SUPREME COURT OF NOVA SCOTIA
Citation: *Paul v. Correctional Services of Canada*, 2020 NSSC 380

Date: 20201223
Docket: ST No. 496429
Registry: Truro

Between:

Brandi Paul

Plaintiff

v.

Correctional Services of Canada, Nova Institution for Women and Attorney General of Canada

Respondents

Judge:	The Honourable Justice D. Timothy Gabriel
Corrected Decision:	The text of the original decision has been corrected according to the attached erratum dated January 11, 2021.
Heard:	October 14, 2020, in Truro, Nova Scotia
Counsel:	Jessica Rose, for the Plaintiff Ami Assignon, for the Respondents

By the Court:

[1] Brandi Paul (henceforth, "Ms. Paul" or the "Applicant") brings this application for *habeas corpus*. She is serving a sentence of three years, one month and fifteen days for offences that include robbery, two counts of possession of property obtained by crime, four counts of failure to comply with a Probation Order, two counts of failure to attend Court, and other counts including fraudulently obtaining food/lodging, possession, use and/or trafficking in stolen/forged/false credit cards, two counts of “theft under” and two counts of “fraud under”.

Background

[2] Ms. Paul is a 35-year-old first-time federal offender. She is presently incarcerated at Nova Institute for Women ("Nova"). She is Maliseet, and hails from St. Mary's First Nation in New Brunswick ("St. Mary's").

[3] Her undisputed contentions are that she lives with long-standing addictions, and has reported diagnoses of bipolar disorder, attention deficit disorder, depression and anxiety. She also reports a history of sexual trauma and family fragmentation.

[4] Nova is a women's multilevel facility. Ms. Paul was released from Nova to St. Mary's on July 15, 2019. She had been granted day parole at the time. That parole was suspended on December 3, 2019. The suspension was subsequently cancelled on December 20, 2019.

[5] Due to a urinalysis test performed in her community on January 9, 2020, (which had returned positive for opiates) Ms. Paul’s day parole was again suspended the next day. In addition to the positive test, she had been considered "... an increased risk for drug use, association with known drug dealers, involvement in drug subculture, missed appointments and family issues related to her drug use." (*Respondent’s brief, para. 10*)

[6] Ms. Paul describes what she experienced, subsequent to being picked up on January 10, 2020, thus:

> 7. In the course of being arrested, I spent thirty minutes in a police car and was transported to police lock up and was held for four hours. I then spent two hours in a sheriff's van and was later transferred to a second sheriff's van where I spent one more hour.

8. I was then incarcerated in New Brunswick Women's Correctional Centre in Miramichi for four days.

9. On January 14, 2020 1 was required to put on my street clothes, I was then transferred in a sheriff's van for two hours to Moncton where I was placed in a court house holding cell from 9:00 am to 3:30 pm. I was then picked up by a Nova Scotia sheriff's van and transported to Nova.

10. I was taken to the Admissions department for an ion scanner test and a drug sniffer dog.

11. Upon being admitted to Nova the ion scanner tested positive for cocaine. I asked to change my clothing because I had worn this clothing in two police cars, and three sheriff's vans and three different jail cells, and I thought it was likely I had come into contact with drugs in those places.

12. Nova staff did not permit me to change my clothing.

13. The drug sniffer dog test was conducted. Nova staff informed me that the dog indicated, twice during the same search, that I had drugs on me.

14. I asked to re-do the test in different clothing but my request was denied.

15. Nova staff asked if I would be willing to do a urinalysis and have an x-ray, I said yes and that I didn't have a package.

16. They refused to administer these tests, and I was placed in the Structured Intervention Unit ("SIU"), which is located in the former segregation unit. I was given some paperwork stating that the reason for my placement in the SIU was "dealing/in possession of drugs".

17. Upon admission to the SIU, a nurse administered urinalysis and checked my vitals. She later informed me, and I do verily believe, that my urinalysis was negative and vitals were normal. The nurse then administered my suboxone.

18. On January 15, 2020 Nova Staff asked me to attend the hospital for an x-ray. I indicated that I was agreeable to an x-ray but would first like the opportunity to speak to a lawyer. I was unable to speak to a lawyer until January 21, 2020 at which point I agreed to submit to an x-ray. However, the acting Warden responded that at that time she did not have reasonable grounds to request the x-ray and therefore would not be authorizing it.

19. On January 16, 2020, I received additional paperwork relating to my transfer to SIU ("January 16 paperwork") advising that my transfer was authorized by section 34(1)(a) of the *Corrections and Conditional Release Act*, which states: "The inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the safety of any person or the security of a penitentiary and allowing the inmate to be in the mainstream inmate population would jeopardize the safety of any person or the security of the penitentiary".

20. The January 16, 2020 paperwork also stated that the reason for my placement in the SIU was "Dealing/in possession of drugs".

> 21. The narrative in the paperwork indicated that Nova staff believed I was carrying a package of drugs.
>
> (*Paul Affidavit, February 10, 2020 paras. 7– 21*)

[7] As is apparent from the above, Ms. Paul arrived back at Nova on January 14, 2020. Prior to her return, Nova had received information from Ms. Paul's community parole officer to the effect that it was believed that she would attempt to introduce drugs into the institution. Acting Warden Kelley O'Neill also attested that unspecified security intelligence had led the institution to believe that Ms. Paul had (after her prior parole suspension) introduced "contraband/unauthorized items into [Nova] … on December 4, 2019". (*Amended affidavit of Kelley O'Neill, para. 25*)

[8] Ms. Paul was subjected to testing by a drug sniffer dog, as well as an ion scanner upon arrival at Nova. This testing was positive for drugs. As a result, the facility placed her in the Structured Intervention Unit ("SIU"), on January 14, 2020. She remained there for six days.

[9] Ms. O'Neill explains:

> 26. Based on the above information, a SIU transfer was authorized on January 14, 2020. Specifically, CSC had reasonable grounds to believe that Ms. Paul was in possession of drugs, and as such, posed a risk to the safety and security of the institution and the individuals therein. It was determined that a SIU transfer would allow CSC to manage this risk and prevent the potential for drugs being introduced into the general population. A copy of the "Structured Intervention Unit (SIU): Transfer Authorization/Confirmation/Cancellation" completed on January 14, 2020 is attached to this affidavit as Exhibit A, Tab 2.
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> (*O'Neill affidavit, October 6, 2020, para. 26*)

[10] Ms. O'Neill continues:

> 27. The SIU transfer authorization was reviewed on January 15, 2020. The following alternatives were considered by NIFW before authorizing a SIU transfer:
>
> - Release to General Population: it was believed that Ms. Paul in possession of drugs, therefore a release to general population was not considered a viable option at the time.
>
> - Placement on a Pod in the Secure Unit with modified movement: at the time, there were no Pods available for Ms. Paul, who would have required to reside there alone.
>
> - Placement in the Private Family Visit house: the Private Family Visit house is located within NIFW's general population. Placing her there

> would have increased the likelihood of drug introduction into general population.
>
> - Movement to a Provincial Correctional Facility to complete a body scan: body scans are not currently supported by CSC policies.
>
> - Placement in a dry cell or a cell with no access to running water: NIFW did not have an operational dry cell at the time.
>
> - X-ray: Ms. Paul was presented with the option of the x-ray search method. She did not consent.
>
> - Camera status/modified watch: Placement in an observation cell is based on a mental health assessment and recommendation. Ms. Paul was not presenting any mental health concerns, self-injury or suicidal behaviour.

(*O'Neill affidavit, October 6, 2020, para. 27*)

[11] The Respondents maintain that the Applicant's Indigenous social history was taken into consideration prior to the recommendation to transfer her to SIU. In fact, an interdisciplinary team was consulted, which team included her parole officer, the Indigenous liaison officer, security intelligence, correctional manager, manager of intensive's intervention strategy, assistant warden, operations, and the chief of health services.

[12] Ultimately, her transfer to the SIU was felt (at the time) by the acting/assistant Warden, to be the only means available to manage and mitigate the risk of potential drug introduction into the population. Ms. Paul complied with a request on January 15, 2020, to provide a urine sample. Nova determined that a SIU transfer would allow Correction Services Canada to manage the risk that they felt she posed and prevent the potential for drugs being introduced into the general population, while these concerns were investigated.

[13] An additional ion scanner test was conducted on Ms. Paul's personal effects on January 17, 2020. It showed "over the threshold" for THC and heroin at that time. However, when her cell was searched with a drug detecting dog, on January 18, 2020, negative results were obtained.

[14] On January 20, 2020, Ms. Paul was transferred out of the SIU and into the secure unit ("SU") of the facility. The results of her urinalysis had returned, negative, earlier that day. She no longer challenges her initial (6-day) placement in the SIU.

[15] What she does challenge is the subsequent decision to detain her in SU (maximum security) when the records at the institution always had her either

classified or as a "recommended" medium security risk. Despite that classification and/or recommendation, she remained in SU until February 14, 2020, when the Warden's Board accepted the recommendation. Only at that time was she moved into general population.

[16] The differences between the two levels of restriction are described in the Respondent's brief. The SU is said to accommodate:

> 28. ... inmates classified as maximum security. The Unit contains intervention and staff office space, as well as an outdoor recreation yard. An inmate in the Secure Unit enjoys access out of their cell once the unit is open, has access to the canteen every two (2) weeks, has daily access to a telephone on the unit, has access to the gymnasium twice a week, has access to a spiritual leader as required, access to group spiritual sessions on Sundays and as required, they can socialize with other offenders within their unit, there is a schedule for access to the Secure Unit recreation yard, they have regular scheduled meetings with the CMT, and they have access to programming and employment.
>
> (*Respondent's brief, October 6, 2020, para. 28*)

[17] This is in contrast to medium security inmates at Nova who are:

> 30. ...housed in residential-style small group accommodation houses in an open campus design model located inside the perimeter fence. There are no physical separations between the inmates who reside in these units. The inmates use the main institution for socializations, spirituality, interventions, health, and recreation facilities in a fully integrated manner…
>
> (*Respondent's brief, October 6, 2020, para. 30*)

[18] Ms. Paul is said to have been initially opposed to transfer to the medium security residential style unit on February 14, 2020, but agreed on February 17, 2020 (*amended affidavit of Kelley O'Neill, para. 67*).

Issues

- *(a) Mootness*
- *(b) Did Ms. Paul's transfer to the secure unit amount to a deprivation of residual liberty?*
- *(c) Was the decision to transfer Ms. Paul from the SIU to the SU either unlawful or unreasonable?*

Analysis

(a) Mootness

[19] All parties concede that, on February 14, 2020, the Applicant was given permission to move back into the general, or medium security, population of inmates. This is commensurate with the "medium security" designation that she says she has always possessed. Consequently, the alleged deprivations of liberty which prompted her to bring this application (which she commenced on February 10, 2020) no longer exist. Because of this, the parties differ as to whether the Court should nonetheless hear this application at all.

(i) the law in general

[20] It is common ground between the parties that the Court is possessed of a discretion to decide moot matters. How that discretion is to be exercised begins with a two-step determination, as set forth in *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342. At page 353 thereof, Sopinka, J. explained:

> The approach in recent cases involves a two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise discretion to hear the case … In the interest of clarity, I consider that a case is moot if it fails to meet the "life controversy" test. A court may nonetheless elect to address the moot issue if the circumstances warrant.

[21] Whether “circumstances warrant” the exercise of the Court's discretion seems to be governed by two key factors: judicial economy, and the observation of the proper law-making function of the Court. When considering these principles, *Borowski* continues:

> The court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgements in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

[22] Our Court of Appeal has had opportunity to speak to these principles on multiple occasions. For example, in *Springhill Institution v. Richards*, 2015 NSCA 40, further insight was provided in relation to the types of circumstances which will warrant the exercise of the discretion:

> 53. ...These include whether: there is still an adversarial context; resolution will have some practical consequences on the rights of the parties; the cases that spark the controversy are of a recurring, but brief duration; it is in the public interest to expend judicial resources to mitigate the social cost of continued uncertainty in the law; adjudicating may be viewed as intruding into the role of the legislative branch.
>
> [Emphasis added]

[23] As the Court pointed out in *Khela v. Mission Institution*, 2014 SCC 24:

> 13. It is important to note that this appeal is now factually moot. On July 23, 2010, the Warden of Mission Institution made another decision to reclassify Mr. Khela as requiring maximum security. [...]
>
> 14. Despite being moot, this appeal merits a decision in the circumstances of this case. The nature of *habeas corpus* applications involving the transfer and segregation of inmates is such that the factual circumstances of a given application can change quickly, before an appellate court can review the application judge's decision. This means that such cases will often be moot before making it to the appellate level, and are therefore "capable of repetition, yet evasive of review" (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), at p. 364). As was true in *May v. Ferndale*, 2005 SCC 82, [2005] 3 S.C.R. 809 (S.C.C.), at para. 14, and *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), at p. 652, the points in issue here are sufficiently important, and they come before appellate courts as "live" issues so rarely, that the law needs to be clarified in the instant case.

ii) The parties' positions

[24] In a nutshell, the Respondent argues that there are no special circumstances in the present case which warrant the expenditure of scarce judicial resources. It also maintains that it would serve no purpose to issue a declaration relating to the placement of inmates within different ranges in medium security facilities, and, on top of that, such a declaration may potentially interfere in matters in which the judiciary has neither expertise or legitimate function.

[25] Among other authorities, the decision in *Hamer v. Fitzpatrick*, 2016 BCSC 2380 is referenced:

> 13. Without such an inmate as its focus, the decision-making process risks becoming a retrospective inquiry at large into those correctional practices, a role the court is ill-equipped for and should normally decline.

[26] The Applicant, however, maintains that there are no express provisions which determine when and if it is appropriate to transfer inmates to more restrictive

conditions than their security classification (before parole) and their recommended classification (after parole revocation) would warrant, and no timelines within which the Warden's Board must make its decision whether to accept the recommendation. Thus, the argument continues, it smacks of arbitrariness and creates a situation capable of repetition, yet evasive of review because, as in this case, the circumstances giving rise to complaint are generally rectified by the time the matter reaches the Court.

[27] In the circumstances, I have concluded that Ms. Paul's matter, although moot, merits a decision in the circumstances of this case.

[28] The Respondent required time to investigate concerns with respect to information received that the Applicant was attempting to bring drugs into Nova. Her security classification, although reviewed by the Respondent in light of the information it possessed, was never changed. And it took until February14, 2020, before she was returned to the general population, a placement to which her "medium security" classification before revocation and subsequent recommendation (after revocation) had always entitled her, at least on a *prima facie* basis.

[29] Hence, it is important to consider the steps that were taken at Nova, what was done, why it was done, and the length of time that it took, overall. Parole revocation is not a rare occurrence. It is invariably revoked for a reason. At such a time, placement in a more secure circumstance than the security classification the prisoner had enjoyed prior to parole may be necessary, depending upon the alleged basis for the revocation, at least until a decision can be made whether to maintain the inmate's classification or change it.

[30] The problem is often straightened out before it makes its way to the Court. It is certainly capable of repetition, and the Respondent says that, among other concerns, there are no guidelines or policies in place which govern how long it should take for the Respondent to first, investigate its concerns, second, determine whether to change an inmate's security status as a result of those concerns, and third, what is to be done with the inmate while these decisions and investigations are ongoing.

[31] So I will decide the matter, and consider (first) whether Ms. Paul's case meets the criteria for a *habeas corpus* application and, if so, whether she merits declaratory relief, which is really the only relief that is potentially available to her in these circumstances.

(b) Did the transfer of Ms. Paul to the secure unit ("SU") following suspension of her parole amount to a deprivation of liberty?

[32] Ms. Paul has not taken issue in this proceeding with respect to her initial placement in SIU from January 14, 2020 – January 20, 2020. This placement nonetheless provides important context to the remainder of her argument, as will be seen.

[33] The Respondents, for their part, have argued that since Ms. Paul is not challenging her initial placement in SIU, and since the conditions of SU, where she was placed from January 20, 2020 to February 14, 2020 (although maximum security) are less restrictive than SIU, she has not established a deprivation of liberty upon which to ground a *habeas corpus* application.

[34] The Applicant contends that the above argument rests upon a false analogy. A proper analogy (she says) would be one which begins with the liberties to which Ms. Paul's medium security classification (prior to parole suspension) and all recommendations (after being returned to Nova) ought to entitle her. In effect, she argues that the restriction placed upon her in SU must be compared with the liberties that are made available to the rest of the general population. I agree.

[35] Indeed, it is fair to observe that the affidavit evidence, in particular that of Ms. Paul (in her supplementary affidavit, paras. 10 - 48), has established that there are significant differences in liberty restrictions imposed on SU (maximum-security) inmates, compared to their medium security (general population) counterparts.

[36] Of particular note, while Ms. Paul was in SU she was (in effect) permitted neither to visit in person with her children, or to practice her spirituality or engage in culturally appropriate activities in as fulsome a manner as she would have otherwise been permitted. There were also limitations placed upon her social interaction, education, exercise and programming when compared with what she would have received in medium security milieu.

[37] As the Court pointed out in *Khela*:

> 40. ...on an application for *habeas corpus*, the legal burden rests with the detaining authorities once the prisoner has established a deprivation of liberty and raised a legitimate ground upon which to challenge its legality. ... This particular shift and onus is unique to the writ of habeas corpus. Shifting the legal burden onto the detaining authorities is compatible with the very foundation of the law habeas

> corpus, namely that a deprivation of liberty is permissible only if the party effecting the deprivation can demonstrate that it is justified.
>
> [Emphasis added]

[38] To repeat, Ms. Paul has not challenged her initial six day placement (in SIU). This is (presumably) because she acknowledges that Nova required some time (after her parole was suspended and she was returned to the institution on January 14, 2020) both to investigate and determine that she was not a threat to introduce drugs into the mainstream population, and that no change to her security classification was necessary as a result.

[39] She does contend, however, that given both her medium security classification, and the subsequent recommendations (which were ultimately approved by the Warden's Board), she ought to been placed into the general population either right away (in other words, on January 20 2020) or much more quickly than the process ended up taking (to February 14, 2020).

[40] So, has a deprivation of liberty been demonstrated? A decision to transfer a prisoner to a more restrictive institutional setting than those enjoyed by the mainstream population does constitute a deprivation or infringement of her residual liberty interests. We also know that the Applicant's security classification upon leaving the institution on parole was medium security, and that it was never changed. She had not been reclassified prior to her parole suspension, nor, indeed, prior to being placed, first, in SIU (on January 14, 2020), then in SU (on January 20, 2020).

[41] The January 17, 2020 assessment which preceded the Applicant's placement in SU (the "A4D"), was authored by the Applicant's parole officer, Heather Oldroyd. It recommended that Ms. Paul remain classified as a medium security risk. Also noted in the A4D was the fact that the Applicant's case management team had been unavailable (at the time) for comment, and so the recommendation was expressed to be "subject to change". (*O'Neill affidavit, September 10, 2020, Exhibit "A", Tab 13, p. 5 of 6*)

[42] Despite the initial unavailability of the case management team, and the positive drug tests that had been garnered six days earlier (when Ms. Paul had been returned to Nova) and in light of the negative urinalysis test result also received on January 20, 2020, she was moved that day by the Acting Warden (after receipt of the A4D) from SIU to SU.

[43] The Applicant, however, was not placed back into general population until over three weeks later. She argues (in part) that the absence of timelines, to which adherence is necessary by correctional authorities, means there is the potential that she and other "lower classified" or "lower recommended" security inmates, following suspension of day parole, to be transferred to maximum security without justification, for a potentially indeterminate length of time.

[44] In effect, Ms. Paul sustained a deprivation of liberty for the period of time during which she was in SU as opposed to a medium security setting. She was deprived of some of the liberties to which the general population inmates were entitled. Neither her prior security classification prior to parole, her recommended security classification after parole revocation, or her classification after the Warden's Board hearing on February 14, 2020, ever changed from "medium". This means that her treatment is subject to review by this Court on the basis of lawfulness and reasonableness.

(c) Was the decision to transfer Ms. Paul from the SIU to the SU either unlawful or unreasonable?

(i) The substantive grounds

[45] Once a deprivation of liberty has been established by the Applicant, along with a legitimate ground upon which to question its legality, she bears no further burden. The onus shifts to the Respondent prison authorities to demonstrate on the balance of probabilities that it/they acted both lawfully and reasonably on both substantive and procedural grounds.

[46] I return to a few of the facts previously mentioned. It is convenient to repeat the uncontested fact that Ms. Paul's parole was suspended.

[47] It was suspended among other things, because of her involvement (while at St. Mary's) with individuals associated with the drug culture, and other activities in which she was participating. This precipitated an apprehended increase in risk for drug use while she remained in the community. She also provided a "positive for opiates" urinalysis test, which test was performed in her community on January 9, 2020.

[48] After being apprehended on January 10, 2020, she was returned to the institution on January 14, 2020. In between, Nova received information from Ms. Paul's community parole officer that it was believed she would attempt to introduce

drugs into the institution. This was not the first time that such information had been received by Nova in relation to the Applicant (*amended affidavit of Kelley O'Neill, para. 25*).

[49] Upon arrival, an itemized test resulted in a reading exceeding the threshold for cocaine. A drug sniffer dog also provided "...two positive hits on two separate occasions." (*O'Neill affidavit, para. 25, Johnson affidavit, Exhibit "A", Tabs 1- 2*)

[50] The Respondent, as we have seen, explains that the Applicant was placed in SIU initially because it had credible evidence that she was attempting to introduce drugs into Nova. The facility also received what it considered to be further corroboration ("the further information") on January 17, 2020. This further information was not provided to the Applicant due to concerns that it could possibly lead to reprisals against the individual(s) who provided it. However, she was not given the "gist" of it, due to oversight, until October 1, 2020 (*Tracy Johnson's amended affidavit, October 2, 2020, para. 11*). I will return to this.

[51] I have examined this "further information", which took the form of a "confidential affidavit". When considered in conjunction with the information known to Nova as outlined above, it was reasonable on the part of the decision-makers at Nova to view this as corroborative of some of the concerns that had led to her placement in the SIU at first instance.

[52] Ms. Paul was nonetheless transferred from SIU to the less restrictive (albeit, still maximum security) SU, on January 20, 2020. This, I have concluded, was not an unreasonable or unlawful move on the part of the facility. Some form of segregation was still necessary while investigation was underway both as to whether Nova's concerns with respect to Ms. Paul were legitimate, and also to protect the general population of the institution in the interim. Consultation was still necessary (also) with her case management team, which had been unavailable for comment at the time that Ms. Oldroyd had prepared the A4D report.

[53] I have therefore concluded this placement was in conformity with the *Corrections and Conditional Release Act*, SC 1992, c.20 (CCRA), s. 33. To be more specific, an alternative placement was perceived to exist which would enable CSC to manage Ms. Paul's risk in a less restrictive (albeit still not medium security) milieu. It was therefore substantively reasonable.

(ii) But was it procedurally fair?

(a) Withholding information

[54] Section 27 of the *CCRA* states:

> 27 (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.
>
> (2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.
>
> (3) Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) or (2) would jeopardize
>
> (a) the safety of any person,
>
> (b) the security of a penitentiary, or
>
> (c) the conduct of any lawful investigation,
>
> the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (a), (b) or (c).
>
> (4) An offender who does not have an adequate understanding of at least one of Canada's official languages is entitled to the assistance of an interpreter
>
> (a) at any hearing provided for by this Part or the regulations; and
>
> (b) for the purposes of understanding materials provided to the offender pursuant to this section.
>
> [Emphasis added]

[55] As per the above, CSC is entitled to withhold potentially harmful information. As the Court pointed out in *Khela*:

> 89. Section 27(3) authorizes the withholding of information when the Commissioner has "reasonable grounds to believe" that should the information be released, it might threaten the security of the prison, the safety of any person or the conduct of an investigation. The Commissioner, or his or her representative, is in the best position to determine whether such a risk could in fact materialize. As a result, the Commissioner, or the warden, is entitled to a margin of deference on this

> point. Similarly, the warden and the Commissioner are in the best position to determine whether a given source or information is reliable. Some deference is accordingly owed on this point as well. If, however, certain information is withheld without invoking s. 27(3), deference will not be warranted, and the decision will be procedurally unfair and therefor unlawful.
>
> [Emphasis added]

[56] Moreover, while the "further information" received on January 17, 2020 was corroborative of some of the other security concerns that were received by CSC prior to Ms. Paul's arrival at Nova on January 14, 2020, it still did not result in the imposition of more restrictive measures upon Ms. Paul. In fact, on January 20, 2020, as previously noted, she was transferred from SIU to the less restrictive SU.

[57] Although, due to an oversight, she was not provided with the "gist" of the further information until October 1, 2020, this did not result in an elevation of her security status to "maximum". Her recommended classification remained at "medium" pending a holistic assessment of whether she presented a threat to the security of Nova due to the total body of information that had led to the Respondent's initial concerns that she intended to introduce drugs into the institution.

[58] Moreover, having viewed this further information, it was not different in quality or kind than what she has herself admitted she was told upon her transfer to SIU (hence, before her SU placement) namely, that the Respondent was possessed of information indicating that she was "dealing/in possession of drugs" and/or "carrying a package of drugs". (*Paul affidavit, February 10, 2020, paras. 16 - 21*)

> *(b) Did procedural unfairness result when it took the Respondent too long to move the Applicant back into general population? Among other things, did this make her detention arbitrary?*

[59] Ms. Paul argues, in effect, that it took the institution too long to figure out that she was not, in fact, a risk, and provide her with liberties commensurate with those to which she, as a medium security prisoner, was entitled.

[60] The *CCRA* does provide a legislative framework for the process of security classification. For example, it states:

> 28. If a person is or is to be confined in a penitentiary, the service shall take all reasonable steps to ensure that the penitentiary in which they are confined is one that provides them with the least restrictive environment for that person, taking into account

> (a) the degree and kind of custody and control necessary for:
>
> (i) the safety of the public,
>
> (ii) the safety of that person and other persons in the penitentiary, and
>
> (iii) the security of the penitentiary;
>
> (b) accessibility to
>
> (i) the person's home community and family,
>
> (ii) a compatible cultural environment, and
>
> (iii) a compatible linguistic environment; and
>
> (c) the availability of appropriate programs and services and the person's willingness to participate in those programs.

[61] Provision is also made for the classification of each inmate according to apprehended risk:

> 30 (1) The Service shall assign a security classification of maximum, medium or minimum to each inmate in accordance with the regulations made under paragraph 96(z.6).
>
> (2) The Service shall give each inmate reasons, in writing, for assigning a particular security classification or for changing that classification.
>
> (3) Within the maximum and medium security classifications, the Commissioner may assign an inmate to a subclassification in accordance with the regulations made under paragraph 96(z.6).
>
> (4) The Commissioner or the staff member designated by the Commissioner shall give each inmate reasons, in writing, for assigning them to a subclassification or for changing that subclassification.

[62] Section 96 goes on to indicate that the Governor in Council may make regulations:

> (s.96) respecting the assignment to inmates of security classifications and sub-classifications under section 30 and setting of the factors to be considered in determining the security classification and subclassification ...

[63] The Applicant's argument is to the effect that neither the CCRA, the regulations passed pursuant to it, or anything else appearing in the Record, sheds any light on the length of time within which a review of an inmate’s security

classification must be completed following a parole suspension. She argues that this makes it arbitrary. Among other things, a decision that is arbitrary cannot be lawful.

[64] With respect, this argument rests upon the assumption that because neither a strict timeline policy, regulation, or legislated guideline exists governing how long the process is to take, it must automatically be an arbitrary process. However, such is not always the case. I will explain why.

[65] Commissioners directive 706 (CD 706) regulates CSC's policy respecting classification. ANNEX B to that document provides the security classification of CSC's institutions by regions and indicates that Nova has a "multilevel" security classification (*O'Neill affidavit, October 6, 2020, para. 40*).

[66] Further elaboration is provided by sections 8 to 12 of CD 706:

> 8. The perimeter of a medium security institution will be well defined, secure and controlled. Inmate movement and association will be regulated and normally monitored. Although firearms will be retained in the institution, they will not normally be deployed inside the perimeter.
>
> 9. Medium security inmates are expected to:
>
> a. interact effectively and responsibly while subject to regular direct/indirect monitoring
>
> b. demonstrate an interest and actively participate in their Correctional Plan.
>
> 10. To access a medium security institution offering a responsibility-based, small-group living environment, inmates will be expected to demonstrate:
>
> a. a capacity to manage responsibility for their own behaviour with minimal staff intervention
>
> b. a high level of motivation to participate in their Correctional Plan.
>
> 11. The perimeter of a maximum security institution will be well defined, secure and controlled. Inmate movement and association will be strictly regulated and most often monitored. Firearms will be retained in the institution and may be deployed inside the perimeter.
>
> 12. Maximum security inmates are expected to:
>
> a. interact effectively and responsibly, while subject to frequent direct/indirect monitoring
>
> b. demonstrate at least a minimum interest in participating in their Correctional Plan.

[67] The purpose of a security classification is, according to ss. 3.1 and 4(c) of the *CCRA*, to protect the public, employees, and offenders through appropriate institutional placement of the inmate. We have earlier seen that s. 28 prescribes the considerations relevant to the environment in which the inmate is placed. It must be one which takes into account the safety of the public, person, and other persons in the penitentiary, accessibility to the persons home community, family, compatible cultural environment, linguistic environment and availability of appropriate programs.

[68] Further specification of the factors to be considered in determining the security classification to be assigned to an offender is provided. S. 17 of the *CCRA Regulations* lists some of them:

> i) seriousness of the offence committed;
>
> ii) any outstanding charges that the inmate is facing;
>
> iii) the inmates performance and behaviour while under sentence;
>
> iv) social and criminal history including young offender history (if available);
>
> v) physical or mental illnesses or disorders;
>
> vi) inmates potential for violent behaviour; and
>
> vii) whether or not the inmate demonstrated continued involvement in criminal activities.

[69] The provisions of s. 30 of the *CCRA* require the assignment of a security classification of either maximum, medium or minimum to each inmate. Section 18 of the Regulations, in turn, provides further guidance on how this is to be done:

> (a) maximum security where the inmate is assessed by the Service as
>
> (ii) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or
>
> (iii)Requiring a high degree of supervision and control within the penitentiary;
>
> (b) medium security where the inmate is assessed by the Service as
>
> (i) Presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or
>
> (ii) requiring a moderate degree of supervision and control within the penitentiary; and
>
> (c) minimum security where the inmate is assessed by the Service as

(i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and

(ii) requiring a low degree of supervision and control within the penitentiary.

[70] Assistant Warden Kelley O'Neill describes how all of this gets applied to the individual circumstances of an offender:

> 46. When an inmate first enters federal custody or returns following a suspension, CSC must assign a security classification to the offender. This enables CSC to determine where the offender will be housed in the institution. For example, an offender who is assigned a medium-security classification will be housed in a medium-security institution. The rules concerning this process are set out in section 28, 30 and paragraph 96(d) of the *CCRA*, section 11 of the *Regulations*, and CD 705-7, entitled "Security Classification and Penitentiary Placement". A copy of CD 705-7 is attached to my affidavit and marked as Exhibit D.
>
> 47. CSC uses computerized tools to assist in determining the appropriate security classification for individual offenders. The Custody Rating Scale ("CRS") is used when an offender returns to federal custody following a suspension of parole. The community parole officer of the inmate must complete the CRS.
>
> 48. The CRS is research-based computerized tools that generate a score that suggests a particular security classification (minimum, medium, or maximum) and assists CSC in determining the appropriate security classification for individual offenders.
>
> 49. However, the score generated by the CRS does not determine an offender's security classification. In addition to the CRS, an Assessment for Decision ("A4D") is also prepared.
>
> 50. The A4D is a fact-based report in which the inmate's community parole office considers the inmate's overall situation, through the specific lenses of Institutional Adjustment, Escape Risk and Public Safety. The A4D sets out the assessor's reasoning with respect to the security classification review and provides a recommendation and rationale for each of the three security classification headings.
>
> 51. The final decision with respect to the inmate's classification rests with the Warden, who can choose to accept or reject the recommendation of the community parole officer.
>
> 52. CD 710-6 provides guidelines for the exercise of clinical judgment regarding an offender's security level with respect to the three primary topics to be assessed in accordance with section 18 of the *Regulations* (a. institutional adjustment; b. escape risk; and c. risk to public safety). A copy of CD 710-6 is attached to my affidavit and marked as Exhibit E.
>
> (*O'Neill affidavit, dated October 6, 2020, paras. 46 to 52*)

[Emphasis added]

[71] With respect to institutional adjustment, the factors to be considered are spelled out in CD 710 – 6 (ANNEX B). They include the length of the sentence, and its impact on the inmates institutional adjustment. Other factors include whether there have been violent institutional incidents (including whether weapons were used) and whether harm was caused, the available disciplinary information, previous periods of segregation and/or other disciplinary measures, behavioural comments from unit staff, security intelligence file, including consultation with security intelligence officer, including whether an inmate has any affiliations or involvement with criminal organizations or gangs, or continued involvement in such activities. Also included is the identification of incompatibles, whether previous administrative intervention has been required, the inmates motivation to participate in her correctional plan; whether she displays special needs or sociocultural factors requiring consideration; history (if any) of mental health issues or suicidal ideation, self injury, and current emotional stability.

[72] The criteria involved in determining whether an offenders' institutional adjustment is either low, moderate or high include those noted (once again) in Annex B of CD 710– 6:

> Low – The inmate has demonstrated:
>
> a. a pattern of satisfactory institutional adjustment; no special management intervention is required
>
> b. the ability and motivation to interact effectively and responsibly with others, individually and in groups, with little or no supervision
>
> c. motivation towards self-improvement by actively participating in a Correctional Plan designed to meet his/her dynamic factors, particularly those relating to facilitating his/her reintegration into the community.
>
> Moderate – The inmate has demonstrated:
>
> a. some difficulties causing moderate institutional adjustment problems and requiring some management intervention
>
> b. the potential to interact effectively with others, individually and in moderately structured groups, but needs regular an often direct supervision
>
> c. an interest and active participation in a Correctional Plan designed to meet his/her dynamic factors, particularly those which would lead

to a transfer to a less structured environment and ultimately, to his/her reintegration into the community

High – The inmate has demonstrated:

a. frequent or major difficulties causing serious institutional adjustment problems and requiring significant/constant management intervention

b. a requirement for a highly structured environment in which individual or group interaction is subject to constant and direct supervision

c. an uncooperative attitude toward institutional programs and staff and presents a potentially serious management problem within an institution

(*O'Neill affidavit, dated October 6, 2020, para. 54*)

[73] Then, there is "escape risk". Ms. O'Neill relates that:

In rating an offender's Escape Risk as either low, moderate or high, CSC takes into account the following adjustment factors noted in Annex B of CD 710-6 (and any other relevant considerations):

Low – The inmate:

a. has no recent serious escape and there are no current indicators of escape potential

b. has no significant history of breaches

Moderate – The inmate:

a. has a recent history of escape and/or attempted escapes OR there are current indicator(s) of escape potential

b. is unlikely to make active efforts to escape but may do so if the opportunity presents itself

c. presents a definite potential to escape from an institution that has no enclosure

High – The inmate:

a. has demonstrated a pattern of escapes and/or attempted escapes OR there are current indicator(s) or significant potential to escape OR could threaten the security of the institution in order to facilitate their escape

(*O'Neill affidavit, dated October 6, 2020, para. 56*)

[74] Finally, a detailed consideration of the public safety risk must be undertaken. The relevant criteria include:

- History of any known violence, include violent community incidents – consider the seriousness and recency
- Dangerous Offender designation under the *Criminal Code*
- The inmate's social, criminal and, where applicable and available, youth offender history
- Nature and gravity of current and number of previous offences – whether weapons were involved and whether serious harm occurred to the victim
- Evidence of family violence
- Level of dynamic factors or areas of need identified in the Correctional Plan
- Correctional Plan motivation/engagement and progress accomplished
- Past releases performance and past escorted temporary absence, unescorted temporary absence or work release performance
- Psychological concerns based on the results of psychological or psychiatric assessments or other information, including the existence of mental health concerns/disorders
- Emotional stability/instability, self-injury and suicide history
- Detention referral or whether the inmate is being considered as a potential candidate for detention
- Alcohol and drug use and the drug and alcohol rating
- Affiliations with criminal organizations/gangs
- Affiliation with a terrorist organization or radicalized group
- Whether the inmate meets the criteria of being a high profile offender (will only have an impact if, in light of the other factors, there is a clear connection with public safety)
- Notoriety likely to invoke a negative reaction from the public, victim(s) or police and/or to receive significant media coverage (sensational crime, major sexual or drug offence, terrorism, affiliation with organized crime, etc.). Note: In order for notoriety to be a relevant factor, it must be demonstrated that it will have an impact on an inmate's reintegration potential by increasing the risk to re-offend, or the likelihood that he/she could pose a threat to the safety of any person or the security of a penitentiary.
- Public safety risk in the event the inmate would escape

(*O'Neill affidavit, dated October 6, 2020, para. 57*)

[75] The relevant adjustment factors employed in assessing the public safety risk are also spelled out:

> Low – The inmate's:
>
> a. Criminal history does not involve violence
>
> b. Criminal history involves violence/sexually-related offence(s), but the inmate has demonstrated significant progress in addressing the dynamic factors which contributed to the criminal behaviour and there are no signs of the high risk situations/offence precursors identified as part of the offence cycle (where it is know)
>
> c. Criminal history involves violence, but the circumstances of the offence are such that the likelihood of reoffending violently is assessed as improbable
>
> Moderate – The inmate's:
>
> a. Criminal history involves violence, but the inmate has demonstrated some progress in addressing those dynamic factors which contributed to the violent behaviour
>
> b. Criminal history involves violence but the inmate has demonstrated a willingness to address the dynamic factors which contributed to the violent behaviour
>
> c. There are current indicator(s) of moderate risk/concern
>
> High – The inmate's:
>
> a. Criminal history involves violence and the inmate has not demonstrated sufficient progress in addressing those dynamic factors which contributed to the violent behaviour or a willingness to attempt to address such factors
>
> b. Criminal history involves violence and the inmate has not demonstrated a willingness to address the dynamic factors which contributed to the violent behaviour
>
> c. There are current indicators of high risk/concerns
>
> (*O'Neill affidavit, dated October 6, 2020, para. 58*)

[76] Ms. Paul's initial recommended custody rating after her return to Nova from parole suspension (on January 14, 2020) was medium. (*O'Neill affidavit, Tab 13, p. 2 of 6, 4th full para.)*. It had been so before parole suspension, and, despite being revisited a few more times, was never changed.

[77] Some further insight is provided in the January 17, 2020 Assessment for Decision ("A4D") report. Among other things, the report provides an analysis of the three factors discussed earlier: institutional adjustment, escape risk, and public safety risk. Each factor was considered to be “moderate”.

[78] In that assessment, we learn that the Applicant:

> ... continues to struggle with aligning herself with positive individuals and distancing herself from those who are problematic for her reintegration. This will continue to be a challenge during her return to custody...
>
> (*O’Neill affidavit, Tab A-13, p. 5 of 6)*

[79] In consultation with Nova Institution and the Fredericton parole office supervisor, it was noted that Ms. Paul’s needs were best served at Nova. While she met the criteria for a medium security offender, Ms. Oldroyd indicated that she had concerns about the Applicant’s institutional adjustment. Since the Ms. Paul’s custody management team was unavailable for consultation, Ms. Oldroyd’s continued recommendation of “medium” was “very cautiously” put forward and was expressed to be “subject to change”. (*O’Neill affidavit, October 6, 2020, Tab A-13, p. 5 of 6*)

[80] There is also reference to some dissent. Indeed, it appears that Ms. Paul's former (and then currently assigned) parole officer was away from the office during the week that the A4D was prepared. The individual acting in his position was unfamiliar with Ms. Paul's history and therefore “…did not feel confident in expressing a dissenting opinion. To meet policy deadlines, however, this report was … entered into the system January 17, 2020”. (*O’Neill affidavit, October 6, 2020, Tab A-13, p. 5 of 6*)

[81] The A4D continues:

> Consultation was had with Nova Institution Security Intelligence Officer on January 15, 2020, at which time there remained suspicion about whether or not Ms. Paul may be attempting to introduce contraband to the institution. Further consultation on January 17, 2020 revealed that, based on the required interventions being employed upon return, due to the belief of attempting to introduce contraband/unauthorized items, they see her Institutional Adjustment as requiring a high degree of supervision and <u>would be a dissenting opinion for medium security</u>. (*O'Neill affidavit, dated October 6, 2020, Tab 13, p. 5 of 6*)
>
> [Emphasis added]

[82] As has earlier been discussed, and as is referenced in the excerpt from the A4D report above, further information of a confidential nature received by the institution on January 17, 2020, reinforced the prior security concerns and contributed to the Respondents' belief that Ms. Paul would attempt to introduce contraband into the institution if released into general population.

[83] An addendum was prepared to the A4D on January 29, 2020 (*O'Neill affidavit, October 6, 2020, Tab 14*). Therein, there is once again reference to the fact that security intelligence suggests that the Applicant had introduced contraband into Nova on the occasion of a previous parole suspension date of December 4, 2019.

[84] It is also noted that consultations were conducted with her institutional parole officer on January 29, 2020 and January 30, 2020. On the basis of those conversations, the writer noted that there still remained "reasons to have concerns" and it was noted that "suspicion continues". However, it was also pointed out that "there has been no confirmation that Ms. Paul has drugs on her person."

[85] In the final paragraph (pages 1-2), it was mentioned, that:

> Based on the global considerations, her institutional PO does cautiously support a medium security level as well. Both this writer and her IPO agree that, should other evidence be produced, an appropriate re-examination of this decision can be made. At this time, the above-mentioned information is not changing this writer's recommendation of medium security placement.
>
> [Emphasis added]

[86] Ms. Paul received the disclosure first, of the A4D dated January 17, 2020 (*O'Neill October affidavit, Tab 14, pp. 1 – 2)* and second, of the addendum, dated January 30, 2020, on January 29, 2020 and February 10, 2020, respectively. These were represented to her (at the time) that they would be the documents that would be relied upon at the Warden's Board meeting (when convened) to review her assigned security level.

[87] On January 29, 2020, Ms. Paul signed a document acknowledging that she had received a copy of the custody rating scale and scoring matrix, that she would not be submitting a written response to the placement recommendation, that she was waiving her right to have two working days notice prior to final decision for penitentiary placement, and that she would like the ALO (Aboriginal Liaison Officer) to be present at the Warden's Board. (*O'Neill affidavit, October 6, 2020, Tab 15*)

[88] Ms. Paul was thereupon requested to submit to further urinalysis testing (random testing) on January 30, 2020. (*O'Neill affidavit, October 6, 2020, Tab 16*). The Respondent does not contend that a positive result ensued, although it has been difficult to locate an affirmative statement that these results were negative.

[89] A Comprehensive Correctional Plan ("Corr Plan") was prepared by Ms. Paul's parole officer (Ms. Oldroyd), and her CSI Supervisor (Marie-Eve Chartrand) dated February 3, 2020 (*O'Neill affidavit, Tab A-1*). It was a 29 page summary of the relevant factors related to Ms. Paul's past and those related to her present security status and recommendation. It was prepared for the Warden's Board (among other things) to assist in the determination of whether to accept the prior recommended "medium" security classification in the A4D, and the addendum.

[90] The next action in relation to the Applicant appears to have occurred on February 14, 2020. This was the time that the Warden's Board rendered its decision in accordance with CD 705 – 7 and *CCRA* s. 87. Noted as attending at the Board meeting were acting Warden Claude Demers, MAI, Rachel Brothers, PO Jeff Ramsay, Elder Joan Prosper, and ILO Janice Blenkhorne.

[91] The operative text from the "final decision" is reproduced below:

> The purpose of the Warden's board is to review and approve the penitentiary placement of Ms. Brandi Paul.
>
> This decision is in accordance with CD 705 – 7. as per *CCRA* section 87, this decision takes into consideration her state of mental health and healthcare needs. This decision was also rendered in accordance to CD 710 – 6.
>
> Ms. Paul was provided the opportunity to make representations at the Warden's Board, and chose not to attend. She was share documentation relevant to this decision.
>
> ...
>
> Ms. Paul is pen placed [general population, medium risk inmates] to Nova Institution and security needs will be met.
>
> As per CD 081, an offender who is not satisfied with the decision from the Institutional Head or District Director may submit a grievance.
>
> (*O'Neill affidavit, October 6, 2020, Tab A-17*)

[92] It would appear, then, on a *prima facie* basis, that by January 30, 2020 (at the latest) the Respondent had all information at its disposal necessary to the deliberations to be made by the Warden's Board. Up to this point, albeit not without

some reservations, her recommended security rating was medium, as it had been prior to her earlier parole release.

[93] That said, clearly the time taken (to February 3, 2020) to prepare the Corr Plan for the assistance of the Board was necessary also.

[94] Therefore, I have concluded that, given the scope of the investigation required, the seriousness of the safety concerns posed by Ms. Paul, and the considerations mandated by the legislation and regulations previously discussed, the unavailability of Ms. Paul's custody management team to provide input into the A4D report, the further information received by Nova on January 17, 2020 and the myriad factors to be considered, Ms. Paul's placement in the SU up to and including February 3, 2020 was reasonable. These were serious concerns that had to be properly investigated by the Respondent despite the ("very cautious") medium security recommendation in the A4D and addendum, put forward up to that point.

[95] As a consequence, the need for her detention in SU, to February 3, 2020, has been explained by the Respondents. It was one of the "reasonable outcomes" available to them, given the circumstances of this case.

[96] However, there is no reference in the affidavits, briefs, or other materials provided, or counsel's submissions, explaining why it took the institution from February 4, 2020 to February 14, 2020 to convene the Wardens Board hearing.

[97] This is not to say that in the circumstances of this case, and given the extensive deliberations and the factors requiring consideration, that the Respondents' actions in keeping Ms. Paul in the SU from February 4, 2020 to February 14, 2020 were automatically rendered unreasonable. But the length of time requires explanation. It requires justification. This is part of the onus which the Respondent must discharge.

[98] And that explanation appears to consist of (to paraphrase) "well, look at all the things that have to be considered before we make a decision – it's complicated".

[99] Indeed, the Respondent argues:

> This is not one of the cases described in *Khela*. The security level review process is one that requires careful attention and assessment. The length of time this assessment may require will differ depending on the individual circumstances of an inmate's case. The decision on security level is complex involving multiple, often competing, and constantly evolving factors pursuant to sections 17 and 188 of the

> *Corrections and Conditional Release Regulations*, SOR/92-620. The recommendation is contained in the A4D and is organized into three assessment areas: Institutional Adjustment, Escape Risk, and Public Safety. The recommendation and accompanying rationale is put before the Institutional Head ("IH") who makes the final determination on the inmate's security level. The IH would be deprived of essential information and advice if they proceeded to determine an inmate's security level absent the appropriate A4D and recommendations of the CMT. In the case at hand, the IH decided on Ms. Paul's security level only after having received all available information, and assessing the case through a Warden's Board – this process was in line with legislation and policy requirements. The IH concluded on February 14, 2020 that Ms. Paul should be assigned a medium security classification.
>
> *(Respondent's brief, para. 63)*

[100] Yet, there is no explanation as to why it took so long to convene the Warden's Board. This is particularly troubling given the fact that the impact of the SU placement on Ms. Paul was always known by the Respondents to have critical consequences to her well-being.

[101] Indeed, in the A4D (O'Neill September 10, 2020 affidavit, Exhibit "A", Tab13, p. 3 of 6) it is pointed out:

> … that Ms. Paul performs much better when she has a strong connection to her spirituality and culture. When she is detached from her culture, she loses herself and her ability to focus on her vision for the future, as well as her goals and expectations. Ms. Paul indicated in the past that she benefited greatly from the culturally appropriate supports she received while residing in house 4 at Nova Institution and the support helped her stay on track better than most other interventions.

[102] Then in the Corr Plan:

> Ms. Paul also made gains by way of her spiritual healing path. She demonstrated these improvements while living in the Aboriginal healing house and continued after she moved out of the house. She participated in sweats, she smudged, and she learned to make prayer ties to help cope with unfavourable emotions. Although Ms. Paul admits to times of going off her healing path, it appears that her Aboriginal path has proven to ground her and <u>act as the backbone to her rehabilitation</u>.
>
> [Emphasis added]
>
> (*O'Neill affidavit, Tab "A-1", p. 14 of 29*)

[103] And later, in the same document:

> Brandi functions best when she feels she is fully engaged on her spiritual path, "giving back" is very important to Brandi, and total immersion in Indigenous ceremonial practices is of crucial importance to Brandi. While it is very important to Brandi to reflect on the teachings, it is equally important that Brandi be given the opportunity to internalize the teachings and even more important that she be able to apply the teachings within her immediate environment. Finally, Brandi best maintains her spirituality through "giving back" and helping with sweat lodge ceremonies and the sacred fire has proven to be most beneficial with respect to Brandi attaining and maintaining holistic wellness. Brandi is prone to bouts of low-self esteem, which in turn seem to affect her self-respect and the degree to which she requires external validation. Brandi functions best when she is given the opportunity to engage in her Indigenous, culture, traditions and ceremonies on a daily basis by immersing herself mentally, spiritually, emotionally and physically and this can only happen if she is given the opportunity to reside in general population.
>
> [Emphasis added]
>
> (*O'Neill affidavit, Tab "A-1", p. 25 of 29*)

[104] It is to be concluded that the Respondent was well aware at all times of the significant impact that incursions upon Ms. Paul's ability to practice her spirituality and connect with her culturally appropriate activities would have upon her.

[105] This must not be understated. From January 20, 2020 (when she was first placed in SU) to February 14, 2020, Ms. Paul's access to spiritual practices was very circumscribed, despite being known by the Respondents to be critical to her mental and physical well being. She was unable to smudge when needed, attend sweats or visit Sacred Grounds. She was concerned about the impact of her children seeing their mother (behind glass) in that condition, and therefore felt it necessary to abstain from family visits. Access to the opportunity to pursue her ongoing education was curtailed. (*Paul, Supplemental Affidavit, para. 10 – 29; 30 – 36).*

[106] In *R. v. Gladue*, [1999] 1 SCR 688, the Court stressed:

> 68. It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely

> affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate …
>
> [Emphasis added]

[107] It is fair to say that if a policy prescribing reasonable timelines existed, and was itself reasonable and consistently adhered to, such may provide the basis of a reasonable explanation. Such a policy is not available here.

[108] However, I do not consider that the absence of policies, legislation or otherwise mandated timelines within which certain tasks are to be performed (in and of itself) necessarily renders the Respondents' actions unreasonable or arbitrary. I agree with the Respondents that the extremely specialized nature of the considerations that must be undertaken lend themselves poorly to a "one-size-fits-all" timeline.

[109] That said, restrictions upon an inmate's residual liberties, although they may be shown to be initially reasonable and necessary, may become unreasonable. The Respondent's onus is not discharged merely by explaining and justifying the reason(s) as to why Ms. Paul was initially allowed less liberty than her medium security counterparts. It must also explain the length of time during which she was so deprived. (*Dumas v. Leclerc Institute,* [1986] 2 SCR 459, para. 12*)*

[110] When the Court receives such an explanation, the necessity of a review on the basis of reasonableness, means that the decision will receive deference, as it should. This is to say that if the explained result falls within the range of reasonable outcomes that were available, the Court will defer to it, rather than impose its own view as to what it feels should have happened.

[111] As I have earlier stated, and based upon the circumstances explained by the Respondent, I have no difficulty understanding why Ms. Paul was housed in the SU, despite her previous classification and all subsequent recommendations as medium, up to February 3, 2020. Up to that point, the Respondent's decision to detain her in the SU was one of the reasonable, available outcomes based upon their holistic security concerns.

[112] But why was the Warden's Board not convened until February 14, 2020? Was the acting warden not available? Were any of the other members of the Board not available until February 14, 2020? If so, why were they unavailable? Was further information of concern received that required further investigation? What other

impediments (if any) existed that would have prevented the Board from being convened earlier? All the while, Ms. Paul continued to be housed in SU.

[113] I will repeat once again. This is not to say that reasonable explanations do not exist for the way the Applicant was treated. Nor is it to say that, if these factors were to be repeated in another case, but reasonable explanations provided by the Respondent for the delay, that the Respondent would be found to have acted unreasonably.

[114] But it is to say that, in these circumstances, where all of the relevant facts were (at least, apparently) known to the Respondent by January 30, 2020, and the Corr Plan prepared as of February 3, 2020, an explanation in justification of why it took a further 10 days to confirm that Ms. Paul would be released into the medium security (general population) (commensurate with her recommended and subsequently endorsed security rating) is required. It was not provided.

[115] Ms. Paul is not, as the Respondent contends, "... seeking declaration involving the policies and procedures..." insofar as they relate to or underlie the transfer decision to the SU. Indeed, the Court expressly refrains from commenting upon such procedures or policies.

[116] What Ms. Paul seeks (at least, in part) is a declaration that her detention was unlawful in these particular circumstances because the Respondent has not satisfactorily explained or justified the reason(s) for a portion of it. She will receive a declaration that the deprivation of her residual liberties that she experienced from February 4, 2020 to February 14, 2020, while housed in the SU was unlawful. It was unlawful because the Respondent did not explain or show that her detention in the SU during this period was reasonable or justifiable.

[117] The Applicant has been partially successful. The Respondents shall pay costs in the amount of $500.00, including disbursements.

Gabriel, J.

SUPREME COURT OF NOVA SCOTIA
Citation: *Paul v. Correctional Services of Canada*, 2020 NSSC 380

Date: 20201223
Docket: *ST No.* 496429
Registry: Truro

Between:

Brandi Paul

Plaintiff

v.

Correctional Services of Canada, Nova Institution for Women and Attorney General of Canada

Respondents

ERRATUM January 11, 2021

Judge: The Honourable Justice D. Timothy Gabriel

Heard: October 14, 2020, in Truro, Nova Scotia

Counsel: Jessica Rose, for the Plaintiff
Ami Assignon, for the Respondents

Erratum:

The word ‘cannot’ in paragraph 105 is replaced with the words ‘must not’.