security) to Dorchester institution (where he was classified as medium security). He remains there.[2]

[15] In his application for *habeas corpus* he states:

> "the applicant says the detention is illegal: 'yes'; 'was not provided procedural and a fair investigation into the allegation of the incident that I have been wrongfully transferred to Dorchester penitentiary…'; The applicant is detained because: 'false allegations between my boss [AA] and this applicant… Unlawfully involuntary emergency transfer to Dorchester penitentiary from Springhill September 2, 2020'; The applicant says the detention is illegal because: 'didn't physically poke my boss nor demand anything whatsoever; was not provided procedural fairness and continued deprivation of liberty was not done according to Ottawa's CSC [Correctional Service of Canada] policies and procedures while detained in building 5– SIU[Structured Intervention Unit]' "

Mr. Ping's position

[16] His counsel says that he should be returned to the Springhill Institution as a medium security prisoner in general population.

[17] In summary, Mr. Ping's arguments are that:

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[1] See paras. 4-8; and 19 – 22, Acting Correctional Manager David Deegan's affidavit.

[2] See paras. 9-16, and 23-26 and Exhibit "G" -Deegan affidavit/see also Springhill Institutional Jaimie Ryan's affidavit - She was Mr. Ping's Parole Officer while at Springhill institution.

1. Contrary to the Crown's argument that the court should *not* review this matter pursuant to *habeas corpus*, (because his application does not plead an unlawful deprivation of residual liberty, whether in relation to the RM protocol or the involuntary transfer; and since his placement on RM protocol ended September 2, 2020 which makes the issue moot; and "the writ of habeas corpus cannot by remedy functionally reach certain alleged reductions or restrictions in residual liberty – the continuation of the same security classification being one" - per Walsh J. in *Wood v Atlantic Institution*, 2014 NBBR 135 at paras. 27-31 – although see *Gogan v Canada (AG),* 2017 NSCA 4 at para. 24) this court *should take* jurisdiction bearing in mind that:

- the original application filed September 16, 2020, was penned by Mr. Ping as a self-represented individual (see *R v Pratt*, 2020 NSCA 39 at paras. 56-7), and although it does not specifically plead any "deprivation of liberty" with respect to his placement on the RM protocol or transfer from Springhill Institution to Dorchester Institution – he did say in his application - "I have been wrongfully transferred to Dorchester penitentiary" and "unlawfully

involuntary emergency transfer to Dorchester Penitentiary from Springhill”; and

- although after the incident he was temporarily placed on a Restricted Movement protocol within Springhill Institution (which involved a deprivation of his residual liberty as compared with offenders in general population –and has been superseded by his involuntary transfer as a medium security inmate to Dorchester Institution) his matter should not be considered moot because the initial deprivation (RM protocol placement which ended on September 2, 2020) and the ultimate further deprivation (involuntary lateral transfer to Dorchester institution which began on September 2, 2020) are inextricably linked, one having directly led to the other and both having been based on the August 27, 2020 incident;

[18] I agree that this court may take jurisdiction in the circumstances.[3]

[3] This court may decline jurisdiction only when a prisoner seeks to attack the legality of their conviction/sentence or faced with a complete, comprehensive and expert scheme which provides a review that is at least as broad and advantageous as *habeas corpus* with respect to the grounds raised by the applicant- per the reasons in *Canada v Chhina*, 2019 SCC 29. The Federal court has suggested it can hear matters within its judicial review jurisdiction as quickly as Superior Courts can hear *habeas corpus* matters- *Brown v Canada*, 2020 FCA 130.

2. There has been a significant deprivation of his residual liberty- this deprivation (firstly, the placement on RM protocol) of his residual liberty is not moot as the collateral consequences thereof are continuing for him (secondly, the transfer to Dorchester-although the Crown says the transfer from one medium security facility to another does not superficially appear to change the extent of his residual liberty interests, and is more appropriately dealt with by the Federal Court); and therefore the onus is upon the Crown to establish the lawfulness of the deprivation of his residual liberty caused by his involuntary transfer to Dorchester institution;

[19] I agree that his placement on RM protocol [because it is *intended to effect* a similar level of restriction as if he were in a Structured Intervention Unit – which would constitute a “prison within a prison” as opposed to being “more in the realm of a loss of privileges”] is sufficient to demonstrate a deprivation of his residual liberty, when one compares his situation with that of the general inmate population (see e.g., *Gogan v Nova Scotia (AG)*, 2017 NSCA 4, per Van den Eynden JA, which involved an inmate’s initial security level – classification (minimum, medium, or maximum); and the subsequent follow-up by Justice Hunt in *Gogan v*

Canada (AG), 2018 NSSC 18). Therefore, the onus shifts to the Crown to demonstrate that the imposition of the RM protocol was done lawfully).

[20] While a lateral transfer conceivably, and exceptionally, could be seen to result in a significant deprivation of an inmate's residual liberty (*Street v Springhill Institution*, 2013 NSSC 348, per Wood J., as he then was) in this case there are insufficient grounds to conclude that there is a substantial difference between Mr. Ping's status as a medium security inmate in Dorchester as compared to Springhill Institution.

[21] Nevertheless, even if I presume a deprivation of residual liberty, the remedy that Mr. Ping seeks is unavailable because his security classification has not changed (see *Pratt*, 2020 NSCA 39 at para. 8; and *Bradley v Springhill Institution*, 2012 NSSC 173 at paras. 78-9, per Bourgeois J., as she then was) – and I see no compelling public interest in making a formal declaration about the lawfulness of the procedures and decision taken. I note that there are statutory provisions that assign the responsibility for the proper security classification and placement of inmates to institutions to CSC, and Superior Courts should be deferential to such decisions which are statutorily provided for in sections 11, 28 – 29 of the CCRA. Arguably in some circumstances, some matters are better suited to hearing by the

Federal Court as judicial reviews (E.g. see Justice Scanlan's dissenting reasons in *Gogan* 2017 NSCA 4].

3. The Crown has failed to demonstrate that the RM protocol and consequent involuntary transfer to Dorchester institution were lawful deprivations of his residual liberty because:

a. he was not afforded procedural fairness (not given sufficient opportunity to make full answer and defence to the allegations);

b. alternatives to his placement – such as mediation – were not sufficiently canvassed by CSC staff; and

c. the reasons given therefore were legally insufficient – Mr. Ping was not given meaningful reasons why neither mediation nor potential reintegration were viable options which were required to be considered pursuant to sections 28 and 34 of the *Corrections and Conditional Release Act*, 1992, SC, c. 20 ("CCRA") therefore the decisions made were not lawful.

[22] The only notable lapse in procedural fairness is related to late provision to Mr. Ping of the three "statements" from the other inmates who were present in the

laundry room. However, in substance they supported his position and he was not disadvantaged thereby, since Ian Carr, as the Acting Warden of Springhill Institution, did consider them in relation to whether the involuntary transfer decision should be upheld or reversed. Mr. Ping did receive them in advance of this *habeas corpus* hearing.

[23] Mr. Ping argues that he was procedurally prejudiced because he was not given the opportunity to participate in mediation which may have involved his reintegration at Springhill before the authorization to transfer him to Dorchester was completed. However, the CSC at Springhill Institution considered this, but it "was ruled out as a viable option. As a result of the incident involving the safety of a staff member at Springhill, it was determined that Mr. Ping posed an ongoing risk at Springhill that could not be safely managed if he were returned to its general population."- para 51 Ryan affidavit.

[24] Moreover, both the RM placement and the involuntary transfer to Dorchester Institution were decisions justifiable in fact and law (common law and statutory), as reasonable (ie. fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" *Khela* at para. 73) and are supported by reasons that reflect sufficient "justification, transparency and intelligibility".

4. In conclusion, Mr. Ping argues that the only meaningful and appropriate remedy available, is to return him to the Springhill Institution.

[25] I agree with the sentiments of Justice Ferguson in *Germa v Atlantic Institution*, 2014 NBQB 208:

> 35 The Supreme Court's decision in *Khela* sets out bright lines between those decisions that are properly those of judges hearing *habeas corpus* motions and those properly left to the administrators of penal institutions. *Threats to security, for example, are best left to those with intimate knowledge of penitentiary culture and behaviour.* Khela *at paragraph 76. Nor is it the role of the courts to go beyond assessing the reasonableness of institutional decisions and to begin to micromanage prisons*. *Khela* at paragraph 75. *This court has no power to order an inmate to be transferred to a particular institution*. See, to the same effect, *Richards v. CSC, (Warden Springhill Institution) Warden (Atlantic Institution) Warden (Dorchester Penitentiary) and the Attorney General of Canada* 2014 NBQB 171 (N.B.Q.B.) per Rideout J. at paragraph 8.
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> [My italicization added]

[26] And those of Justice Rideout in *Richards v Canada (AG)*, 2014 NBBR 171 at para. 8:

> 8 The authorities are clear that this Court shall not interfere with the administration of penal institutions. This Court cannot dictate where an inmate is to be sent. In addition, the custody and control rests with the warden of the institution where an inmate is detained. *The only role this Court can play is in determining whether a deprivation of liberty has occurred and, if so, was it lawful. If there was a deprivation which was unlawful, this Court can only order the deprivation be changed to the appropriate deprivation of liberty. This Court cannot further order that an applicant be sent to a particular institution*.
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> [My italicization added]

[27] Mr. Ping is in a different location, but has precisely the same status in the Dorchester Institution as he seeks in the Springhill Institution – he is a medium-security inmate in the general population. This court cannot order him to be returned to Springhill Institution.

> **5.** He says that if the court does not find it can order his return to Springhill Institution outright, as a *habeas corpus* remedy, then he seeks a declaration from the court that the process followed in his case and the resulting effects were procedurally unfair and therefore unlawful, and a breach of his section 7 Charter rights, which may provide a source for the declaration sought (see *Gogan v Canada (Attorney General)*, 2017 NSCA 4, and *Bonamy v Canada (Commissioner of Correction Service)*, 2000 SKQB 385-see also the decision in *Street v Springhill institution (Warden)*, 2013 NSSC 348, per Wood, J , as he then was, at paras. 8-10.)

[28] As I mentioned earlier, I find it inappropriate to make a formal declaration in the circumstances of this case.

> **6.** No costs should be awarded against him if he is unsuccessful, given that: he is exercising his constitutionally protected right to *habeas*

corpus (*Pratt* at para. 54); he has not done so vexatiously in this instance, nor has he done so repeatedly as this is his first *habeas corpus* application; particularly where he is being represented on a *pro bono* basis.

[29] I agree.

Why I am dismissing his claim to be transferred back to Springhill Institution as a medium security inmate

[30] Let me elaborate in a little more detail.

The court has jurisdiction

[31] I am sufficiently, though not wholly, satisfied that in the circumstances of this case, I should conclude that Mr. Ping has experienced a substantial reduction in his residual liberty as an inmate, and therefore treat the temporary decision to place him on an RM protocol[4] as a substitute for being placed in a Structured Intervention Unit[5] not a mere loss of certain privileges, but rather as more

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[4] As authority: see s. 37.91 CCRA and Commissioner's Directive ["CD"] 711- whereas ss. 29.1 and 31-39 CCRA and sections 19 – 23 of the Corrections and Conditional Release Regulations, SOR/92 – 620 [" CCRA Regulations"] permit the use of Structured Intervention Units.

[5] Inmates in each are to be accorded the same basic rights and entitlements – see paras. 4 and 17 of Commissioners Directive 711 – Exhibit "B" Deegan affidavit/Springhill Institution does not have Structured Intervention Units- which were introduced by CSC in 2019.

analogous to a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty is more restrictive or severe than that of the general population in the Springhill Institution.[6]

[32] I furthermore accept that Mr. Ping's being placed on RM protocol and the involuntary transfer to Dorchester are inextricably linked – both are premised on the incident in the laundry room, with results in the short term and medium to long-term (see Exh. "J" Deegan affidavit).

[33] Therefore, I conclude that he is entitled to bring his *habeas corpus* application before this court in relation to the involuntary transfer to Dorchester Institution.[7]

The lateral transfer to Dorchester Institution[8]

[6] See Mr. Ping's affidavit at para. 29; *R v Miller*, [1985] 2 SCR 613 at para 35; *Khela v Mission Institution*, 2014 SCC 24 at paras. 37 and 54-5. This conclusion would be different, if during his RM protocol, he had been offered and become involved with re-integration at Springhill before the authorization to transfer to Dorchester. But it appears that although he was willing to participate in mediation, he could not be integrated back into the general population because the Institution concluded mediation was not appropriate- at paras. 31-2 Mr. Ping's affidavit.

[7] A generous approach to such matters was reiterated by our Court of Appeal in *Pratt*, 2020 NSCA 39 at paras. 58 and 95 and in *Gogan*, 2017 NSCA 4 at para. 27: "It is clear that the Supreme Court of Canada has directed the provincial superior courts should guard against unduly narrowing the scope of *habeas corpus* – which is a constitutionally protected right".

[8] Authority: See ss. 28, 30 CCRA and sections 11, 13, 13.2, 17-18 and 29 CCRA Regulations; CDs 710-6 and 710-2.

[34] The Crown argues that Mr. Ping has not established that the lateral "transfer has placed him in Dorchester within a more restrictive environment than the one experienced at Springhill." Thus, there is no significant deprivation of his residual liberty interest.[9]

[35] Mr. Ping argues, *inter alia,* "at Dorchester, [he] has no job. He has applied for jobs, but none are available. He can only access the canteen once every two weeks and the duration and circumstances of the time he spends outside his cell are different… He does argue the conditions of his confinement have changed and that he experienced more freedom prior to August 27, 2020."[10]

[36] There will be intrinsic environmental and qualitative variations between institutions of similar classifications – and not all reductions in individual liberty rise to the level of the deprivation of residual liberty (*Dumas v LeClerc Institute*,

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[9] In support of its general assertion that this is the case the Crown cites the following: *Starr v Canada (AG),* 2019 ONSC 2534; *Thompson v Canada (AG),* 2018 ONSC 6484; *Spooner v Canada (AG),* 2016 ONSC 3570; *Firbank v Canada (AG),* 2016 ONSC 6592; *Ewode v Canada (AG)* 2019 ONSC 2533; *Storrey v William Head Institution*, [1997] FCJ No 1768 (TD); *Larente v Bonnefogel*, 2018 ABQB 140; *Blanchard v Canada (AG)* , 2010 SKQB 359, affirmed 2011 SKCA 60; *Barriera v Canada (AG),* 2018 ONSC 6123 at para 32; *Green v R*, 2009 ABQB 233 at para. 38; *Muir v Canada (AG),* 2015 ONSC 3593 at para. 39; *Bradley v Canada (AG),* 2012 NSSC 173 at paras. 78-9 per Bourgeois J (as she then was). Crown counsel describes as "an outlier decision to the above-noted jurisprudence in the Nova Scotia Supreme Court's decision of *Street v Springhill Institution*", 2013 NSSC 348, per Wood J (as he then was).In *Street* the lateral transfer was between Ontario and Nova Scotia, in contrast to Mr. Ping being transferred 70 km to Dorchester Institution.

[10] See Mr. Ping's affidavit at para. 34 where he states: "The current conditions of my confinement are different than those I was experiencing in general population at Springhill in the following ways: I can only access canteen once every two weeks; I am not employed; I spend less time out of my cell due to Covid 19 protocols; I am very concerned with the lack of hand sanitizer available at Dorchester."

[1986] 2 SCR 459 at para 12; *Hart v Canada (Attorney General)*, 2016 ABQB 177 at paras. 9 and 17: where Justice Walsh found that the inmate was seeking "to have this Court review scheduling decisions by CSC staff in respect of access to amenities or privileges.")

[37] Notably in *Gogan,* 2017 NSCA 4, Justice Van den Eynden stated at paragraph 51:

> "… The circumstances in *L.V.R.* and *Fisk* ([1996] B.C.J. No. 179 (S.C.)) which the Court of Appeal relied upon, do not mirror Mr. Gogan's. In fact, they are fundamentally different. To repeat, in *L.V.R.*, the inmate's liberty increased as a result of his initial security classification and transfer out of the RRAC. *In Fisk,* the inmate was also held at the same RRAC and initially classified as a maximum-security offender. *The terms of confinement were considered to be lateral (maximum to maximum) so no further deprivation arose from the initial classification. Put another way, neither* L.V.R. *or* Fisk *suffered a "substantial change of circumstances resulting in a further deprivation of liberty" (*Dumas*, category 2).*
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> [My italicization added]

[38] While there may be cases where unusual and exceptional circumstances allow a court to conclude that a lateral transfer to a different institution does trigger "a substantial change in the conditions" such that the level of an inmate's deprivation of residual liberty is sufficiently affected to justify a review of the lawfulness thereof, I do not conclude that is the case here.

[39] Nevertheless, presuming for the moment that Mr. Ping has shown a sufficient deprivation of his residual liberty, I will continue the analysis with a focus on its lawfulness.

Was Mr. Ping afforded procedural fairness throughout?

[40] Mr. Ping says he was not afforded procedural fairness in responding to the allegations of August 27, 2020 because:

1. he was not provided with the statements of the three other prisoners who were present in the laundry room during the incident until after he had made his verbal and written rebuttal in response (which he characterizes as full answer and defence);
2. the reasons for his placement on the RM protocol and the involuntary transfer to Dorchester rely entirely on the facts of the August 27, 2020 incident, and CSC staff did not take all reasonable steps to ensure that the information about him from that incident was "as accurate, up-to-date and complete as possible" per s. 24(1) CCRA (unreliable information); and
3. that he was not offered the opportunity for mediation or reintegration into the general population at Springhill Institution (which is a

threshold issue for the RM placement – ie. a finding pursuant to s. 34 CCRA that “there is no reasonable alternative to the inmates confinement in a structured intervention unit…” (which he characterizes as insufficient reasons for the decision)[11]

[41] Regarding the “full answer and defence” argument, there are legislative requirements that mandate inmates be provided with “all the information to be considered in taking of the decision or a summary of that information”, per s.27 CCRA; and that CSC “shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up-to-date and complete as possible” per s. 24 CCRA.[12]

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[11] His parole officer’s affidavit testimony at para. 51 simply states: “Mediation with this staff member was considered but was ruled out as a viable option. As a result of the incident involving the safety of a staff member at Springhill, it was determined that Mr. Ping posed an ongoing risk at Springhill that could not be safely managed if he were returned to its general population. Mr. Ping’s current placement at Springhill is therefore not supported in the A4D.”; See also Tab 11 of Exhibit “A” to her affidavit Casework Record Log September 1, 2020, wherein she notes Mr. Ping “was advised that mediation has been considered however not deemed to be a viable option at this time”.

[12] See also ss. 4, 27-33, 38-44 CCRA; moreover in *Bradley v Canada (AG)* 2012 NSSC 173 Justice Bourgeois had to consider whether the Supreme Court of Canada’s decision in *May v Ferndale Institution*, [2005] 3 SCR 809] regarding CSC’s disclosure obligations was “still ‘good law’”, and in doing so found it important to reference the British Columbia Court of Appeal decision in *Khela*, which was ultimately upheld by the Supreme Court of Canada 2014 SCC 24. In the latter decision the Supreme Court confirmed that regarding the scope of the duty of disclosure under section 27 of the CCRA, any information considered by the decision-maker must be disclosed even if they did not rely upon that information. Notably the court stated at para. 83 that “this disclosure is not tantamount to the disclosure required by *R v Stinchcombe* [1991] 3 SCR 326… [because] the inmate’s residual liberty is at stake, but his or her innocence is not in issue… Section 27 does not require the authorities to produce evidence in their possession that was not taken into account in the transfer decision; they are only required to disclose the evidence that was considered. Further, whereas *Stinchcombe* requires the Crown to disclose all relevant information, section 27 of the CCRA provides that a summary of that information will suffice.” Mr. Ping was also advised that continuation of the RM protocol was cancelled, therefore no longer approved, and that he would be transferred to Dorchester Institution – see Exhibit “J” Deegan affidavit

The various "statements"

[42] **AA** the staffer in the laundry stated in her Statement/Observation Report:

> "Offender Ping works in laundry on a part-time basis. This morning he shows up as usual, and there was no coffee available. He mentions that I should be providing and paying for coffee for my staff. I mentioned that even though I did get a tub of coffee when I started working here, I cannot afford to keep them in coffee. He argued that I should of supply it for hard-working staff. When Mr. Ping was folding the laundry, he proceeded to take a shirt from the folded ones and went to the bathroom to change. I told him that he cannot be doing that. He threw his dirty shirt in the basket to which I took it out and slid it across the table he was sitting at and it landed on his knees. He then got up in a fit of rage and came around the table right to my face poked his finger on my shoulder and told me to never throw anything at him again. I told him to leave and he kept ranting in my face until two of my co-workers [redacted names], intervened and pushed him out the door. I called his unit and advised that I sent him home as he was being disrespectful. I also sent the rest of the staff home. The other workers in laundry are: X, Y and Z."

[43] **Mr. Ping's Statement**/Observation Report as recorded by David Deegan (Exh. "A" Deegan affidavit) reads:

> On the above date and time, I was advised that Offender Ping was being disrespectful to AA staff [laundry worker]. Ping was sent back to the unit and I immediately had him back to my office to see what happened.
>
> Offender Ping told me that **AA and himself got into a really bad argument** and that **he was sick of her treating him with disrespect**, Ping claims that **AA threw a dirty shirt at him so he got in her face and called her disrespectful, he also said that the old me wouldn't be so easily disrespected.** As I'm having this conversation with Ping, I get a call stating that Ping assaulted AA.
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> At this point I get off the phone and told Ping he has to lock up as he assaulted a staff member and that is not medium behaviour. Ping immediately got emotional stating she is lying, stating 'why would I assault her on going up on the [Parole] Board Monday'. I asked Ping his side of the story as I could tell her was extremely emotional about this accusation. Ping said he was working on the folding table where they folded all the clothes when he went to get a coffee, he says he was told there was none left. Ping says he asked AA why she doesn't bring good per coffee in like [B] used to. He said she snapped at him screaming 'I don't have the fucking money to buy you coffee.' Ping says he went back to

> folding clothes and when it was break-time he changed his shirt into a new one like he has done time and time before. Ping said **when he sat down AA came out yelling at him telling him he is not to do that anymore and threw the shirt at him. Ping stated that at this point he got very mad and got in AA's face yelling and screaming** at her calling her disrespectful. He says AA told him to leave and he did, but he **admits calling her a few profanity names before he left**. I asked Ping if he touched AA at all – Ping says he never once touched her, he **admits that he was in her personal space** but he says there is no way I would've touched her with my day parole coming up.

[44] The only information that Mr. Ping suggests he did not have prior to giving his rebuttals, is that of the three other inmates who were present in the laundry area.[13]

[45] Inmate **X** stated:

> "Offender Ping had went for coffee and seen that there was none left, Ping approached AA and asked why she doesn't bring coffee and like the other staff. She replied 'I don't make enough money to supply all you guys with coffee.'"

[46] Based on what X said to him, Mr. Deegan then recorded non-verbatim what X stated had happened:

> "…. Ping went and changed a shirt into a clean one. At this time, X said **AA came out of her office yelling at Ping saying that you cannot change your shirt and threw the dirty one at Ping. X says Ping got up and was yelling at AA and AA was yelling back. AA then told Ping to leave, which he did but was still yelling at AA**. I asked X if Ping had touched AA in any way during the argument and X said it was a very intense argument, but he did not see Ping touch AA at all."

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[13] Their "statements", reduced to writing as an SOR and redacted to protect their identities, can be found at Exhibits "D", "E" and "F" of David Deegan's affidavit- he only became aware of them on September 4, 2020, while speaking to Ian Carr, CSC Springhill Penitentiary - see Tabs 7 and 8 of Exhibit "A" of Jaimie Ryan affidavit.

[47] Inmate **Y** stated:

> "Offender Ping had went for coffee and I told him that there was none left, Ping asked AA why she doesn't bring coffee in like [B]. She replied, 'I don't make enough money fucking to bring in coffee for you'".

[48] Based on what Y said to him, Mr. Deegan then recorded non-verbatim what Y stated had happened:

> "Y says Ping went back to folding clothes and then when it was his break-time he changed his shirt into a clean one. At this time, Y said **AA came out of her office yelling at Ping saying you cannot change your shirt and threw the dirty one at Ping. Y says Ping got up and was yelling at AA** saying she was disrespectful for throwing the shirt at me. **AA then told Ping to leave, which he did but was still yelling at AA.** I asked Y if Ping had touched AA in any way during the argument and Y said **they were in a deep argument and very close to each other** but he did not see Ping touch AA at all, he says Ping's not that stupid, he's going up for day parole soon."

[49] Inmate **Z** stated:

> "**I was working… so didn't really see much- just heard it**"…

[50] Based on what Z said to him, Mr. Deagan then recorded non-verbatim what Z stated had happened:

> Z said he remembers Ping asking AA why she doesn't bring in perk coffee. She replied, 'I'm not bringing in coffee for you guys it costs money'. Z says Ping went back to folding clothes and **then the next thing I know they are fighting because AA had thrown Ping's shirt back at him after he replaced it with a new one. Z said they were in each other's face yelling and screaming and then AA told Ping to leave which he did but was still yelling back at AA as he left.** I asked him if Ping had touched AA in any way during the argument. Z said that they were yelling at each other and in each other's face, but I never seen Ping touch her or hurt her.

[51] Those statements are generally consistent with his own statements as to what happened in the laundry room – that he was upset because there was no coffee available, and after he took off his dirty shirt and helped himself to a clean one, the civilian staffer (who is their supervisor) retrieved and threw the dirty shirt at Mr. Ping admonishing him for having done so- and that they did not see him actually touch her. However, they also confirmed that it was an extremely heated and very close encounter which he ultimately brought into being, and it was more than momentary. He himself admits that he made a comment to her 'the old me wouldn't be so easily disrespected'.

[52] His not seeing the statements until September 4, 2020 is of no consequence.

[53] Regarding the "unreliable information" argument, I conclude that the investigation proceeded expeditiously, with a genuine effort to be accurate and reliable, and that the gist of the gathered information from all persons present was communicated to Mr. Ping. Notably, all those present indicate that Mr. Ping approached the staff member complaining that she did not provide them with coffee as had happened in the past, and then he changed into a clean shirt tossing the dirty one into the laundry, which AA then threw in his direction while yelling at him for having put it into the laundry. They both began yelling at each other and were very close to each other while yelling and screaming.

[54] The staff member's account states that when Mr. Ping was folding the laundry, he proceeded to take a shirt from the folded ones and went to the bathroom to change. "I told him that he cannot be doing that. He threw his dirty shirt in the basket to which I took it out and slid it across the table he was sitting at and it landed on his knees. He then got up in a fit of rage and came around the table right to my face poked his finger on my shoulder and told me to never throw anything at him again. I told him to leave and he kept ranting in my face until two of my workers intervened and pushed him out the door."

[55] Mr. Ping does not deny the general tenor of what happened, however he is adamant he did not touch the staff member.

[56] I note at this juncture that section 265 (1) of the *Criminal Code* defines assault as follows:

> "A person commits an assault when
>
> a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> b) *he attempts or threatens, by act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose*; or
>
> c) while openly wearing or carrying a weapon or imitation thereof, he accosts or impedes another person or begs."

[57] There is no real controversy about what happened. Further investigation was not required by law or in the factual context of this case.

[58] Whether Mr. Ping touched the staff member is not determinative. He was in no manner physically “defending” himself against the staff member. It could fairly be said that he was attempting to intimidate her, and she would have reasonably concluded that he threatened her.

[59] Regarding his argument that he received “insufficient reasons” for his involuntary transfer to Dorchester Institution, because it was not explained to him how CSC staff could be “satisfied that there is no reasonable alternative” to his being subject to an RM protocol and then involuntarily transferred to Dorchester Institution, this is really a complaint that he was “given no more substantive reasons why neither mediation nor potential reintegration are not viable options” (p. 18 Mr Ping’s brief).

[60] The reality is that both mediation and potential reintegration would have involved Mr. Ping remaining at Springhill Institution in the short term and medium term. Understandably, once CSC’s attention was drawn to him, they did a re-assessment of his security classification, which included contextual relevant information beyond the incident in the laundry room.

[61] Moreover, the laundry room staffer, who is a person in authority at the Institution, "works in every unit at Springhill" (para. 10 Deegan affidavit). Given that the institution only houses 96 persons in general population, the chances of Mr. Ping and AA crossing paths again is significant. Mr. Ping admitted "to being in her personal space, screaming and yelling at her, and calling her profane names" (para. 12 Deegan affidavit). "CSC's investigation into the incident noted that… Mr. Ping was held back by other inmates who removed him from the situation" (para. 11 Deegan affidavit).

[62] Mr. Ping's history suggests a concern about situational *animus* against females: he murdered his wife in 1988; in October 2018 "Mr. Ping made a verbal threat towards a female nurse at Springhill to the effect that he would kill her. Mr. Ping admitted to making the statement to the nurse but denied any actual intent to harm her. In following months, Mr. Ping was involved in further inappropriate comments in relation to healthcare workers, was verbally challenging with staff, and made perceived of veiled threats when speaking with an officer." (para. 8 Deegan affidavit).

[63] Mr. Ping was advised about the potential outcomes from the August 27, 2020 incident – see para. 43-4 and 55; and they were all considered by CSC staff - see paras. 47-52 Deegan affidavit.

[64] Mr. Ping's behaviour, in the context of his history, giving due deference to CSC staff involved, including his then parole officer, and to those responsible for the safe and effective operations of the Springhill Institution, leads me to the conclusions that: the decision to place him on the RM protocol and ultimately involuntarily transfer him to Dorchester Institution were taken after a sufficient level of procedural fairness was accorded to Mr. Ping; the decision was made with the requisite degree of "justification, transparency and intelligibility" and falls within the "range of possible acceptable outcomes which are defensible in respect of the facts and law" in this case.

[65] As the Supreme Court of Canada stated in *Khela* at para 76:

> "…a transfer decision [from medium to maximum institution] requires a 'fact driven inquiry involving the weighing of various factors and possessing a negligible legal dimension' … Determining whether an inmate poses a threat to the security of the penitentiary or the of the individuals who live and work in it requires intimate knowledge of that penitentiary's culture and of the behaviour of the individuals inside its walls. Wardens and the Commissioner possess this knowledge and related practical experience to a greater degree than a provincial Superior Court judge."

Conclusion

[66] For the foregoing reasons I dismiss Mr. Ping's application for relief pursuant to the principles associated with *habeas corpus*.[14]

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[14] Mr. Ping made an argument that Covid 19 should have been a consideration in not moving him to Dorchester Institution. No material evidence was presented in this regard insofar as what differences as to the risk of

[67] Mr. Ping has had the benefit of counsel, who has spoken eloquently on his behalf, and has also been of great assistance to the Court. Crown counsel has similarly been of great assistance. The court is appreciative of their diligence in the preparation and presentation of the facts and arguments.

Order

[68] I direct that counsel for the Crown prepare the order. I am not satisfied that it is in the interests of justice to order costs against Mr. Ping as the unsuccessful party. I decline to make any award as to costs.

Rosinski, J.

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transmission are as between Springhill and Dorchester Institutions. At the time, neither Nova Scotia nor New Brunswick had a discernible public health problem arising from Covid-19. Mr. Ping also argued that should the court find it did not have jurisdiction or cause to make an order that he be returned to Springhill institution, it should entertain making a declaration that the decision process followed in his case and the resulting effects were procedurally unfair and therefore unlawful. I have found otherwise and reiterate it is well accepted that courts should be loathe to give formal declaratory relief except in situations where justice *demands* it.