SUPREME COURT OF NOVA SCOTIA
Citation: *Maillet v. Springhill Institution*, 2014 NSSC 240

Date: 20140704
Docket: Amh. No. 427954
Registry: Amherst

Between:

Michael Maillet

Applicant

v.

Springhill Institution, Correctional Services of Canada, and The Attorney General of Canada

Respondents

Judge: The Honourable Justice Denise M. Boudreau

Heard: June 19, 2014, in Amherst, Nova Scotia

Counsel: Michael Maillet, applicant, self-represented
Sarah Drodge, for the respondents

By the Court:

[1] This is an application for habeas corpus brought by the Applicant Michael Maillet, in relation to his recent security reclassification.

[2] I start with some background information. The applicant is presently serving a four year sentence for armed robbery and other offences. His sentence commenced on December 20, 2011.

[3] At the time of his intake into the correctional system, the applicant was classified as a medium security offender and housed at the Springhill Institution. However, the applicant was noted to have become involved in a number of disciplinary incidents over the course of the 2012-2013, including the finding of a weapon in his cell in March 2013. The applicant was thus re-classified at that time as a maximum risk offender and transferred to the Atlantic Institution at Renous. According to the evidence before the court, the applicant was well-behaved during his time at Renous and no incidents were noted. Five months later, the applicant was re-classified back to medium risk, and returned to Springhill Institution.

[4] Following the applicant's return to Springhill, the evidence shows that his behaviour has again showed reason for concern. Most recently in February 2014, the applicant was identified as being one of five aggressors in an assault on an inmate. The victim was seriously injured. As a result of this and previous incidents, the decision was made to re-classify the applicant again to maximum status. This decision was made by Acting Warden Lorne Breen, upon information, advice and recommendation from staff at Springhill Institution. It is from this decision that the applicant seeks the court's review by way of habeas corpus.

[5] The recent case of *Mission Institution v. Khela* 2014 SCC 24 is helpful and instructive. It provides the following test for such an application:

> [30] To be successful, an application for habeas corpus must satisfy the following criteria. First the applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful.

[6] In this case, the respondent acknowledges that the first branch of the test has been met; the applicant has shown that he has been deprived of liberty.

[7] I next move on to the second part of the test, as to whether the applicant has raised a legitimate ground upon which to question the legality of his re-

classification. The applicant has argued that the process undertaken by the respondents was unfair and not procedurally sound, as he was not provided with certain parts of the evidence against him, nor notice as to the withholding of this evidence; moreover, the applicant argues that the respondent's decision was unreasonable, as it was based on unreliable or irrelevant evidence.

[8] It seems to me that it is difficult, if not impossible, to assess the applicant's grounds without embarking upon a full review of the lawfulness of the process and decision (the third part of the test). As to this issue, I agree with the comments of Justice Walsh in *Wood v. Atlantic Institution* 2014 NBQB 135 at paragraph 39:

> [39] In reality, however, a court cannot normally do one without doing the other, that is, in order to determine whether the applicant has raised a legitimate doubt about the reasonableness of the decision, a court needs to consider the record upon which that decision was made. In such an event, a court is invariably embarking upon a full consideration of reasonableness. In other words, this screening threshold more often than not is more illusory than real…
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> [40] In keeping with the modern face of this ancient remedy and mindful of the core constitutional values this prerogative writ protects, I am prepared to assume the applicant has raised a legitimate doubt on the face of his pleadings so as to require a full inquiry…

[9] Based on the representations of the applicant, and in keeping with the spirit of the above-noted comments, I conclude that the applicant has raised issues worthy of a full analysis pursuant to the third branch of the test.

[10] As confirmed by the Supreme Court in *Khela*, the substantive review in an application for habeas corpus involves a review of the process involved, as well as, the reasonableness of the ultimate decision:

> A transfer decision that does not fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" will be unlawful (Dunsmuir, at para. 47). Similarly, a decision that lacks "justification, transparency and intelligibility" will be unlawful (ibid.) For it to be lawful, the reasons for and record of the decision must "in fact or in principle support the conclusion reached".

[11] In relation to the assessment of the ultimate reasonableness of decisions, the court stated:

> [74] As things stand, a decision will be unreasonable and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support any conclusion, although I do not foreclose the possibility that it may also be unreasonable on other grounds. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.
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> [75] A review to determine whether a decision was unreasonable, and therefore lawful, necessarily requires deference (Dunsmuir, at para. 47; **Canada (Citizenship and Immigration) v. Khosa** 2009 SCC 12 [2009] S.C.R. 339, at para. 59; **Newfoundland and Labrador Nurses Union**, at paras. 11-12) An involuntary transfer decision is nonetheless an administrative decision made by a decision maker with expertise in the environment of a particular penitentiary. To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts.
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> [76] Like the decision at issue in **Lake,** a transfer decision requires a "fact-driven inquiry involving the weighing of various factors and possessing a 'negligible legal dimension'" (**Lake v. Canada (Minister of Justice)** 2008 SCC 23, [2008] 1 S.C.R. 761, at paras. 38 and 41). The statute outlines a number of factors to which a warden must adhere when transferring an inmate; the inmate must be placed in the least restrictive environment that will still assure the safety of the public, penitentiary staff and other inmates, should have access to his or her home community, and should be transferred to a compatible cultural and linguistic environment (s. 28 CCRA). Determining whether an inmate poses a threat to the

> security of the penitentiary or of the individuals who live and work in it requires intimate knowledge of the penitentiary's culture and 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.

[12] Secondly, in relation to the issue of procedural fairness, the Supreme Court notes:

> [79] …the ability to challenge a decision on the basis that it si unreasonable does not necessarily change the standard of review that applied to other flaws in the decision or the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness".
>
> [82] …In order to guarantee fairness in the process leading up to a transfer decision, s. 27(1) provides that the inmate should be given all the information that was considered in the taking of the decision, or a summary of that information.

[13] I shall be conducting my inquiry pursuant to these principles. I also note that I have reviewed and considered some recent Nova Scotia decisions dealing with habeas corpus (*Richards v. Springhill Institution* 2014 NSSC 121; *Cain v. Correctional Service Canada* 2013 NSSC 367). These decisions contain a very thorough review of the law including the *Khela* decision, as well as others.

[14] The Court was provided with an affidavit from Nicole Terrio (Exhibit 2), who also testified at this hearing. Ms. Terrio is the Manager of Assessment and Intervention at Springhill Institution.

[15] Ms. Terrio testified that, when considering the question of an offender's classification (or re-classification), the main question to be posed is the level of

intervention that is needed in the case of that particular offender. In other words, the process focuses on a consideration of the level of direct supervision that the offender needs, as evidenced by his behaviour, or patterns of behaviour.

[16] Ms. Terrio noted that, for the purposes of classification, all offenders must be rated at a certain security level so as to determine the appropriate placement for that offender. An offender can be classified as maximum, medium, or minimum security. A computerized tool is used by the Correctional Service of Canada in order to help determine appropriate security classifications. This tool is the Security Reclassification Scale (SRS) which rates a number of factors in relation to the offender's particular circumstances. The SRS, once completed, provides a "score" for the offender, which corresponds to a particular classification. In the case of the applicant, the use of the SRS tool (most recently on 05/15/14) provided a score of 22.5, corresponding to a medium security classification (Exhibit 2, Tab B).

[17] As noted by Ms. Terrio, however, this score is not the end of the analysis, it is merely a starting point. A more subjective review is also undertaken by the offender's case management team, in determining his appropriate classification. This review is contained in a document called Assessment for Decision (A4D), normally completed by the offender's parole officer, which provides assessment of

the offender in the areas of 1) institutional adjustment, 2) escape risk, and 3) public safety issues. By way of this assessment, the parole officer will sometimes "override" the result of the computer score in his/her recommendation.

[18] In the case of the applicant, Ms. Terrio noted that due to time constraints and other factors, she prepared the A4D. The document was then reviewed by her immediate supervisor, and approved.

[19] The A4D concluded with a recommendation of a maximum security classification and transfer for the applicant. In relation to the three factors that must be assessed, the "Institutional Adjustment" rating of the document was determined to be "high". Section 18 of the *Corrections and Conditional Release Act* Regulations provides that such a rating necessarily results in a maximum security classification.

[20] Commissioner's Directive 710-6 provide guidelines for determining how to assess institutional adjustment:

> **Institutional Adjustment Rating**:
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> Based on the individual adjustment factors and any other relevant considerations, assign a rating of either low, moderate, or high:
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> **High – the inmate has demonstrated:**
>
> frequent or major difficulties causing serious institutional adjustment problems and requiring significant/constant management intervention

> a requirement for a highly structured environment in which individual or group interaction is subject to constant and direct supervision
>
> an uncooperative attitude toward institutional programs and staff and presents a potentially serious management problem within an institution

[21] The A4D detailed various incidents attributed to the applicant from 2012 – 2014, in support of the "high" rating. These included incidents throughout the applicant's time at Springhill; both before and after his five month transfer to Atlantic Institution commencing in March 2013. The incidents included possession of contraband and unauthorized items; being out of bounds in unauthorized units; and disrespectful behaviour. In March 2013, on two occasions, the applicant was found to be in possession of weapons including a sharpened butter knife and a hacksaw blade. Most recently (winter 2013-2014), the applicant was found to be in possession of forged movement passes, which was considered a serious infraction.

[22] Incidents are reported by officers and staff of the Institution as they occur. Some of these become the subject of formal in-house "charges", which are then the subject of hearings and punishment (if deemed appropriate).

[23] The court was provided with a series of "Inmate Offence Reports" (Exhibit 3) in relation to the Applicant which constitute written reports from staff as to

incidents. They are not the complete set of incidents that are listed in the Applicant's A4D. I summarize them here:

Date	Incident	Conclusion
2012/05/22	new tattoo	dismissed (failure to comply w/ Reg)
2012/06/07	unauth. pills found	pled guilty / fined
2012/08/10	refused order	given warning
2012/11/27	unauth. items found	pled guilty / fined
2013/02/03	out of bounds/ providing false identity	had been transferred
2013/03/05	weapon found	had been transferred
2013/03/15	blade (weapon) found	had been transferred
2013/12/17	unauth. items found	no hearing due to delay
2013/12/20	out of bounds	no hearing due to delay
2013/12/21	forged movement passes found	no hearing due to delay
2014/01/23	guard gloves found	not satisfied of intent
2014/02/09	absent for count / disrespectful behaviour	no hearing due to delay
2014/02/11	unauth. items found	no hearing due to delay
2014/02/20	out of bounds	no hearing due to delay

[24] In February 2014, an inmate at Springhill was assaulted by a number of other inmates, who kicked and punched him as a group. Investigation led officials from the institution to be believe that the applicant was one of the aggressors. According to Ms. Terrio, this last incident was the catalyst which required a review of the applicant's security level. The evidence that the applicant was involved in

this assault, consisted of a video of the incident, taken by one of the hidden cameras located at the Institution, as well as source information. When being escorted to the segregation unit following this incident, the applicant was also noted to be uncooperative by spitting (possibly directed towards the officer).

[25] This event, in the context of the behaviour issues that were evidenced by the prior incidents, caused Ms. Terrio to recommend that the applicant's institutional adjustment be rated as "high", thereby causing a re-classification to maximum status.

[26] Ms. Terrio described the applicant's case as a frustrating one, as he is clearly intelligent and capable of doing well. He has completed the programs required of him, and he demonstrates a good work ethic. Ms. Terrio notes that following his return from Renous in 2012, the applicant was given the chance to show change, but incidents kept occurring. It was her conclusion that the applicant requires fairly consistent intervention with his behaviour and requires constant and direct supervision, which necessitates a maximum security setting. She provided the A4D and other documents to A/W Breen for final decision.

[27] It is the applicant's position that he was not involved in the assault in February 2014. It is his further position that he has not been "proven" to be guilty

of many of the other incidents which have been attributed to him. In his submission, this evidence is irrelevant or unreliable. He feels it is unfair, in those circumstances, for him to be re-classified and transferred.

[28] In relation to the assault, the court heard evidence from Neil Rideout, security intelligence officer at the Institution. He was, along with Ms. Terrio, supportive of the applicant's reclassification and provided information and advice to A/W Breen. He testified that he was 100% confident that the applicant was the person shown in the video, and that his sources, which he considered believable, were corroborative of the events.

[29] Following receipt of the A4D, the applicant filed a written and oral rebuttal. In his written rebuttal, he denied involvement in the assault. However, during his oral rebuttal he eventually admitted his involvement. Both the applicant and A/W Lorne Breen testified about the oral rebuttal meeting; both agreed that the applicant, at first, protested his innocence, and claimed he had nothing to do with the assault. However, following continued discussions, the applicant eventually acknowledged to A/W Breen that he had been involved, by kicking the victim once or twice.

[30] The applicant testified that he said this to A/W Breen because he felt pressured. He stated that A/W Breen was not accepting his protests of innocence, and the applicant decided to "tell him what he wanted to hear". He also harboured some hope that things would go better for him if he agreed with A/W Breen's suggestions.

[31] A/W Breen denied that he pressured the applicant in any way. He acknowledged telling the applicant that he believed the applicant was involved in the assault, and he encouraged the applicant to admit it. He believed that the applicant was being sincere when he admitted his involvement.

[32] The applicant later recanted this admission. Before this Court, the applicant denied involvement in the assault.

[33] Having considered all the circumstances, in my view there was evidence that the applicant had been involved in the assault incident. It was appropriate for this evidence to be considered by A/W Breen when assessing the applicant's classification.

[34] A/W Breen was the ultimate decision maker in the applicant's case. He testified that he reviewed the A4D, noting the applicant's institutional adjustment as high. He considered the prior behaviour described therein. He also was made

aware of the source information in relation to the assault, and viewed the video. He also considered the submissions made within the written rebuttal of the applicant, and heard his oral rebuttal.

[35] In relation to decisions regarding classification, A/W Breen agreed that such requires a review of each offender's individual circumstances. It is not an exact science. The assessment is one of risk; the question is whether the offender can be managed within a particular classification. A/W Breen made the point that, while at Atlantic Institution in 2013, the applicant seemed to do well and had no incidents. While it is difficult to know exactly why, it might be inferred that the applicant is best managed at an institution where there is a high level of supervision and intervention, within which he can do very well.

[36] In relation to the prior events, I find that it was also appropriate for them to be considered by A/W Breen. He was not considering them with a view to assessing punishment. His role was not to determine the applicant's formal guilt or innocence to the various incidents attributed to him. However, these incidents, as reported, materially affected the applicant's risk assessment. While the reliability of such a report would be enhanced by a formal finding of guilt, this does not mean that the report has no value or reliability when assessing classification. In my view, the reports being acted upon have sufficient reliability for a decision maker

to consider them in the context of a classification decision. I note the comments of the BCSC in *Caouette v. Mission Institution* [2010] BCJ No. 1039, said in the context of source information in a prison setting but also applicable here:

> p.[86] It cannot be said that the Warden's decision was unreasonable unless it can be said that it is always unreasonable to rely upon the evidence of a prison informant or an informant of unknown reliability. If that were the case, it would be very difficult or impossible for the CSC to establish security ratings and investigate offences within the prison. It should be borne in mind that the criticism of jailhouse informants and concern with respect to the reliability of their testimony is most pronounced in criminal cases, where the question is the guilt or innocence of the accused, rather than administrative cases where fairness to the prisoner must be weighed against the interests of the safety of other prisoners in the institution.

[37] My role is not to substitute the decision I would have made, or to consider whether I agree with the ultimate decision. I am to determine whether the decision was within a reasonable range of decisions that could have been made by A/W Breen, given the information before him.

[38] I conclude that, given the incidents attributed to the applicant, up to and including the incident of February 2014, there certainly was information before A/W Breen that would make a maximum security classification appropriate. The decision was not arbitrary or unreasonable. The totality of the information before him supported a finding that the applicant's behaviour requires a high degree of intervention, supervision, and control.

[39] In my view, A/W Breen's decision to reclassify the applicant to maximum security, falls within a range of possible, reasonable outcomes.

[40] Secondly, the applicant argues that the process was not procedurally fair. The applicant's objects, specifically, to non-disclosure of the video which shows the applicant's involvement in the assault from February 2014. The applicant refers to section 27 of the CCRA, which provides as follows:

> 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.
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> (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.
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> (3) Expect 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
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> (a) the safety of any person,
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> (b) the security of the penitentiary, or
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> (c) the conduct of any lawful investigation,
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> 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).

[41] The Supreme Court in *Khela* (supra) discussed the procedure to be used in these circumstances, and suggested that the Institution file a sealed affidavit

containing the information withheld, along with the reasons why the release of this information would jeopardize one or all of the items contained in ss. 27(3).

[42] This was done here. I have reviewed the affidavit, which outlines the reasons why the release of the video here would constitute jeopardy to the security of the institution. Essentially, the cameras at the institution are hidden and inmates are not advised of their whereabouts for obvious reasons that are listed in the affidavit. This video would identify a camera's whereabouts, by its angle and point of view. In addition, persons may be identifiable in the video, who may or may not have been known to be present; such creates a concern for reprisals toward possible sources.

[43] I accept the reasoning for the refusal to disclose the video and I agree that this decision meets the criteria of ss. 27(3).

[44] The applicant was provided with a copy of the A4D, the SRS, and a "gist" of the information in relation to his involvement in the assault. It is clear from s. 27(1) that the offender can be given information or "a summary" of the information. The "gist" (provided as Tab H to the affidavit of Ms. Terrio) constitutes such a summary. This was the same information before A/W Breen (with the exception of the video which he watched upon request of the applicant).

[45] The applicant further argues that, if the video did not need to be disclosed, the Institution should have provided him with written reasons therefor at the time it was withheld. The applicant points to a policy bulletin from CSC, dated 2014/05/20, attached to the affidavit of Ms. Terrio at Tab 4. It provides, at page 4, that where ss. 27(3) is invoked, the reports should include "a statement", explaining the specific reasons why, to the inmate.

[46] I would agree with the respondent that this bulletin does not have force of law, it is a "best practices" document. The applicant here was advised orally of the withholding of the video, and the reasons therefore, by Neil Rideout. He was also advised of the existence of believable and corroborating sources.

[47] The applicant further notes Commissioner's Direction 710-2 at section 9(d) which notes that a transfer decision must take into account the health care needs of the offender. This was done at p. 6 of A4D:

> The following information from the most recent A4D remains valid:
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> According to file information, there are no psychological concerns noted at this time. There is no history of suicide attempts/ideation reported on file. According to the Mental Health Screening/Assessment, written by psychologist J. Dionne on 2012.02.24, "Mr. MAILLET can currently be described as having moderate needs with respect to mental health services. Mr. MAILLET has a significant history of mental health symptoms and interventions and he is currently receiving pharmaceutical treatment. Hence, ongoing psychiatric follow-up is required."

[48] In conclusion, I find that the process here was fundamentally fair, on a standard of correctness as required by *Khela*, supra. The applicant invoked other irregularities he had noted in the process. I find that any deviations were not material and did not affect the fairness of the proceeding. I dismiss the application for habeas corpus.

Costs

[49] The Crown seeks costs on this application. I decline to order costs against the applicant. I have not been provided with any Nova Scotia case where costs were awarded against an inmate making a habeas corpus application.

[50] There is no doubt that such applications require significant response from correctional institutions as well as the courts. However, costs orders may create barriers to inmates' access to the courts through the habeas corpus process, which is undesirable.

Boudreau, J.